Conducting Family Part Discovery

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by Curtis J. Romanowski, Esq.

PERTINENT RULES OF COURT CONCERNING DISCOVERY & PRACTICE TIPS

PRACTICE TIP: Discovery demands and considerations are vitally important in your initial assessment of the case and deciding whether you even want to handle the case.

R. 4:10 Pretrial Discovery

R. 4:10-1. Discovery Methods

Except as otherwise provided by R. 5:5-1 (discovery in family actions), parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions.

Unless the court orders otherwise under R. 4:10-3, the frequency of use of these methods is not limited.

PRACTICE TIP: Subpoenae, releases and authorizations are great sources of discoverable information, but are not included in this list. R. 1:9 applies only to production by a witness at trial. Procedures for and constraints upon compelling production for discovery purposes are prescribed by R. 4:14-7 and R. 4:14-8; deposition Rules. Releases and authorizations are not technically discovery. However, neither are requests for admissions, which are included in the list. Case law is abundantly clear that requests for admissions are not discovery, per se. Accordingly, when the period for pretrial discovery comes to a close, requests for admissions can still be propounded. R. 4:24-1 disposes of this issue, by clearly excepting R. 4:22 requests for admissions from the time for completion of discovery constraints.

R. 5:5-1. Discovery

Except for summary actions and except as otherwise provided by law or rule, discovery in civil family actions shall be permitted as follows:

(a) Interrogatories as to all issues in all family actions may be served by any party as of course pursuant to R. 4:17.

(b) An interrogatory requesting financial information may be answered by reference to the case information statement required by R. 5:5-2.

PRACTICE TIP: Prior to forwarding propounded interrogatories to your client, take some time to insert "See CIS" after each question you would prefer to respond to by doing so. Also insert any objections you may have and "N/A" as appropriate.

(c) Depositions of any person, excluding family members under the age of 18, and including parties or experts, as of course may

be taken pursuant to R. 4:11 et seq. and R. 4:10-2(d)(2) as to all matters except those relating to the elements that constitute grounds for divorce.

PRACTICE TIP: Carefully consider to what extent you would like to address child-related and parenting-related issues in your initial pleadings. If you decide to include allegations in this regard as part of an extreme cruelty action, consider including the following language:

> **"More than three months have elapsed since the last act of extreme cruelty complained of as constituting Plaintiff's cause of action herein. The acts of extreme cruelty committed by the Defendant within a period of three months before the filing of this Complaint, as well as any allegations involving or relating to parenting or custodial duties obtaining to any child, or any alleged behaviors or practices or any absence of behaviors or practices involving or related to any child as above set forth, are alleged not as constituting in whole or in part the cause of action set forth herein, but as relating back or otherwise to qualify and characterize the acts constituting said cause of action."**

Use this pleading technique to except-out any allegations in your initial pleadings that you may want to depose upon.

(d) All other discovery in family actions shall be permitted only by leave of court for good cause shown except for production of documents (R. 4:18-1); request for admissions (R. 4:22-1); and copies of documents referred to in pleadings (R. 4:18-2) which shall be permitted as of right.

PRACTICE NOTE: R. 4:15 Depositions Upon Written Questions and R. 4:19 Physical and Mental Examinations of Persons are not permitted in Family Part cases, absent leave of Court.

(e) Discovery shall be completed within 90 days from the date of service of the original complaint in actions assigned to the expedited track and within 120 days from said date in actions assigned to the standard track. In actions assigned to the priority or complex track, time for completion of discovery shall be prescribed by case management order.

R. 4:10-2. Scope of Discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

PRACTICE TIP: You will often hear an objection to the effect that your client already has the knowledge, the documents, etc. It is not a valid objection. Also, the "reasonably calculated to lead to the discovery of admissible evidence" standard is a very easy one to meet.

(b) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

PRACTICE TIP: This may be particularly important when dealing with certain domestic torts.

(c) Trial Preparation; Materials. Subject to the provisions of R. 4:10-2(d), a party may obtain discovery of documents and tangible things otherwise discoverable under R. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of R. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to R. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by R. 4:17-4(a), the furnishing of a copy of that person's report. Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule.

QUAERE: Does the protection afforded under this Rule apply to cases where the client, and not the attorney, retains or specially employs the expert? See "Kovel Letter" attached.

(2) Unless the court otherwise orders, an expert whose report is required to be furnished pursuant to subparagraph (1) may be deposed as to the opinion stated therein at a time and place as provided by R. 4:14-7(b)(2). Unless otherwise ordered by the court, the party taking the deposition shall pay the expert or treating physician a reasonable fee for the appearance, to be determined by the court if the parties and the expert or treating physician cannot agree on the amount therefor. The fee for the witness's preparation for the deposition shall, however, be paid by the proponent of the witness, unless otherwise ordered by the court.

(3) A party may discover facts known or opinions held by an expert (other than an expert who has conducted an examination pursuant to R. 4:19) who has been retained or specially employed by another party in anticipation of litigation or preparation for

trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means. If the court permits such discovery, it shall require the payment of the expert's fee provided for by R. 4:10-2(d)(2), and unless manifest injustice would result, the payment by the party seeking discovery to the other party of a fair portion of the fees and expenses which had been reasonably incurred by the party retaining the expert in obtaining facts and opinions from that expert.

PRACTICE TIP: Be absolutely certain that your client is advised in advance that this discovery demand will likely result in your client being directed to subsidize the costs incurred by the other party in retaining that expert.

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

PRACTICE TIP: Many attorneys attempt to assert claim of privilege or trial preparation without even attempting to abide by this Rule. Insist that they comply.

R. 1:9. Subpoenas

R. 1:9-1. For Attendance of Witnesses; Forms; Issuance; Notice in Lieu of Subpoena

A subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk... It shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein... The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon the party's attorney demanding that the attorney produce the client at trial. If the party is a corporation or other organization, the testimony of any person deposable on its behalf, under R. 4:14-2, may be compelled by like notice. The notice shall be served in accordance with R. 1:5-2 at least 5 days before trial. The sanctions of R. 1:2-4 shall apply to a failure to respond to a notice in lieu of a subpoena.

R. 1:5-2. Manner of Service

Service upon an attorney of papers referred to in R. 1:5-1 shall be made by mailing a copy to the attorney at his or her office by ordinary mail, by handing it to the attorney, or by leaving it at the office with a person in the attorney's employ, or, if the office is closed or the attorney has no office, in the same manner as service is made upon a party. Service upon a party of such papers shall be made as provided in R. 4:4-4 or by registered or certified mail, return receipt requested, and simultaneously by ordinary mail to the party's last known address; or if no address is known, despite diligent effort, by ordinary mail to the clerk of the court. Mail may be addressed to a post office box in lieu of a street address only if the sender cannot by diligent effort determine the addressee's street address or if the post office does not make street-address delivery to the addressee. The specific facts underlying the diligent effort required by this rule shall be recited in the proof of service required by R. 1:5-3. If, however, proof of diligent inquiry as to a party's whereabouts has already been filed within six months prior to service under

this rule, a new diligent inquiry need not be made provided the proof of service required by R. 1:5-3 asserts that the party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry.

R. 1:2-4. Sanctions: Failure to Appear; Motions and Briefs

(a) Failure to Appear. If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, on the return of a motion, at a pretrial conference, settlement conference, or any other proceeding scheduled by the court, or on the day of trial, or if an application is made for an adjournment, the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the Clerk of the Superior Court, or, in the Tax Court to its clerk, or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees,

to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.

R. 1:9-2. For Production of Documentary Evidence; Notice in Lieu of Subpoena

A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1 may require production of books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. The court may direct that the objects designated in the subpoena or notice be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the

parties and their attorneys and, in matrimonial actions and juvenile proceedings, by a probation officer or other person designated by the court. Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).

PRACTICE TIP: The Notice in Lieu of Subpoena is a grossly underutilized discovery tool. You will find that some adversaries served with a Notice fail to produce the requested documents at trial. Some argue that five days is not enough time for the production, however, "at least 5 days before trial" is the limitation stated in R. 1:9-1.

PRACTICE TIP: If you propound the notice and the demanded documents are not produced at trial, move immediately for sanctions in accordance with R. 1:2-4 for a failure to respond to a notice in lieu of a subpoena.

PRACTICE TIP: It is important for you to be reasonable in your document demand, however, in order to protect your client from a successful application to quash the Notice.

PRACTICE TIP: After propounding the Notice, if done far enough in advance, application can be made, asking the Court to direct that the objects designated in the subpoena or Notice be produced before the Court at a time prior to the trial or prior to the time when they are to be offered in evidence, permitting them or portions of them to be inspected by the parties and their attorneys upon their production. This can also be done by way of cross-motion to a motion to quash.

If you are served with the Notice, and you believe that compliance would be unreasonable or oppressive, you must promptly move to quash or modify the subpoena or Notice.

Alternately, you might move the Court to condition any denial of your motion upon the advancement by the person in whose behalf the subpoena or Notice is issued of the reasonable cost of producing the objects subpoenaed.

PRACTICE TIP: Remember, except for pretrial production directed by the court pursuant to R. 1:9-2, subpoenas for pretrial production must comply with the requirements of R. 4:14-7(c). Mandatory language from R. 4:14-7(c) must therefore be included. It is amazing how often you will likely receive discovery subpoenas without the mandated language.

R. 4:14-7. Subpoena for Taking Depositions

(a) Form; Contents; Scope. The attendance of a witness at the taking of depositions may be compelled by subpoena, issued and served as prescribed by R. 1:9 insofar as applicable, and subject to the protective provisions of R. 1:9-2 and R. 4:10-3. The subpoena may command the person to whom it is directed to produce

designated books, papers, documents or other objects which constitute or contain evidence relating to all matters within the scope of examination permitted by R. 4:10-2.

(b) Time and Place of Examination by Subpoena; Witness' Expenses.

(1) *Fact Witnesses*. A resident of this State subpoenaed for the taking of a deposition may be required to attend an examination only at a reasonably convenient time and only in the county of this State in which he or she resides, is employed or transacts business in person, or at such other convenient place fixed by court order. A nonresident of this State subpoenaed within this State may be required to attend only at a reasonably convenient time and only in the county in which he or she is served, at a place within this State not more than 40 miles from the place of service, or at such other convenient place fixed by court order. The party subpoenaing a witness, other than one subject to deposition on notice, shall reimburse the witness for the out-of-pocket expenses and loss of pay, if any, incurred in attending at the taking of depositions.

