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## New Age Practice

### How To Avoid Giving Judges Headaches

Litigator's informal poll yields useful guide on hot buttons not to be pushed

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The genesis of this piece was a desire to find out from judges what topics in the civil arena they felt should be brought to the attention of attorneys. Numerous letters were sent to judges in the federal and state courts in New Jersey to solicit topics. The survey was not intended to be scientific and the anticipated response was uncertain. Nonetheless, nearly 20 percent of the judges contacted responded to the request by letter, email, fax or telephone.

A variety of topics were identified by judges, ranging from very general to very specific. Some were new, while others have been a continuing source of headaches to judges. A half dozen were selected for review in this piece, and each deserves a more comprehensive review than can be given here.

#### Orders to Show Cause

The New Jersey judiciary recently

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issued Directive No. 16-05 on the topic of orders to show cause that serve as original process. Litigators seeking temporary restraints, preliminary injunctions on the return date, or summary relief, see Rule 4:52 and Rule 4:67, must now incorporate language found in summonses into their forms of order to show cause. They must also file a proof of service and a proposed form of order at least three days before the return date of the order to show cause. The directive promulgates three model forms of orders to show cause.

Although the court rules will be amended later to reference the new requirements, the forms have been approved for immediate use. Therefore, litigators should revise their forms of order to show cause before they rush into court. Directive No. 16-05 may be found at 182 N.J.L.J. 1120 (Dec. 19, 2005) and on the New Jersey Judiciary's Web site ([www.judiciary.state.nj.us/directive/civil/dir\\_16\\_05.pdf](http://www.judiciary.state.nj.us/directive/civil/dir_16_05.pdf)).

#### Protective Orders

The U.S. District Court (D.N.J.) recently amended Local Civil Rule 5.3, entitled "Protective Orders and Public Access under CM/ECF." The rule covers both confidentiality orders used during discovery and motions to seal or otherwise restrict public access to materials filed with the court.

With regard to discovery, parties may submit a form of order governing the confidentiality of discovery. However, the form must now be accom-

panied by an affidavit describing a) the nature of the materials to be kept confidential, b) the legitimate private and public interests that warrant confidentiality, and c) the clearly defined and serious injury that would result if the order is not entered. Local Civil Rule 5.3(b). With regard to motions to seal materials, the motion papers must address these same three items as well as explain why less restrictive alternatives are not available. Local Civil Rule 5.3(c).

Therefore, in light of early mandatory disclosures, litigators will want to think about and discuss these factors with their clients very early in the litigation. The full text of the rule, explanatory notes and the Order adopting the rule are found on the "What's New" page of the District Court's Web site ([pacer.njd.uscourts.gov](http://pacer.njd.uscourts.gov)).

#### Discovery Motions

N.J. Court Rule 4:24-2 requires that certain motions (e.g., to file third party complaints) be made during the discovery period in order for the court to be able to grant relief. The rule was amended in June 2005 and again in December 2005 to include discovery motions within the scope of the rule. As a result, a motion to compel discovery, or to impose or enforce sanctions for failure to provide discovery, must be filed within sufficient time to allow the return date of the motion to be heard before the end of the discovery period. The court has the discretion to hear such a motion after the discovery period, but only for good cause shown.

Therefore, litigators need to be aware of the discovery end date now

more than ever if they need to file a motion to compel discovery and/or a motion to dismiss or suppress a pleading for failure to provide discovery. The notice to the bar and the amended rule may be found at 182 N.J.L.J. 1123 (December 19, 2005) and at [www.judiciary.state.nj.us/notices/2005/n0501213b.htm](http://www.judiciary.state.nj.us/notices/2005/n0501213b.htm).

#### **Extending the Discovery Period**

The discovery period in civil actions will last 150, 300 or 450 days, depending on the type of case. See Rule 4:24-1(a). Parties may, by consent, extend the discovery period for an additional 60 days. Rule 4:24-1(c). They may file a stipulation or submit a letter to the court confirming the extension of the discovery period by consent. The document, however, must be received by the court before the end of the discovery period. This is, in essence, an automatic extension and, thus, no reason is needed to extend the discovery period. See Rule 4:24-1(c).