PRACTICE NOTE: You will likely observe that few, if any, of your non-party, non-expert fact witnesses will ever ask for any sort of compensation for their appearance. In cases where your adversary has opted to depose your client's entire family, employer, school teachers, etc., you might consider bringing this aspect of the Rule to your adversary's attention.

(2) *Expert Witnesses and Treating Physicians*. If the expert or treating physician resides or works in New Jersey, but the deposition is taken at a place other than the witness' residence or place of business, the party taking the deposition shall pay for the witness' travel time and expenses, unless otherwise ordered by the court. If the expert or treating physician does not reside or work in New Jersey, the proponent of the witness shall either (A) produce the witness, at the proponent's expense, in the county in which the action is pending or at such other place in New Jersey upon which all parties shall agree, or (B) pay all reasonable travel and lodging expenses incurred by all parties in attending

the witness' out-of-state deposition, unless otherwise ordered by the court.

(c) Notice; Limitations. A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties, who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced. If evidence is produced by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt

thereof and of its specific nature and contents, and shall make it available to all other parties for inspection and copying.

QUAERE: ARE THE RULES INCONSISTENT? R. 4:14-7 (c), dealing with Subpoena for Taking Depositions, provides that "a subpoena commanding a person to produce evidence for discovery purposes... shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties..." In seeming contradiction, R. 4:14-2, Notice of Examination, etc., at subparagraph (d), specifically addressing Production of Things, provides: "The notice to a party deponent may be accompanied by a request made in compliance with and in accordance with the procedure stated in R. 4:18-1 for the production of documents and tangible things at the taking of the deposition.

R. 4:18-1 at (b) Procedure, then goes on to provide: "... The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 50 days after service of the summons and complaint upon that defendant..." SO, WHICH IS IT... 10 DAYS OR 35 to 50 DAYS?

PRACTICE TIP: The key to understanding that there is no real contradiction in the Rules is to appreciate that R. 4:14-7 (c) provides the general Rule, obtaining to all non-party deponents, while R. 4:14-2 (d) specifically addresses notice to a party deponent.

PRACTICE TIP: From a practical standpoint, if documents are sought from a party absent testimony, a R. 4:18-1 Notice to Produce is the preferred approach.

PRACTICE TIP: If you are the recipient of a discovery subpoena or deposition notice directed to your client, which announces a deposition date just 10 days later while demanding a raft-load of documents, the best course of is to alert your adversary that the production within the brief time frame is impractical and will not be forthcoming. Suggest a later, more practicable production date, consistent with R. 4:18-1 (b).

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

(a) Notice. Except as otherwise provided by R. 4:14-9(b), a party desiring to take the deposition of any person upon oral examination shall give not less than 10 days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition, which shall be reasonably convenient for all parties, and the name and address of each person to be examined, if known, and, if the name is not known a general description sufficient to identify the person or the particular

class or group to which the person belongs. If a defendant fails to appear or answer in any civil action within the time prescribed by these rules, depositions may be taken without notice to that defendant...

(d) Production of Things. The notice to a party deponent may be accompanied by a request made in compliance with and in accordance with the procedure stated in R. 4:18-1 for the production of documents and tangible things at the taking of the deposition.

R. 4:18-1. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-litigation Discovery

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained and translated, if necessary, by the respondent through electronic devices into reasonably usable form),

or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of R. 4:10-2 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of R. 4:10-2.

PRACTICE NOTE: Good luck finding any reported NJ cases usefully addressing the specific requirements or definition of "possession, custody or control of the party upon whom the request is served." You are likely to hear a good deal of unsubstantiated argument about what this phrase really means. This writer does not agree that it should be construed to mean: "My client doesn't currently have it in his personal possession, so he has no obligation to get it for you."

PRACTICE TIP: First and foremost, view every written discovery request you are about to make with the possibility in mind that you may eventually have to move to compel or dismiss. Never make a request where a Judge may be inclined to conclude that your request is unreasonably burdensome (or idiotic). Be careful not to request more documents, or back over a longer period of time, than you intelligently need. Imagine yourself justifying your request to a skeptical Judge somewhere down the line, and ask yourself if you feel credible doing so. If you don't know why you are asking for it, maybe you shouldn't be.

PRACTICE TIP: If you are planning to use an expert to explore a particular issue, ask the expert for a list of the types of documents they would require to do the job. Many have expanded document requests of their own, specifically tailored to their particular purposes.

PRACTICE TIP: In requesting copies of checks, ALWAYS request originals or copies of both sides. Coding on the backs of checks are valuable sources of discoverable information.

PRACTICE TIP: In this age of computer literacy (and fraud), practice a healthy level of skepticism concerning the authenticity of documents. Always take care to assure that the tax returns offered by the other party are actually true copies of the ones actually filed. Also take care to assure that pay stubs provided are in fact what they purport to be.

PRACTICE TIP: Do not be taken in by R. 4:18-1 requests that ask your client to provide lists of various things, where the lists are not already in existence. The Rule does not require your client to create original documents. If any such lists do in fact exist, you can object to their production under attorney work product grounds, where appropriate.

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party...

> **PRACTICE TIP: Consider applying for leave of Court by way of ex parte Order to Show Cause for short-term production and inspection in cases where there is reasonable concern that documents or things will disappear if handled otherwise.**

...A copy of the request shall also be simultaneously served on all other parties to the action. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 50 days after service of the

summons and complaint upon that defendant. On motion, the court may allow a shorter or longer time. The written response, without documentation annexed but which shall be made available to all parties on request, shall be served by the party to whom the request was made upon all other parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. The party submitting the request may move for an order of dismissal or suppression or an order to compel pursuant to R. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter

obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly.

PRACTICE TIP: Insist that your adversary either produce documents "as they are kept in the usual course of business" or "organize and label them to correspond with the categories in your request."

PRACTICE TIP: You might even encounter the argument that "a written response, without documentation annexed," is what propounder of the request is due to receive. This is certainly not the case. If there are third-party defendants involved, the intention of the Rule is that the party making the request is entitled to receive a set of documents from the party from whom the documents are requested; not just a written response, sans documents, which documents that party may provide to other non-requesting parties with the written response.

PRACTICE TIP: To the extent you might be concerned about the defendant in a given case resisting discovery, an all too common tactical error is for the plaintiff to serve the defendant with a written discovery request, either simultaneously with the Complaint, or immediately thereafter. The risk is that the defendant might react by serving you with your own written discovery request, which would then be due to the defendant from your client as much as 15 days before the defendant's obligation would kick in. Since R. 4:23-5 conditions relief upon your client not being in discovery default, the strategy of dispatching a "mirrored" discovery demand is growing increasingly popular.

The party submitting the request may move for an order of dismissal or suppression or an order to compel pursuant to R. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a

request to produce thereafter obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly.

PRACTICE NOTE: In September 2000, the Best Practice Rule amendments and a careful reading of the Comments to the 2001 Rules left some doubt that the real intention behind the changes affecting R. 4:17 and R. 4:18 by deleting references to them in R. 4:23-1, and planting them instead in R. 4:23-5, was to specifically limit recourse of the propounder to the two-step dismissal practice. The Comment to R. 4:23-1 clearly stated: "As explained in the Comment on R. 4:18-1, the aggrieved party's recourse on noncompliance is not the seeking of an order to compel but rather an order under the two-step dismissal practice of R. 4:23-5(a)."

In September 2002, the Rules were again amended to allow for motions to compel more complete responses to discovery requests, short of requesting a dismissal. In the 2003 Rules, the following Comment appears to R. 4:23-5(c): "While the aggrieved party's initial recourse to a motion to compel, which may well better serve the party's interests than the dismissal practice, would seem to be implicit in the discovery practice, the absence of specific authority led some judges to deny that motion. This paragraph of the rule makes clear that the aggrieved party may defer initiation of the two-step procedure until after the motion to compel, which, if granted, will obviate its necessity."

Interestingly, applications under the two-step dismissal process of R. 4:23-5(a) were largely observed in the breach in the Family Part, despite its rather mandatory sounding tone.

PRACTICE TIP: Where no discovery whatsoever has been provided, it makes good sense to move for the dismissal and alternately for more complete discovery to be compelled. In most cases, your adversary will respond to the motion by providing some discovery while the motion is pending. You can then address the shortcomings of the answers or document production in your second set of papers.

PRACTICE TIP: It is now explicitly clear that a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly. Consider using the Notice in Lieu of Subpoena to compel updated documents from your adversary for trial or prior to trial.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. Pre-litigation discovery within the scope of this rule may also be sought by petition pursuant to R. 4:11-1.

R. 1:9-3. Service

A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof.

PRACTICE TIP: The preferred interpretation of this Rule does not permit service by mail, just because someone 18 years of age or more is mailing the subpoena.

R. 1:9-4. Place of Service

A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey.

R. 1:9-5. Failure to Appear

Failure without adequate excuse to obey a subpoena served upon any person may be deemed a contempt of the court from which the subpoena issued.

PRACTICE NOTE: Since the party is not actually served with a subpoena when a notice in lieu of subpoena is used, the contempt sanction of R. 1:9-5 does not apply to non-compliance with the demand of a notice in lieu of subpoena. The Rule makes applicable to that non-compliance the various sanctions provided for in R. 1:2-4.

PRACTICE NOTE: The September 1990 amendment to R. 1:9-2, by the addition of the last sentence, which cross-references to R. 14-7(c), was intended to make clear that a discovery subpoena in not a unilateral matter, as is a subpoena issued for trial appearance.

PRACTICE NOTE: The violation of the discovery subpoena Rule is quite common; either through design or neglect. Its violation tends to be particularly prevalent in the course of post-judgment, ex parte "fishing expeditions." Unfortunately, many financial institutions, for example, as well as other large corporate entities, liberally release documents upon receiving clearly inappropriate discovery subpoenas.

Sometimes, you will ultimately learn about these subpoenas; sometimes, you will not. Sometimes, you will actually see them attached as exhibits supporting post-judgment motions, despite the requirements of R. 4:24-3.

PRACTICE TIP: Always advise your clients to notify any entity that could conceivably be contacted for discovery purposes through unsanctioned means, that the entity is never to provide any information or documents to anyone concerning that client without immediately advising the client that such a request has been made, while immediately providing the client with a copy of and written request or purported discovery subpoena to that effect. The entity should also be advised that the client is to be given a minimum of ten days before otherwise responding to the request in any event. This notice should be given both verbally and in writing, with confirming correspondence in return, whenever possible.

PRACTICE TIP: Consider the following excerpts from *Cavallaro v. Jamco Property Management,* 334 *N.J. Super.* 557 (App. Div. 2000) and *Crescenzo v. Crane,* 350 *N.J. Super.* 531 (App. Div. 2002), with both opinions delivered by Carchman, J.A.D. for the Court, in dealing with such discovery abuses.

In *Cavallaro*, the Superior Court, as a discovery sanction, disqualified counsel from further representation. On appeal, the Superior Court, Appellate Division, Carchman, J.A.D., held that: (1) property management company violated discovery rule by sending, along with subpoena, a cover letter to condominium owner's doctors that stated they could avoid appearing for a deposition by forwarding copies of privileged treatment records, and (2) disqualification of counsel was an appropriate remedy for violation of the rule. The Trial Court was affirmed.[1]

[1] *Cavallaro v. Jamco Property Management,* 334 *N.J.Super.* 557 (App. Div. 2000).

The following discussion of *Cavallaro* is highly germane. Judge Carchman began delivering the opinion for the Court:

> **This appeal requires us to address the recurring and vexing problem of violations of the discovery subpoena and notice provisions of *R*. 4:14- 7(c) (the Rule) and the appropriate sanction for violating the Rule. In this case, the violation resulted in defendant obtaining privileged medical and psychiatric records. Judge Bernhard imposed a sanction disqualifying counsel from further representation of defendant in the underlying matter. We granted leave to appeal and now conclude that the judge's findings of a violation of the Rule were supported by the record. Under the circumstances presented, disqualification was an appropriate sanction and not an abuse of discretion.[2]**
>
> **Although copies of the subpoenas and notices were also served on Plaintiff's counsel, unbeknownst to Plaintiff, the originals were accompanied by a cover letter which provided:**
>
> > **Attached please find a Subpoena and a deposition notice which requires your appearance in my office on March 10, 2000. At that time, you are required to produce copies of the following documents regarding [plaintiff]...**
> >
> > **<u>However, as a convenience to you, if you would like to forward copies of these documents to my attention, then your appearance would not be necessary</u>. The subpoenaed evidence may not be produced or released until the date**

[2] *Id.* at 560-561.

> **specified for the taking of the deposition. If you are notified that a motion to quash the subpoena has been filed, you may not produce or release the evidence until either ordered to by the court, or all the parties consent thereto....**

In bold, capitalized type immediately following the above paragraph, the letter stated:

> **IF YOU WOULD LIKE TO AVOID APPEARING IN MY OFFICE ON MARCH 10, 2000 AND WOULD RATHER FORWARD THE COPIES TO ME THAT WOULD BE ACCEPTABLE.**
>
> **Please contact this office if you will be attending the deposition. Otherwise, I will assume that the above is agreeable.**

Judge Carchman then went on to discuss the actions of the Judge sitting below, excerpted with emphasis:

> **Judge Bernhard... also found that the... subpoenas were 'so violative of the Rules of Civil Procedure and Code of Professional Responsibility that this Court must act — must comment and take independent action,' despite defense counsel's explanation that 'that is the way we normally do things...'**
>
> **More germane to the issue before us, the judge found the subpoenas violated *R.* 4:14-7(c) because they did not state that the subpoenaed evidence was not to be produced or released until the return date, or, in the event of notice of a pending motion to quash, at anytime absent a court order or consent of all the parties. To the contrary, the judge noted that the cover letter stated, and reiterated in bold letters, that the subpoenaed**

witnesses could avoid the inconvenience of an appearance by forwarding copies of the subpoenaed documents to defense counsel's office. In sum, Judge Bernhard concluded:

> **Defense counsel's attempt at obtaining medical information concerning the plaintiff was an egregious violation of the Rules.... The purported subpoenas were a willful attempt to gain information in an unpermitted fashion. It was obviously a willful violation of the Rules of Civil Procedure...**
>
> **Inappropriate service was made and the cover letter spelled out counsel's true intent, that is to have the physicians and psychologists merely forward information to him.**

Finally, the judge found that defense counsel's subpoena practice violated both *RPC* 3.4(c) and *RPC* 4.1 by 'knowingly violat[ing] the Rules ... and ma[king] false statements to the person[s] to whom he addressed the documents.' Noting that defendant had already been provided privileged information as a result of the improper March 10 subpoenas, Judge Bernhard found that '[t]his Court has no other alternative, as a result of counsel's egregious conduct, than to quash the subpoenas and disqualify counsel from further representation of the defendant in this case.' The judge ordered that any materials obtained as a result of those subpoenas, including those materials already sent by Drs. Riley and Gugliotta, be returned without defense counsel or defendant's carrier making copies. Defense counsel was ordered to arrange for substitute counsel by April 24, 2000.[3]

[3]Id. at 563-565. *(Emphasis added)*

Judge Carchman continues, excerpted with emphasis:

We now address the issue of primary concern — the violation of the Rule. While defendant concedes that the subpoena did not technically comply with the Rule, defendant asserts that the disqualification order should be reversed because defendant's subpoena practice 'substantially complied' with the Rule and its purported primary objective of notifying other parties that information from non-parties is being sought. We disagree. The Rule provides:

> **A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. *The subpoena shall state* that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties, who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced. If evidence is produce by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and of its specific nature and contents, and shall make it available to all**

> **other parties for inspection and copying. [*R.* 4:14-7(c) (emphasis added).]**

[2] Contrary to defendant's contention that the purpose of the Rule is merely to provide notice to other parties that discovery is being sought from non-parties, the Rule is more expansive in its scope and protection. The Rule has three objectives: 1) to provide litigants the opportunity of full discovery from non-parties; 2) to afford notice of such inquiries to adversaries; and 3) to permit adversaries an appropriate opportunity to challenge the propriety of such discovery. We observe that the Rule's present configuration was designed to address discovery abuses, including the misuse apparent here.

[3] Under the Rule's clear mandate, simple notice is not sufficient. The subpoena must notify the recipient that documents *shall not* be produced or released until the date of the deposition and that a notification of a motion to quash requires withholding the documents until further notice. A practice which obfuscates or conflicts with these requirements, confuses subpoenaed witnesses, and lulls witnesses into avoiding the inconvenience of appearing by encouraging untimely production undercuts the purpose and effectiveness of the Rule. That is the case here — and the result was inevitable given the subpoenas' missing language and the highlighted invitation to produce in the accompanying cover letter.

Any possible misunderstanding as to our Supreme Court's intent in promulgating and amending the Rule is dispelled not only by the clarity of the Rule itself, but also by commentary explaining its import:

> **[the Rule] should, moreover, be interpreted and applied consistently with its intention of foreclosing unilateral discovery and giving adverse parties the opportunity to move to**

> **quash the subpoena or otherwise object to its compliance on the basis of privilege or other appropriate ground.**
>
> **Because of continuing abuses following the adoption of paragraph (c), the rule was again amended, effective September 1992, in two respects. First it requires the person served with the subpoena not only to withhold production or release of the subpoenaed evidence until the date specified for the deposition, but also to continue to do so if noticed of the making by a party of a motion to quash. The second change is to require service of the subpoena on the witness and all parties no later than 10 days prior to the date fixed for hearing. This means that an objecting party, in order to obtain the benefit of the rule, will have to file the motion to quash and serve it on the witness within that 10-day period. [Pressler, *Current N.J. Court Rules,* comment 3 on *R.* 4:14-7(c)(2001) (emphasis added) (citations omitted).]**

The Rule effectively prescribes a procedure whereby a party will be notified of a subpoena for records and will have an adequate opportunity to challenge the bona fides of the request without concern that the adverse party will secure the records prematurely contrary to the Rule's provisions.

The March 10 subpoenas simply command the recipients to appear with '[a]ny and all records regarding [plaintiff],' and caution that failure to appear would subject the recipients to penalties, suit for damages, and contempt. Defense counsel's omission of the ten day requirement coupled with the cover letter's generous offer of relief from the inconvenience of traveling to

counsel's Monmouth County office and appearing for a deposition were specifically designed to accomplish the result achieved here...

[4] Relying on our decision in *Ricra v. Barbera,* 328 *N.J.Super.* 424, 429, 746 *A.*2d 68 (App.Div.2000), defendant nevertheless asserts that the March 10 subpoenas 'substantially complied with the [R]ule's requirements.' That reliance is misplaced. Factors to be considered in determining whether the doctrine of substantial compliance may serve to avoid defeat of a valid claim on technical grounds include:

(1) the lack of prejudice to the defending party;

(2) a series of steps taken to comply with the [rule] involved;

(3) a general compliance with the purpose of the [rule];

(4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not strict compliance with the [rule]. [*Ricra, supra,* 328 *N.J.Super.* at 429, 746 *A.*2d 68 (quoting *Cornblatt v. Barow,* 153 *N.J.* 218, 239, 708 *A.*2d 401 (1998)).]

Defendant contends that the cover letter was sufficient to provide the requisite information missing from the subpoenas, and that it 'did not incite anyone to produce the subpoenaed records prior to the scheduled deposition date.' Defendant further suggests that plaintiff was not prejudiced, despite the release of privileged information, because '[p]laintiff was well aware that defendant was seeking these medical records, given what transpired during plaintiff's two depositions and as a result of plaintiff's filing a motion for a protective order.' We first observe that unlike *Ricra,* which dealt with an affidavit of merit, the Rule in issue before us is prophylactic and designed to avoid the result complained of here. That defendant incorporated the notices required by the Rule in letter form rather than in the body of the

subpoena is irrelevant since it engaged in a course of conduct which rendered the requisite notices superfluous in any event. Although the subpoenas and deposition notices were forwarded to counsel, the offending document — the cover letter — was not. That letter provided the witnesses a seemingly convenient alternative to the proposed burden of traveling to Monmouth County on short notice to present records which could be more easily mailed. The convenience of the subpoenaed party became the purported object of the letter rather than the protection of plaintiff whose privileged records were being sought. And the apparent opportunity to expedite the transaction became too tempting.