If all parties do not consent, or more than a 60-day extension is sought, then a party must file a motion to extend the discovery period. The court will grant such a motion for good cause shown; therefore, the moving party needs a good reason to extend the discovery period, especially if he cannot obtain his adversary's consent or if he needs more than an additional 60 days. Rule 4:24-1(c). As a discovery motion, it must be filed within sufficient time to allow the return date of the motion to be heard before the end of the discovery period. Rule 4:24-1(c) & Rule 4:24-2.

In addition, the proposed form of order must set forth both the new discovery end date and describe with specificity the discovery that remains to be obtained. Rule 4:24-1(c). This was a shortcoming noted by several judges. For example, if a deposition needs to be taken, then the form of order should specify the witness to be deposed and, if

possible, the date of the deposition. If a litigator fails to mention the discovery in the order, he may be precluded from obtaining it.

#### **Trial Adjournments**

Adjournments of civil trials and arbitrations are governed by Rule 4:36-3(b) & (c). However, litigators should be aware that the state judiciary has issued a directive to further clarify the adjournment procedure. See Directive 6-04 at [www.judiciary.state.nj.us/directive/civil/dir\\_6\\_04.pdf](http://www.judiciary.state.nj.us/directive/civil/dir_6_04.pdf).

In June 2005, the state judiciary issued a directive laying out the procedure to resolve an attorney's civil trial scheduling conflicts. See Directive 12-05 at [www.judiciary.state.nj.us/directive/civil/dir\\_12\\_05.pdf](http://www.judiciary.state.nj.us/directive/civil/dir_12_05.pdf). Therefore, a litigator needing an adjournment should consult both directives in addition to the court rules before contacting the court for an adjournment.

#### **Amending Interrogatory Answers and Expert Reports**

Amendments to answers to interrogatories must be served no later than 20 days before the end of the discovery period. Rule 4:17-7. Thereafter, amendments may be made only if accompanied by a certification of due diligence stating that the information leading to the amendment was not reasonably available or discoverable through the exercise of due diligence prior to the discovery end date. The amended answers will be disregarded without the certification. Moreover, within 20 days after receipt of the amended answers and certification, a party may file a motion challenging the certification of due diligence, especially one that fails to adequately explain why the information was not reasonably available or discoverable before the discovery end date.

Interrogatories almost always request a copy of expert reports. A frequent answer to such an interrogatory is that the expert report will be supplied later, and are often supplied with amended answers to interrogatories 20 days before the discovery end date. Rather than waiting for the expert report near the end of the discovery period, a litigator may seek an order fixing a deadline for the service of an expert report. Rule 4:17-4(e). Normally, such an order will provide that an expert will be barred from testifying at trial for a party's failure to serve the expert report by the established deadline.

Therefore, litigators must be mindful of the discovery end date when they need to amend answers to interrogatories. Litigators should also seek orders establishing deadlines for the service of expert reports.

#### **Odds and Ends**

The filing and service of late opposition and reply motion papers appears to be a frequent problem. See Rule 1:6-3(a) and (c). A lack of civility and professionalism of litigators, especially among younger attorneys, is also a concern.

Finally, it was noted that many questions of litigators could be answered by reading the court rules and reviewing judiciary Web sites. Indeed, the New Jersey Judiciary's Web site is chock full of useful information. See [www.judiciary.state.nj.us](http://www.judiciary.state.nj.us). The federal District of New Jersey's Web site is not quite as useful, see [pacer.njd.uscourts.gov](http://pacer.njd.uscourts.gov), but a large amount of electronically filed information is available to attorneys. See [ecf.njd.uscourts.gov](http://ecf.njd.uscourts.gov).

In conclusion, the best medicine to treat these headaches, for both litigators and judges alike, is to carefully read the court rules and other information readily available from the courts. ■