[5] [6] We fully appreciate that pragmatic problems arise in the course of discovery proceedings, but the subpoena power is a significant one which must be exercised in good faith and in strict adherence to the rules to eliminate potential abuses. *See* Pressler, *Current N.J. Court Rules,* comment 3 on *R.* 4:14-7(c); **360 *Brookside Apartments, Inc. v. C.S.*, 276 *N.J.Super.* 501, 648 *A.*2d 275 (App.Div.1994). Practical problems are not insurmountable. Offering a subpoenaed witness the opportunity to forward documents is not inappropriate if the witness is clearly apprised that the documents may not be forwarded until after a date certain before which an adversary may move to quash the subpoena and preclude transfer of the documents entirely. Moreover, adherence to the terms of the Rule by including in the subpoena itself the requisite language regarding production of the documents avoids the necessity of arguing 'substantial compliance' when simple compliance is a straight-forward task. Providing an adversary with the same documents and correspondence served on the witness so that appropriate and timely action can be taken to protect the interests of all parties is equally practical and should be mandated by the Rule.

> **Judge Bernhard found that 'the purported subpoenas were a willful attempt to gain information in an unpermitted fashion' and that 'the cover letter spelled out counsel's true intent, ... to have the physicians and psychologists merely forward information to him.' *See Pascale v. Pascale*, 113 *N.J.* 20, 33, 549 *A.*2d 782 (1988). Upon examination of the record, we agree with that assessment...**[4]

The next case for discussion is *Crescenzo v. Crane*, 350 *N.J. Super.* 531 (App. Div. 2002), which was argued before Judges Skillman, Carchman and Wells, the opinion delivered by Carchman, J.A.D. It is likewise directly on point and excerpted in pertinent point with emphasis below.

Judge Carchmen begins:

> **"The authority of an attorney to issue a discovery subpoena *duces tecum* under the seal of the Superior Court pursuant to *R.* 4:14-7(c) (the Rule) 'is a significant one which must be exercised in good faith and in strict adherence to the rules to eliminate potential abuses.' *Cavallaro v. Jamco Prop. Mgmt.*, 334 *N.J.Super.* 557, 569, 760 *A.*2d 353 (App.Div.2000). Unfortunately, violations of the Rule are both 'recurring and vexing.' *Id.* at 560, 760 *A.*2d 353. Failure to adhere to the Rule's provisions may result in the improper and unauthorized acquisition of records and documents that, although ultimately**

[4] *Id.* at 566-570.

discoverable, may... infringe on the lawful rights and privileges of those against whom discovery is sought. This is what happened here...[5]

In May 1998, plaintiff's husband filed a complaint for dissolution against plaintiff. [FN1 Omitted] On May 7, 1998, Pinizzotto served Crane with a subpoena *duces tecum* which provided in relevant part:

> **THE STATE OF NEW JERSEY,**
>
> **TO: Dr. Walter Crane**
> **219 N. White Horse Pike**
> **Hammonton, NJ 08037**
>
> **You are hereby commanded to attend and give testimony before the above named attorney at 105 N. White Horse Pike, Hammonton, NJ 08037 on the 12th day of May, 1998, at 10:00 o'clock A.M., on the part of Defendant, Mark A. Santora in the above entitled action, and that you have and bring with you and produce at the same time and place, the following:**
>
> **Any and all medical records of Antoinette Santora.**
>
> **Failure to appear according to the command of this Subpoena will subject you to a penalty, damages in a Civil Suit and punishment for contempt of Court.**
>
> **Dated: May 7, 1998...**

The subpoena was accompanied by a letter of the same date. This letter stated:

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[5] *Crescenzo v. Crane*, 350 *N.J. Super.* 531 (App. Div. 2002).

> **Dear Dr. Crane:**
>
> **Please find enclosed a Subpoena Duces Tecum with respect to any and all medical records relating to Antoinette Santora. This is a Subpoena Duces Tecum wherein that means you can forward the medical records to my attention at the above stated address. If I do obtain a copy of the requested medical records, then there is no reason to have any individual from your office to appear in my office on said Tuesday, May 12, 1998 at 10:00 a.m...**

Neither an authorization from plaintiff consenting to release of the records nor any notice of a scheduled deposition was included with the subpoena and the accompanying letter. While the husband was sent a copy of the cover letter, no such copy was sent to plaintiff or any attorney purportedly representing her... Both the letter and subpoena were captioned in a domestic violence action identifying plaintiff as the complainant and the husband as defendant...[6]

Plaintiff filed a multi-count complaint against Crane... Crane answered and filed a third-party complaint joining Pinizzotto and seeking indemnification and contribution. Plaintiff then sought to amend her complaint joining Pinizzotto as a direct defendant, whereupon Crane moved to dismiss the complaint asserting that plaintiff failed to state a cause of action as against him. The motion judge granted the dismissal motion and denied the application to amend.

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[6] *Id.* at 535, 536.

In granting the dismissal, the judge relied on the fact that the medical records were admitted into evidence over the objection of plaintiff. He said:

> **Even if ... the procedures were wrong, and we'll assume for the purposes of argument that they were, that the subpoena that was issued didn't carry the proper notice to the adversary, the court ends up admitting the records into evidence anyhow, and if they're admissible in evidence they have to be discoverable. There's no way around that, and ... if they're discoverable, to use a basketball analogy, no harm, no foul. [FN3 Omitted][7]**

Judge Carchman continues, expressing disagreement on the Court's behalf with the "no harm, no foul" philosophy:

> **The Rule sets forth the notice provisions and limitations of a discovery subpoena. It is neither difficult to interpret nor complex in compliance. Its component parts require:**
>
> **[1.] A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a *deposition is simultaneously compelled* [;]**
>
> **[2.] *The subpoena shall state* that the subpoenaed evidence *shall not be produced or released* until the date specified for the taking of the deposition and[;]**
>
> **[3.] [I]f the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered**

[7] *Id.* at 537.

to do so by the court or the release is consented to by all the parties to the action[;]

[4.] The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness *and on all parties,* who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced[;]

[5.] If evidence is produced by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and of its specific nature and contents, and shall make it available to all other parties for inspection and copying. [*R.* 4:14-7(c) (emphasis added).]

We have previously noted that the objectives of this Rule are threefold. The Rule provides 'litigants with the opportunity of full discovery from non- parties,' affords 'notice of such inquiries to adversaries,' and permits 'adversaries an appropriate opportunity to challenge the propriety of such discovery.' *Cavallaro, supra,* 334 *N.J.Super.* at 566, 760 *A.*2d 353. In affirming a trial court's disqualification of an attorney who violated this Rule, we recognized the significance of the subpoena power and emphasized the necessity for good faith and strict adherence to the mandates of the Rule. *Id.* at 569, 760 A.2d 353.

Measuring Pinizzotto's exercise of his subpoena authority against the provisions of the Rule, we observe the following apparent violations: 1) no deposition was simultaneously noticed or compelled; 2) the subpoena did not state: a) that the evidence shall not be produced or released until the date specified in the notice; and b) if the deponent is notified of a motion to quash the records shall not be produced or released until ordered by a court or by consent of the parties; 3) no notice of the subpoena was sent to plaintiff or her attorney; 4) no

> **copy of the cover letter affording the witness the opportunity to forward the records was served on plaintiff or her attorney; and 5) the subpoena was not timely served as the date of service was apparently May 7, 1998, and the return date of the subpoena was May 12, 1998. In sum, Pinizzotto and his client secured allegedly privileged records through the use of an ex parte subpoena process in direct contravention of the Rule. We have previously commented on the violations of the Rule. The subpoena must notify the recipient that documents *shall not* be produced or released until the date of the deposition and that a notification of a motion to quash requires withholding the documents until further notice. A practice which obfuscates or conflicts with these requirements, confuses subpoenaed witnesses, and lulls witnesses into avoiding the inconvenience of appearing by encouraging untimely production undercuts the purpose and effectiveness of the Rule. That is the case here — and the result was inevitable given the subpoenas' missing language and the highlighted invitation to produce in the accompanying cover letter.**
>
> **[*Id.* at 566-67, 760 *A.*2d 353.][8]**

While the Court goes on to discuss issues compounded by a physician-patient privilege, the unlawful discovery and not any privilege is really at the heart of the Appellate Division's commentary on the wrongful behavior of the attorney in *Crescenzo*. The *Crescenzo* opinion continues:

[8] *Id.* at 538, 539.

Since we reverse the order denying the amendment and allow for further discovery, we make the following observations as to the viability of causes of action against Pinizzotto for the alleged wrongful issuance of the subpoena.

[5] While an attorney's violation of an ethics rule does not in itself state a cause of action in tort, *see Baxt v. Liloia,* 155 *N.J.* 190, 197-201, 714 *A.*2d 271 (1998); *see also Petrillo v. Bachenberg,* 263 *N.J.Super.* 472, 483, 623 *A.*2d 272 (App.Div.1993), *aff'd,* 139 *N.J.* 472, 655 *A.*2d 1354 (1995), defendant is exposed to other potential claims for violation of the Rule. *See, e.g., Tedards v. Auty,* 232 *N.J.Super.* 541, 557 *A.*2d 1030 (App.Div.1989) (permitting a litigant to prosecute a cause of action against an attorney for abuse of process for improper use of a writ of *ne exeat*); *see also Baglini v. Lauletta,* 338 *N.J.Super.* 282, 293-94, 768 *A.*2d 825 (App.Div.), *certif. denied,* 169 *N.J.* 607, 782 *A.*2d 425 (2001) (alluding to the improper issuance of a subpoena as a predicate act to a claim of abuse of process). Since we are only concerned with the propriety of the denial of the motion to amend, we need not explore the parameters of the proposed causes of action.

[6] Both Crane and Pinizzotto assert that the records were ultimately admissible and thus adopt the trial judge's view of 'no harm, no foul.' We reject that position. The determination of whether the records are ultimately admissible should not in the first instance be made by a doctor responding to a subpoena or an attorney who violates the Rule and improperly subpoenas the records. In adopting *R.* 4:14-7(c), the Supreme Court established a procedure that balances the rights of all concerned and affords each interested party an opportunity to test the bona fides of the subpoena and ultimately the admissibility of the records in the underlying cause of action... That determination must be made in a courtroom by a judge consistent with

appropriate due process concerns including notice and an opportunity to be heard. The fact that this occurred here, after the fact, is of little moment given the utter disregard for the language, spirit and intent of the Rule and, as important, the rights of the patient-litigant. The Rule demands adherence to its terms. As we have noted, violations of the Rule are both 'recurring and vexing.' *Cavallaro, supra,* 334 *N.J.Super.* at 560, 760 *A.*2d 353. This appeal provides yet another example of the problem. The power and authority to secure records is a profound one that must be exercised carefully. Failing to do so, those in violation must bear the consequences, which may include the award of damages.

The motion judge dismissed this complaint and denied the motion to amend. Since we conclude that plaintiff has stated a viable cause of action as to both Crane and Pinizzotto, further discovery will be required. We do not address the issue of the scope of plaintiff's damages as that issue will abide the completion of discovery and further motion practice, if necessary. At this stage of the proceedings, we only determine that plaintiff has stated a cause of action against both Crane and Pinizzotto. Accordingly, we reverse the order of the motion judge dismissing the complaint as to Crane and denying plaintiff's motion to join Pinizzotto as a direct defendant and remand to the Law Division for proceedings consistent with this opinion.[9]

[9] *Id.* at 541-544.

PRACTICE NOTE: The Rules do not provide, however, for sanctions for pre-action misconduct in respect of discovery. It has been held that as between private parties, in the absence of rule or statute, a litigant's pre-action misconduct in obtaining discovery will not justify exclusion of evidence. *See Tartaglia v. Paine Webber, Inc.*, 350 *N.J. Super*. 142, 148-150 (App. Div. 2002).

R. 1:6-2. Form of Motion; Hearing

(c) Civil and Family Part Discovery and Calendar Motions. Every motion in a civil case or a case in the Chancery Division, Family Part, not governed by paragraph (b), involving any aspect of pretrial discovery or the calendar, shall be listed for disposition only if accompanied by a certification stating that the attorney for the moving party has either (1) personally conferred orally or has made a specifically described good faith attempt to confer orally with the attorney for the 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, or (2) advised the attorney for the opposing party by letter, after the default has occurred, that continued non-compliance with a discovery obligation will result in an appropriate motion being made without further attempt to resolve the matter. The moving papers shall also set forth the date of any scheduled pretrial conference, arbitration proceeding scheduled pursuant to R. 4:21A, calendar call or trial, or state that no such dates have been fixed. Discovery and calendar motions shall be disposed of on the papers unless, on at least two days notice, the court specifically directs oral argument on its own motion or, in its discretion, on a party's request. A movant's request for oral argument shall be made either in the moving papers or reply; a respondent's request for oral argument shall be made in the answering papers.

R. 5:5-4. Motions in Family Actions

(a) Motions. Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, the court shall

ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions.

R. 1:10-3. Relief to Litigant

Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action... The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule...

R. 4:10-3. Protective Orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) <u>That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery</u>;

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) That discovery be conducted with no one present except persons designated by the court;

(f) That a deposition after being sealed be opened only by order of the court;

(g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

PRACTICE NOTE: A party against whom a Domestic Violence restraining order has been entered generally has the right to attend any deposition involving that party's interest, despite the fact that the adjudged victim will be present as well. The victim's attorney must apply for a protective order under this Rule, seeking the imposition of conditions on the attendance at the deposition of any such party. *See Mugrage v. Mugrage,* 335 *N.J.Super.* 653, 661-663 (Ch. Div. 2000).

R. 4:10-4. Sequence and Timing of Discovery

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that

a party is conducting discovery, whether by deposition or otherwise, shall not, of itself, operate to delay any other party's discovery.

R. 4:11-5. Depositions Outside the State

A deposition for use in an action in this state, whether pending, not yet commenced, or pending appeal, may be taken outside this state either (a) on notice pursuant to R. 4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice; or (c) in any manner stipulated by the parties. Depositions within the United States taken on notice shall be taken before a person designated by R. 4:12-2. Commissions and letters rogatory shall be issued in accordance with R. 4:12-3. If the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath.

R. 4:12-3. In Foreign Countries

Unless an international treaty or convention otherwise requires, in a foreign country depositions shall be taken (a) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (b) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued on application and notice, and on such terms and with such directions as are appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

R. 4:12-1. Within the State

Within this State, depositions shall be taken before a person authorized by the laws of this State to administer oaths.

R. 4:12-2. Without the State but Within the United States

Outside this State but within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held.

R. 4:12-4. Disqualification for Interest

No deposition shall be taken before or recorded by a person, whether or not a certified shorthand reporter, who is a relative, employee or attorney of a party or a relative or employee of such attorney or is financially interested in the action. Any regulations of the State Board of Shorthand Reporters respecting disqualification of certified shorthand reporters shall apply to all persons taking or recording a deposition.

R. 4:13. STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation

(a) Provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(b) Modify the procedure provided by these rules for other methods of discovery, except that stipulations extending the time provided in R. 4:17 (interrogatories to parties) may be made only with the approval of the court.

R. 4:14-1. When Depositions May Be Taken

Except as otherwise provided by R. 4:14-9(a), after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 35 days after service of the summons and complaint upon the defendant by any manner, except that leave is not required if the defendant has already served a notice of taking deposition or otherwise sought discovery. The attendance of witnesses may be compelled by subpoena as provided in R. 4:14-7. The deposition of

a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

R. 4:14-3. Examination and Cross-Examination; Record of Examination; Oath; Objections

(a) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted in the trial of actions in open court, but the cross-examination need not be limited to the subject matter of the examination in chief.

(b) Oath; Record. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be recorded and transcribed on a typewriter unless the parties agree otherwise.

(c) Objections. No objection shall be made during the taking of a deposition except those addressed to the form of a question or

to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order...

QUEARE: Isn't this inconsistent with the mandate of R. 5:5-1(c), to the extent that objection to questions relating to the elements that constitute the grounds for divorce are not addressed?

...The right to object on other grounds is preserved and may be asserted at the time the deposition testimony is proffered at trial. An objection to the form of a question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question. No objection shall be expressed in language that suggests an answer to the deponent. Subject to R. 4:14-4, an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order. All objections made at the time of the examination to the qualifications of the officer taking the

deposition or the person recording it, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidential objections to a videotaped deposition of a treating physician or expert witness which is taken for use in lieu of trial testimony shall be made and proceeded upon in accordance with R. 4:14-9(f).

(d) No Adjournment. Except as otherwise provided by R. 4:14-4 and R. 4:23- 1(a) all depositions shall be taken continuously and without adjournment unless the court otherwise orders or the parties and the deponent stipulate otherwise.

(e) Written Questions. [Not permitted in Family Actions]

(f) Consultation With the Deponent. Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.

R. 4:14-4. Motion or Application to Terminate or Limit Examination or for Sanctions

At any time during the taking of the deposition, on formal motion or telephone application to the court of a party or of the deponent and upon a showing that the examination or any part thereof is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, or in violation of R. 4:14-3(c) or (f), the court may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in R. 4:10-3. If the order made terminates the examination, it shall be resumed thereafter only upon further order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion or telephone application for an order. The provisions of R. 4:23-1(c) shall apply to the award of expenses incurred in making or defending against the motion or telephone application.

PRACTICE TIP: To this writer's knowledge, Family Part Judges can rarely, if ever, accommodate this sort of telephone application.

R. 4:14-5. Submission to Witness; Changes; Signing

If the officer at the taking of the deposition is a certified shorthand reporter, the witness shall not sign the deposition. If the officer is not a certified shorthand reporter, then unless reading and signing of the deposition are waived by stipulation of the parties, the officer shall request the deponent to appear at a stated time for the purpose of reading and signing it. At that time or at such later time as the officer and witness agree upon, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness. If the witness fails to appear at the time stated

or if the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the witness' failure or refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under R. 4:16-4(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

R. 4:14-6. Certification and Filing by Officer; Exhibits; Copies

(a) Certification and Filing. The officer shall certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony. The officer shall then promptly file with the deputy clerk of the Superior Court in the county of venue a statement captioned in the cause setting forth the date on which the deposition was taken, the name and address of the witness, and the name and address of the reporter from whom a transcript of the deposition may be obtained by payment of the prescribed fee. The reporter shall furnish the party taking the

deposition with the original and a copy thereof. Depositions shall not be filed unless the court so orders on its or a party's motion. The original deposition shall, however, be made available to the judge to whom any proceeding in the matter has been assigned for disposition at the time of the hearing or as the judge may otherwise request. Filed depositions shall be returned by the court to the party taking the deposition after the termination of the action. A videotaped deposition shall be sealed and filed in accordance with R. 4:14-9(d).

(b) Documentary Evidence. Documentary evidence exhibited before the officer or exhibits proved or identified by the witness, may be annexed to and returned with the deposition; or the officer shall, if requested by the party producing the documentary evidence or exhibit, mark it as an exhibit in the action, and return it to the party offering the same, and the same shall be received in evidence as if annexed to and returned with the deposition.

(c) Copies. The party taking the deposition shall bear the cost thereof and of promptly furnishing a copy of the transcript to

the witness deposed, if an adverse party, and if not, to any adverse party. The copy so furnished shall be made available to all other parties for their inspection and copying. Copies of videotaped depositions shall be made and furnished in accordance with R. 4:14-9(d).

R. 4:14-8. Failure to Attend or Serve Subpoena; Expenses

If the party giving notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, or if the party giving the notice fails to serve a subpoena upon a witness who because of such failure does not attend and another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred as a result of attendance either by the attending party or that party's attorney, including reasonable attorney's fees.

PRACTICE TIP: Carefully calendar your depositions and use a check list to ensure that all necessary subpoenas have gone out for service with your deposition notice. If you encounter problems serving the subpoenas within the mandatory lead time for doing so, be certain to send out an amended notice to take depositions, reflecting the later date. Be certain that your certified shorthand reporter is booked well in advance, and don't use one who is related to you. R. 4:12-4.

R. 4:14-9. Videotaped Depositions

Videotaped depositions may be taken for discovery purposes or for use at trial in accordance with the applicable provisions of these discovery rules subject to the following further requirements and conditions:

(a) Time for Taking Videotaped Depositions. The provisions of R. 4:14-1 shall apply to videotaped depositions except that such a deposition of a treating physician or expert witness which is intended for use in lieu of trial testimony shall not be noticed

for taking until 30 days after a written report of that witness has been furnished to all parties. Any party desiring to take a discovery deposition of that witness shall do so within such 30-day period.

(b) Notice. A party intending to videotape a deposition shall serve the notice required by R. 4:14-2(a) not less than 10 days prior to the date therein fixed for the taking of the deposition. The notice shall further state that the deposition is to be videotaped.

(c) Transcript. The videotaping of a deposition shall not be deemed to except it from the general requirement of stenographic recording and typewritten transcript. Prior to the swearing of the witness by the officer, the name, address and firm of the videotape operator shall be stated on the record.

(d) Filing, Copies. Immediately following the conclusion of the videotaped deposition, the videotape operator shall deliver the tape to the party taking the deposition who shall take physical custody thereof and arrange for the making of one copy. The party

taking the deposition shall then furnish a copy of the tape to an adverse party who shall make it available for copying and inspection to all other parties.

(e) Use. Videotaped depositions may be used at trial in accordance with R. 4:16-1. In addition, a videotaped deposition of a treating physician or expert witness, which has been taken in accordance with these rules, may be used at trial in lieu of testimony whether or not such witness is available to testify and provided further that the party who has taken the deposition has produced the witness for further videotaped deposition necessitated by discovery completed following the original videotaped deposition or for other good cause. Disputes among parties regarding the recall of a treating physician or expert witness shall be resolved by motion, which shall be made as early as practicable before trial. The taking of a videotaped deposition of a treating physician or expert witness shall not preclude the party taking the deposition from producing the witness at trial.

(f) Objections. Where a videotaped deposition is taken for use at trial in lieu of testimony, all evidential objections shall, to the extent practicable, be made during the course of the deposition. Each party making such objection shall, within 45 days following the completion of the deposition, file a motion for rulings thereon and all such motions shall be consolidated for hearing. The court may, however, on its own motion or the motion of a party, abbreviate the time period if the deposition of a treating physician or expert witness is taken pursuant to R. 4:36-3(c) or for other good cause. A copy of the tape shall be edited in accordance with said rulings and the copy so edited shall be made available for copying to all other parties.

PRACTICE NOTE: The editing process is important in domestic tort cases, to the extent they involve juries.

(g) Cost of Videotaped Depositions. All out-of-pocket expenses incurred in connection with a videotaped deposition, including the making of copies herein required and the editing of tapes, shall be

borne, in the first instance, by the party taking the deposition. The cost of court presentation of the deposition shall be borne, in the first instance, by the party offering the deposition.

(h) Record on Appeal. Where a videotaped deposition is used at trial, a typewritten transcript thereof shall be included in the record on appeal. The videotape itself shall not constitute part of the record on appeal except on motion for good cause shown.

R. 4:16-1. Use of Depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence.

(b) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.

(c) Except as otherwise provided by R. 4:14-9(e), the deposition of a witness, whether or not a party, may be used by any party for any purpose, against any other party who was present or represented at the taking of the deposition or who had reasonable notice thereof if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify, such as age, illness, infirmity or imprisonment, or is out of this state or because the party offering the deposition has been unable in the exercise of reasonable diligence to procure the witness's attendance by subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party. The deposition of an absent but not unavailable

witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which ought in fairness be considered with the part introduced, and any party may offer any other parts.

Substitution of parties pursuant to R. 4:34 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward maintained between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor, provided that the officer's statement required by R.

4:14-6(a) was duly filed. A deposition previously taken may also be used as permitted by the Rules of Evidence.

R. 4:16-2. Objections to Admissibility

Subject to the provisions of R. 4:16-4(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

R. 4:16-4. Effect of Errors and Irregularities in Depositions

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless at least 3 days before the time fixed for examination, or within such time as the court fixes by order, written objection is served upon the party giving the notice.

PRACTICE TIP: DO NOT OVERLOOK THIS RULE.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom or the person by whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) *Objections Not Waived*. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) *Objections Waived*. Except as otherwise provided by R. 4:14-3(c), errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated,

removed, or cured if promptly presented are waived unless timely objection thereto is made at the taking of the deposition. Objections to the form of written questions [not permitted in Family Part actions absent leave of Court] submitted under R. 4:15 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or redirect questions or, if the objection is as to recross questions, then within 5 days after service thereof.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

R. 4:17-1. Service, Scope of Interrogatories

(a) Generally. Any party may serve upon any other party written interrogatories relating to any matters which may be

inquired into under R. 4:10-2. The interrogatories may include a request, at the propounder's expense, for a copy of any paper...

PRACTICE TIP: If copious sets of documents are sought to be attached to Answers to Interrogatories, particularly to the extent they might be quite costly to produce, be mindful of the cost allocation provision of this Rule.

PRACTICE TIP: AVOID using extensive sets of generic interrogatories. Be thoughtful in the questions you chose to ask and customize them to the needs of your case.

PRACTICE TIP: Contact your adversary to discuss the reasonableness of the phone-book-thick set you just received in connection with your $50,000 per year W-2 wage-earner client (especially the ones that are 45th generation copies, sometimes with the wrong parties on the caption or Certification pages). Protect your clients from mindless discovery abuse.

R. 4:17-3. Number of Copies Served; Form of Interrogatories

The party serving the interrogatories shall furnish the answering party with the original thereof. The interrogatories shall be so arranged that after each separate question shall appear a blank space reasonably calculated to enable the answering party to have the answer typed in.

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

(a) Form of Answers; By Whom Answered. Except as otherwise provided in this rule, interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if a public or private corporation, a partnership or association, or governmental agency, by an officer or agent who shall furnish all information available to the party. If a party is unavailable, the interrogatories may be answered by an agent or authorized representative, including a liability carrier who is conducting the defense, whose answers shall bind the party. The party shall furnish all information available to the party and the party's agents, employees, and attorneys. The person answering the

interrogatories shall designate which of such information is not within the answerer's personal knowledge and as to that information shall state the name and address of every person from whom it was received, or, if the source of the information is documentary, a full description including the location thereof. Each question shall be answered separately, fully and responsively either in the space following the question or on separate pages. Except as otherwise provided by paragraph (d) of this rule, if in any interrogatory a copy of a paper is requested, the copy shall be annexed to the answer. If the interrogatory requests the name of an expert or treating physician of the answering party or a copy of the expert's or treating physician's report, the party shall comply with the requirements of paragraph (e) of this rule.

PRACTICE TIP: Insist that the Certification that you include with your interrogatories comes back signed and dated by the person upon whom they were propounded.

(b) Service of Answers; Time; Enlargement of Time. Except as otherwise provided by R. 4:17-1(b)(2), the party served with interrogatories shall serve answers thereto upon the party propounding them within 60 days after being served with the interrogatories. For good cause shown the court may enlarge or shorten such time upon motion on notice made within the 60-day period. Consent orders enlarging the time are prohibited.

PRACTICE TIP: Be absolutely certain to keep track of the time in which you have to apply for a change of due date, earlier or later. Remember, no Consent Orders.

(c) Copies; Service by Propounding Party. The original of the answers shall be served upon the propounding party, who shall then serve a copy of the interrogatories and answers upon each of the other parties. Parties against whom default has been entered need not, however, be served, and parties represented by the same attorney need be served with one copy.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from or requires annexation of copies of the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(e) Expert's or Treating Physician's Names and Reports. If an interrogatory requires a copy of the report of an expert witness or treating or examining physician as set forth in R. 4:10-2(d)(1), the answering party shall annex to the interrogatory an exact copy of the entire report or reports rendered by the expert or physician. The report shall contain a complete statement of that

person's opinions and the basis therefor; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation. If the answer to an interrogatory requesting the name and report of the party's expert or treating physician indicates that the same will be supplied thereafter, the propounder may, on notice, move for an order of the court fixing a day certain for the furnishing of that information by the answering party. Such order may further provide that an expert or treating physician whose name or report is not so furnished shall not be permitted to testify at trial. Except as herein provided, the communications between counsel and expert deemed trial preparation materials pursuant to R. 4:10-2(d)(1) may not be inquired into.

R. 4:17-5. Objections to Interrogatories

(a) Objections to Questions; Motions. A party upon whom interrogatories are served who objects to any questions propounded therein may either answer the question by stating "The question is improper" or may, within 20 days after being served with the interrogatories, serve a notice of motion, to be brought on for hearing at the earliest possible time, to strike any question, setting out the grounds of objection. The answering party shall make timely answer, however, to all questions to which no objection is made. Interrogatories not stricken shall be answered within such unexpired period of the 60 days prescribed by R. 4:17-4(b) as remained when the notice of motion was served or within such time as the court directs. The propounder of a question answered by a statement that it is improper may, within 20 days after being served with the answers, serve a notice of motion to compel an answer to the question, and, if granted, the question shall be answered within such time as the court directs.

PRACTICE TIP: Once again, pay close attention to the time frames in which you must act in accordance with this Rule.

(b) Objections to Request for Copies of Papers. A party served with interrogatories requesting copies of papers who objects to the furnishing thereof shall, in lieu of complying with the request, either state with specificity the reasons for noncompliance or invite the propounder to inspect and copy the papers at a designated time and place. The propounder of a request for a copy of a paper which is not complied with, may, within 20 days after being served with the answers, serve a notice of motion directing compliance with the request or for other appropriate relief.

PRACTICE TIP: Do not feel compelled to instruct your client to tediously comply with excessive and unwarranted document requests and interrogatories. Fully understanding the Rules will help you to defend your clients from such abuses.

(c) Interrogatory Motions; Form. Motions to strike interrogatories or to compel more specific answers thereto shall include a short statement of the nature of the action and shall have annexed thereto the text of the questions and answers, if any, objected to.

(d) Costs and Fees on Motion. If the court finds that a motion made pursuant to this rule was made frivolously or for the purpose of delay or was necessitated by action of the adverse party that was frivolous or taken for the purpose of delay, the court 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.

R. 4:17-6. Limitation of Interrogatories

Except as otherwise provided by R. 4:17-1(b), the number of interrogatories or of sets of interrogatories to be served is not limited except as required to protect the party from annoyance, expense, embarrassment, or oppression. The party to whom

interrogatories are propounded may apply for a protective order in accordance with R. 4:10-3.

> **PRACTICE TIP: Do not hesitate to so apply, in the event these issues cannot be worked out with your adversary. Always try to come to a solution through discussion, before resorting to costly motion practice.**

R. 4:17-7. Amendment of Answers

Except as otherwise provided by R. 4:17-4(e), if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late

amendment shall be disregarded by the court and adverse parties. Any challenge to the certification of due diligence will be deemed waived unless brought by way of motion on notice filed and served within 20 days after service of the amendment. Objections made thereafter shall not be entertained by the court. All amendments to answers to interrogatories shall be binding on the party submitting them. A certification of the amendments shall be furnished promptly to any other party so requesting.

> **PRACTICE TIP: To repeat, it is essential to be fully familiar with the time frame constraints for taking various actions under these Rules. Your calendaring and file management systems must be detailed enough to address these deadlines.**

R. 4:17-8. Use, Filing and Effect of Interrogatories

(a) Use. Answers to interrogatories may be used to the same extent as provided by R. 4:16-1(a) and R. 4:16-1(b) for the use of the deposition of a party. If less than all of the interrogatories and answers thereto are marked or read into evidence by a party, an

adverse party may read into evidence any other of the interrogatories and answers or parts thereof necessary for a fair understanding of the parts read into evidence. Interrogatories shall not be marked into evidence without good cause.

PRACTICE NOTE: R. 5:5-1 is silent as to the use as evidence of answers to interrogatories and, where permitted, depositions. Such use is clearly subject, however, to case law limitations on the use of defendant's admission as corroborative evidence of the fundamentals of the cause of action for divorce or nullity.

(b) Filing. Neither the interrogatories nor the answers shall be filed unless the court so directs at the pre-trial conference or trial.

(c) Pleading Not Stayed. The service of interrogatories shall not stay the time for service of an answering pleading.

R. 4:18-2. Copies of Documents Referred to in Pleading

When any document or paper is referred to in a pleading but is neither annexed thereto nor recited verbatim therein, a copy thereof shall be served on the adverse party within 5 days after service of his written demand therefor.

PRACTICE TIP: Also an under-utilized Rule. Do not include such references in you pleadings, unless you are prepared to produce them within 5 days of demand. Always make the demand when you notice such references in your adversary's pleadings.

PRACTICE NOTE: Although the Comment to this Rule states that versions of R. 4:23-4 include failure of compliance with such a demand as one to which its sanctions are applicable, R. 4:23-4's title, "Failure of Party to Attend at Own Deposition or Comply With Demand or Respond to Request for Inspection implies this, while the text of the Rule is actually silent.

RULE 4:19. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

In an action in which a claim is asserted by a party for personal injuries or in which the mental or physical condition of a party is in controversy, the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert by serving upon that party a notice stating with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests. The time for the examination stated in the notice shall not be scheduled to take place prior to 45 days following the service of the notice, and a party who receives such notice and who seeks a protective order shall file a motion therefor, returnable within said 45-day period. The court may, on motion pursuant to R. 4:23-5, either compel the discovery or dismiss the pleading of a party who fails to submit to the examination, to timely move for a protective order, or to reschedule the date of and submit to the examination within a reasonable time following the originally scheduled date. A court

order shall, however, be required for a reexamination by the adverse party's expert if the examined party does not consent thereto. This rule shall be applicable to all actions, whenever commenced, in which a physical or mental examination has not yet been conducted.

PRACTICE TIP: Strictly available on leave of Court in Family Part actions, but applicable to matrimonial actions. Consider using where disability is alleged, but insufficient corroborating evidence has been provided.

***But see DiVito v. DiVito,* 136 *N.J.Super.* 580 (Ch. Div. 1975); no examination ordered on motion of party alleging extreme cruelty boiler plate concerning the endangerment of his health and safety.**

As to conduct of the examination, *see B.D. v. Carley,* 307 *N.J.Super.* 259 (App. Div. 1998).

R. 5:3-3. Appointment of Experts...

(d) Investigation by Experts. Any expert appointed by the court shall be permitted to conduct an investigation independently to obtain information reasonable and necessary to complete his or her report from any source, and may make contact directly with any party from whom information is sought within the scope of the order of appointment. The parties shall be entitled to have their attorneys and/or experts present during any examination by a court appointed expert...

PRACTICE TIP: This writer has successfully argued that the Rule permits attendance of attorneys at interviews by forensic accountants. Although it is unlikely that a Judge would permit an attorney to attend a medical or psychological examination, this writer has likewise used the Rule as justification, in addition to *B.D. v. Carley* (where court-appointment is not necessary), for the tape recording of all such interviews.

(e) Submission of Report. Any finding or report by an expert appointed by the court shall be submitted upon completion to both the court and the parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to, the right to take the deposition of the expert.

R. 5:5-2. Case Information Statements...

(b) Time and Filing. Except as otherwise provided in R. 5:7-2, a case information statement or certification that no such statement is required under subparagraph (a) shall be filed by each party with the clerk in the county of venue within 20 days after the filing of an answer or appearance... The court on either its own or a party's motion may, on notice to all parties, dismiss a party's pleadings for failure to have filed a Case Information Statement. If dismissed, said pleadings shall be subject to reinstatement upon such conditions as the court may deem just.

(c) Amendments. Parties are under a continuing duty to inform the court of any changes in the information supplied on the case

information statement. All amendments to the statement shall be filed with the court no later than 20 days before the final hearing. The court may prohibit a party from introducing into evidence any information not disclosed or it may enter such other order as it deems appropriate...

PRACTICE TIP: In cases where you are not provided with an updated CIS within 20 days of Trial (all of them), specifically request one in your Notice in Lieu of Subpoena.

4:22-1. Request for Admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters of fact within the scope of R. 4:10-2 set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of

the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, 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 the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after being served with the summons and complaint. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering

party may not give lack of information or knowledge as a reason for failure to admit or deny unless stating that a reasonable inquiry was made and that the information known or readily obtainable is insufficient to enable an admission or denial. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial, may not, on that ground alone, object to the request but may, subject to the provisions of R. 4:23-3, deny the matter or set forth reasons for not being able to admit or deny.

Requests for admission and answers thereto shall be served pursuant to R. 1:5-1 and shall not be filed unless the court otherwise directs.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be

served. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

R. 4:22-2. Effect of Admission

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of R. 4:25-1 [Pretrial Conferences] governing amendment of a pretrial order, 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 be prejudicial to maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding.

PRACTICE TIP: This is a woefully underutilized tool.

It can be used to support a Summary Judgement motion concerning certain issues in the case; thereby limiting them.

It can be used where there have been discovery failures, and necessary facts need to be established for trial.

It can be used to avoid the necessity of authenticating documents at trial.

It can be used very effectively as an adjunct in preparing proposed Findings of Fact.

R. 4:23-1. Motion for Order Compelling Discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) Motion. If a deponent fails to answer a question propounded or submitted under R. 4:14 or 4:15 [not applicable without leave of Court to Family Part actions], or a corporation or other entity fails to make a designation under R. 4:14-2(c) or 4:15-1, the discovering party may move for an order compelling an answer or designation in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to R. 4:10-3.

(b) Evasive or Incomplete Answer. For the purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(c) Award of Expenses of Motion. 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 the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party opposing the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

R. 4:23-2. Failure to Comply With Order

(a) Failure to Be Sworn or Answer a Question. If a deponent fails to be sworn or to answer a question after being directed to do so, the failure may be considered a contempt of that court.

(b) Other Matters. If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or

without prejudice, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

R. 4:23-3. Expenses on Failure to Admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under R. 4:22, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the court for an order requiring the other party to pay the

reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

(a) The request was held objectionable pursuant to R. 4:22-1, or

(b) The admission sought was of no substantial importance, or

(c) The party failing to admit had reasonable ground for not making the admission.

PRACTICE TIP: Always consider making this application when you are forced into a much longer Trial than you would have otherwise had to participate it, due to admissions failures.

PRACTICE TIP: Alternatively, you can make this a part of your Certification of Attorney's Services and supporting argument for counsel fees and costs.

PRACTICE TIP: To facilitate such applications, and to the extent practicable, use your Request for Admissions to guide your examination of the other party, noting date and elapsed trial time consumed in the margins. Accompany your application with your attorney's Certification, attaching the Request for Admissions with notations as an Exhibit, attesting to your contemporaneous time entries in the margins.

R. 4:23-4. Failure of Party to Attend at Own Deposition or Comply With Demand or Respond to Request for Inspection

If a party or an officer, director, or managing agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1), (2) and (3) of R. 4:23-2(b). In lieu of any order or in

addition thereto the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by R. 4:10- 3.

R. 4:23-5. Failure to Make Discovery

(a) Dismissal.

(1) Without Prejudice. If a demand for discovery pursuant to R. 4:17, R. 4:18-1, or R. 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, 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 stating that the moving party is not

in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-F of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court if the motion to vacate is made within 30 days

after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry of the order of dismissal or suppression, the court may also order the delinquent party to pay sanctions or counsel fees and costs, or both, as a condition of restoration.

(2) With Prejudice. If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 90 days from the date of the order, move on notice for an order of dismissal or suppression with prejudice. The attorney for the delinquent party shall, not later than 7 days prior to the return date of the motion, file and serve an affidavit reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-G, of the pendency of the motion to dismiss or suppress with prejudice. In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed

in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made. If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was not made. Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party. The moving party need not appear but may be required to do so by the court. The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.

(3) General Requirements. All motions made pursuant to this rule shall be accompanied by an appropriate form of order. All affidavits in support of relief under paragraph (a)(1) shall include a representation of prior consultation with or notice to opposing counsel or pro se party as required by R. 1:6-2(c). If the

attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless exceptional circumstances are demonstrated, proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule. If the court is required to take action to ensure compliance or the motion for dismissal or suppression with prejudice is denied because of extraordinary circumstances, the court may order sanctions or counsel fees and costs, or both. An order of dismissal or suppression shall be entered only in favor of the moving party.

(4) Applicability. The July 5, 2000 amendments to paragraphs (a)(1) and (a)(2) of this rule shall be applicable to all actions, whenever commenced, in which a party seeks relief from a failure of an adverse party to make discovery that has been demanded.

(b) Failure to Furnish Expert's Report. The court at trial may exclude the testimony of a treating physician or of any other expert whose report is not furnished pursuant to R. 4:17-4(a) to the party demanding the same.

(c) Motion to Compel. Prior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to R. 4:18-1 or R. 4:19. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith.

R. 5:3-5. Attorney Fees and Retainer Agreements in Civil Family Actions; Withdrawal...

(c) Award of Attorney Fees. Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an

allowance, both pendente lite and on final determination, to be paid by any party to the action... In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award...

R. 4:24-1. Time for Completion of Discovery

(a) Originally Named Parties. Except for proceedings under R. 4:11 (depositions before action or pending appeal), and R. 4:22 (request for admissions) and except as otherwise provided by R.

5:5-1(e) (civil family actions), all proceedings referred to in R. 4:10-1 to R. 4:23-4 inclusive shall be completed within... [Go to R. 5:5-1(e)]. If an originally named party has been unable to be timely served, an extension of discovery may be sought pursuant to paragraph (c) of this rule.

(b) Added Parties. [Although not specifically addressed in the Rules or Comments, this writer respectfully suggests that the Judge assigned to any Family Part case having a party filing a pleading that joins a new party to the action shall determine how to proceed in such circumstances in the interest of justice, honoring the spirit, if not the letter of the Rule].

(c) Extensions of Time. [Although not specifically addressed in the Rules or Comments, this writer respectfully suggests that the Judge assigned to any Family Part case where an extension of time for discovery is requested, shall determine how to proceed in such circumstances in the interest of justice, honoring the spirit, if not the letter of the Rule].

(d) Applicability. [Once again, not specified in the Rule, but presumably in the discretion of the Judge].

R. 4:24-2. Motions Required to Be Made During Discovery Period

No motion for the relief provided by the following rules may be granted in any action unless it is returnable before the expiration of the time limited for discovery unless on notice and motion, for good cause shown, the court otherwise permits: R. 4:8 (motion for leave to file a third-party complaint); R. 4:7-6, 4:28-1, or 4:30 (motion for joinder of additional parties); R. 4:38- 1 (motion for consolidation); and R. 4:38-2 (motion for separate trials).

R. 4:24-3. Discovery After Judgment

The provisions of R. 4:24 shall not preclude the further use of discovery proceedings, on motion and order of the court, after the entry of judgment.

R. 4:59-1. Execution...

(e) Supplementary Proceedings. In aid of the judgment or execution, the judgment creditor or successor in interest appearing of record, may examine any person, including the judgment debtor, by proceeding as provided by these rules for the taking of depositions or the judgment creditor may proceed as provided by R. 6:7-2, except that service of an order for discovery or an information subpoena shall be made as prescribed by R. 1:5-2 for service on a party. The court may make any appropriate order in aid of execution. If the warrant for arrest is not executed within 24 months after the date of the entry of the order authorizing it, both the order and the warrant shall be deemed to have expired and to be of no further effect.

R. 6:7-2. Orders for Discovery; Information Subpoenas

(a) Order for Discovery. The court may, upon the filing by the judgment creditor or a successor in interest (if that interest appears of record) of a petition verified by the judgment creditor or the creditor's agent or attorney stating the amount due on the judgment, make an order, upon good cause shown, requiring any

person who may possess information concerning property of the judgment debtor to appear before the attorney for the judgment creditor or any other person authorized to administer an oath and make discovery under oath concerning that property at a time and place therein specified. The location specified shall be in the county where the person to be deposed lives or works.

No more than one appearance of any such person may be required without further court order. The time and place specified in the order shall not be changed without the written consent of the person to be deposed or upon further order of the court.

(b) Information Subpoena

(1) To Judgment Debtor. An information subpoena may be served upon the judgment debtor, without leave of court, accompanied by an original and copy of written questions and a prepaid, addressed return envelope. The information subpoena and written questions shall be in the form and limited to those set forth in Appendix XI-L to these Rules. Answers shall be made in writing, under oath or certification, by the person upon whom served, if an individual, or

by an officer, director, agent or employee having the information sought, if a corporation, partnership or sole proprietorship. The original subpoena, with the answers to the written questions annexed thereto shall be returned to the judgment creditor, if pro se, or judgment creditor's attorney within 14 days after service thereof. An information subpoena shall not be served on a judgment debtor more frequently than once in any six-month period without leave of court.

(2) <u>To Other Person or Entity</u>. An information subpoena may be served upon banking institutions possibly used by the judgment-debtor without leave of court or upon possible employers or account-debtors (who are business entities) of the judgment-debtor upon ex-parte application, supported by certification, and court order, if the judgment-debtor has failed to fully answer an information subpoena served pursuant to subparagraph (1) within 21 days of service. The application shall be granted if the court determines that the information subpoena is reasonably necessary to effectuate a post-judgment judicial remedy and that the party receiving the subpoena may have in their possession information

about the debtor that will assist the creditor in collecting the judgment. The information subpoena shall be accompanied by an original and copy of written questions and a prepaid, addressed return envelope. The information subpoena and written questions shall be in the form and limited to those set forth in Appendix XI-R to these Rules, except that an information subpoena served upon a banking institution shall contain a certification by the judgment-creditor or the creditor's attorney that the debtor has failed to fully answer an information subpoena served pursuant to R. 6:7-2(b)(1) within 21 days of service, that the information subpoena is reasonably necessary to effectuate a post-judgment judicial remedy, and that the bank may have in its possession information about the debtor that will assist the creditor in collecting the judgment. Answers shall be made in writing, under oath or certification, by the person served, if an individual, or by an officer, director, agent or employee having the information sought, if a corporation, partnership or sole proprietorship. The original subpoena, with the answers to the written questions annexed thereto, shall be returned to the judgment creditor, if pro

se, or judgment creditor's attorney within 14 days after service thereof. (c) Service of Proceedings. A copy of the order for discovery as provided in paragraph (a) of this rule shall be served personally or by registered or certified mail, return receipt requested, and simultaneously by regular mail, at least 10 days before the date for appearance fixed therein. The information subpoena, as provided for in paragraph (b) of this rule shall be served personally or by registered or certified mail, return receipt requested, and simultaneously by regular mail.

Service of an order for discovery or an information subpoena shall be effective as set forth in R. 6:2-3(d)(4). Upon completion of service, the failure to comply with an information subpoena shall be treated as a failure to comply with an order for discovery entered in accordance with paragraph (a) of this rule.

(d) Enforcement Against Other Person or Entity. Proceedings to seek relief pursuant to R. 1:10-3, when a person who is not a party fails to obey an order for discovery or an information subpoena, may be commenced by order to show cause or notice of motion.

(e) Enforcement by Motion. Proceedings to seek relief pursuant to R. 1:10-3, when a judgment-debtor fails to obey an order for discovery or an information subpoena, shall be commenced by notice of motion supported by affidavit or certification. The notice of motion and certification shall be in the form set forth in Appendices XI-M and N to these Rules. The notice of motion shall contain a return date and shall be served on the judgment-debtor and filed with the clerk of the court not later than 10 days before the time specified for the return date. The moving papers shall be served on the judgment-debtor either in person or simultaneously by regular and certified mail, return receipt requested. The notice of motion shall state that the relief sought will include an order:

(1) adjudicating that the judgment-debtor has violated the litigant's rights of the judgment-creditor by failing to comply with the order for discovery or information subpoena;

(2) compelling the judgment-debtor to immediately furnish answers as required by the order for discovery or information subpoena;

(3) directing that if the judgment-debtor fails to appear in court on the return date or to furnish the required answers, he or she shall be arrested and confined to the county jail until he or she has complied with the order for discovery or information subpoena;

(4) directing the judgment-debtor, if he or she fails to appear in court on the return date, to pay the judgment-creditor's attorney fees, if any, in connection with the motion to enforce litigant's rights; and

(5) granting such other relief as may be appropriate.

The notice of motion shall also state, in the case of an information subpoena, that the court appearance may be avoided by furnishing to the judgment-creditor written answers to the information subpoena and questionnaire at least 3 days before the return date.

(f) Order to Enforce Litigant's Rights. If the judgment-debtor has failed to appear in court on the return date and the court

enters an order to enforce litigant's rights, it shall be in the form set forth in Appendix XI-O to these Rules and shall state that upon the judgment-debtor's failure, within 10 days of the certified date of mailing or personal service of the order, to comply with the information subpoena or discovery order, the court will issue an arrest warrant. The judgment-creditor shall serve a copy of the signed order upon the judgment-debtor either personally or by mailing it simultaneously by regular and certified mail, return receipt requested. The date of mailing or personal service shall be certified on the order.

(g) Warrant for Arrest. Upon the judgment-creditor's certification, in the form set forth in Appendix XI-P to these Rules, that a copy of the signed order to enforce litigant's rights has been served upon the judgment- debtor as provided in this rule, that 10 days have elapsed and that there has been no compliance with the information subpoena or discovery order, the court may issue an arrest warrant. If the judgment-debtor is to be arrested in a county other than the one in which the judgment was entered, the warrant shall have annexed to it copies of the order to enforce

litigant's rights and the certification in support of the application for the warrant. The warrant shall be in the form set forth in Appendix XI-Q to these Rules and, except for good cause shown and upon such other terms as the court may direct, shall be executed by a Special Civil Part Officer or Sheriff only between the hours of 7:30 a.m. and 3:00 p.m. on a day when the court is in session. If the notice of motion and order to enforce litigant's rights were served on the judgment-debtor by mail, the warrant may be executed only at the address to which they were sent. In all cases the arrested judgment-debtor shall promptly be brought before a judge of the Superior Court in the county where the judgment-debtor is arrested and released upon compliance with the order for discovery or information subpoena. When the judgment-debtor has been arrested for failure to answer an information subpoena, the clerk shall furnish the judgment-debtor with a blank form containing the questions attached to the information subpoena, as set forth in Appendix XI-L to these Rules.

(h) Execution of Warrants by Special Civil Part Officers and Sheriffs. A warrant may be directed to the sheriff in the first

instance, but a warrant directed to a Special Civil Part Officer shall remain with the Officer for execution for six months, at the conclusion of which the Officer shall furnish a certification of his or her efforts to serve the warrant and the judgment creditor may apply ex parte for an order directing the issuance of a warrant to the sheriff.

(i) Expiration of Unserved Warrants. If the warrant for arrest is not executed within 24 months after the date of the entry of the order authorizing it, both the order and the warrant shall be deemed to have expired and to be of no further effect.