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The Unwritten Rules of Civil Court

A. General Conduct/Interaction with the Court and Court Staff

I. Basic Rules

a. Timeliness.

i. This should go without saying, but so many attorneys still break this rule: always be on time. Early is preferable. Don't create a bad impression (or get yourself frazzled) before you even open your mouth in court.

b. Remember, everything you do is potentially being observed, from your drive approaching the courthouse to your interactions in the courtroom. You don't want to create a bad impression before a potential juror, or courtroom staff by acting discourteously before you even walk into the courtroom. Be a model of courteousness and good behavior before you even exit your car in the courthouse parking lot, and continue until you are well on your way home (or back to the office) from court.

II. Interactions with the Court

a. Treat the Court staff (court clerk, bailiff, law clerk, secretary, court reporter, etc.) with the utmost respect, whether via phone, email, or in-person. They are the eyes and ears of the judge. If you make a

bad impression with them, you have made a bad impression with the judge (and, in fact, many judges are very protective of the court staff and will take rudeness to their staff more personally than rudeness to them directly).

b. Don't thank the Court for favorable rulings, even though it may feel reflexive.

c. Conversely, even if you vehemently disagree with the court's ruling (or if the judge seems to be outright hostile to you, your client, or your case), always handle it with grace. Ask the court if you may be heard further, respond, or make a statement for purposes of the record. (You can even say something along the lines of "we understand that Your Honor has ruled, however, for purposes of the record, we would respectfully submit ...."). If the court does not permit you, consider whether to submit a written offer of proof or otherwise make a written record to preserve an issue for appeal.

d. Understand when to stop arguing. Give the Court credit for understanding your point and don't belabor or guild the lily. You will only antagonize.

  i. This is particularly true for motion practice, where the Judge has almost certainly read your papers, and does not want a recapitulation. Touch upon your main/strongest points and sit down. Respond as appropriate to opposing counsel's arguments or the Judge's questions.

e. Relatedly, always be courteous to and non-confrontational with opposing counsel.

i. Even if counsel's conduct may warrant some hostility, you responding in kind will only upset the Court

ii. If your adversary is truly discourteous/obstreperous, the Court will take notice and act accordingly

f. Tailor your etiquette to the preferences of the judge. (If you don't know them, it may behoove you to attend another hearing before that judge or speak to colleagues who have appeared in front of him/her before.) Certain, more traditional judges may expect or appreciate adherence to rules of etiquette that are generally no longer observed and which many attorneys may not even be aware of. (For example, asking the court for permission to turn your back to retrieve a document from your litigation bag.)

g. Stand when addressing the court. Not only is this a basic courtesy to the court, but during trial, it immediately alerts the judge to an objection, and breaks the flow of opposing counsel's presentation.

III. Preparation is key

a. "Scouting the Court":

i. If you are appearing in front of a judge you haven't been before previously, it may pay dividends to attend a hearing beforehand so you can observe how he/she conducts a courtroom. Even Zoom motion hearings are publicly accessible though the NJ judiciary website.

ii. Similarly, if you are in a court/practice area that is unfamiliar to you, check to see if there are any court rules/directives applicable to that court, or speak to other practitioners who

practice in that area. For example, in Chancery cases, there is no need to file a case information statement, and most discovery occurs pursuant to a case management order entered by the Court following a conference after the defendant(s) answer(s) the complaint. However, many attorneys unfamiliar with Chancery practice will serve discovery in advance of a case management conference, or file a case information statement. While this will certainly not materially prejudice your case, it does create a bad impression with the judge and opposing counsel, and you may be taken less seriously than you otherwise should be.

iii. Similarly, it may be helpful to scout the actual courtroom itself in advance of trial. If you plan on using demonstratives (or a white board/easel) or certain technology, figure out where you will position them or set them up. (Does the courtroom have a video screen? What kind of screen is it? Does it connect to a laptop? How does it operate? Are there outlets available to you? Where? Do you need an extension cord? How long of one? Will the court permit you to use one?). Likewise, it may helpful to consider where you will stand during opening/closing arguments and witness examinations. Not all courtrooms are laid out the same and you may be thrown by a different layout than you are expecting or are used to.

IV. Etiquette in a Zoom World

a. Treat a Zoom appearance as similarly to an in-person appearance as possible.

- **i.** Dress appropriately
  - **1.** Even though, generally, only the upper portion of your torso will be visible, still dress as if you are appearing in public. That way, you can stand up and move confidently, if need be, without worrying about the judge seeing the sweatpants you've paired with your button down, tie, and jacket.
- **ii.** "Arrive" (login in) early (in case you have any issues logging in)
- **iii.** Stand when the court clerk says "all rise," pay rapt attention at all times (don't check your phone or your email), and do not slouch/recline.)

b. Try not to position yourself with a window in the background, as it will cause glare (and distractions to those viewing your screen).

- **i.** In fact, consider using a zoom/blurred background to eliminate those distractions.

c. Do your best to eliminate distractions for yourself - find a quiet/isolated place to set up.

d. Don't eat or chew gum (coffee is OK, even though you wouldn't be able to bring it into a real courtroom).

e. Make sure your software is properly downloaded and up to date.

f. Be conversant with and practice document sharing/handling procedures so you can do so seamlessly during trial.

g. Similarly, determine how you will appear on screen (angle of the camera, what is visible in the background, how your name appears on screen).

h. Don't stare at yourself on screen. You will just get distracted (and possibly experience "zoom fatigue").

i. Mute your audio until its time for you to speak (if you are objecting to an examination, this is unnecessary and may delay your reaction time).

V. Trial Practice Etiquette

a. The jury expects you to be courteous! (Many of these rules apply to bench trials as well.)

i. Even if a litigation has been contentious, the jury is not aware of that. Treat witnesses and opposing counsel with professionalism and respect. (Of course, if you can confidently read the jury and are sure they are on your side, you may take *some* liberties, but only if you believe it will further endear them to you.)

1. Don't cut off or become argumentative with opposing counsel. In fact, in court, you generally should not address opposing counsel directly at all. All interactions (other than basic courtesies) should be handled through the court.

2. Don't attack/become aggressive towards witnesses on cross-examination, especially if they are naturally sympathetic.
3. Even if a witness on cross-examination is hostile or non-responsive, don't become nasty or argumentative in response. Demonstrate control and composure.
4. Be careful of objecting too much. You obviously want to keep our harmful or improper evidence and demonstrate competence, but you don't want to look like a "know it all" or that you are attempting to hide something. Read the judge and jury. If the judge is overruling your objections, sustaining them conditionally, or appears aggravated, cut back to only those objections that are absolutely critical.
5. Control your body language. You will no doubt encounter rulings, testimony by witnesses, or arguments by counsel that you find outrageous. Don't show your frustration by sighing, shaking your head, or rolling your eyes.

b. Respect personal space in the courtroom.

i. Don't stand to close to witnesses when presenting evidence.

ii. Don't crowd the jury's space, especially at the beginning of a trial before you have developed familiarity and rapport.

iii. Similarly, always ask the court for permission to approach the witness or the bench, even if you are simply providing the

court documents it has requested. It never hurts to be deferential to the court; being overly deferential is certainly preferable to being overly familiar or outright rude.

c. Remember to modulate your presentation to your audience. A jury may expect some measure of dramatics and background explanation, but a judge will appreciate efficiency.

VI. **Motion Practice**

a. Just because you can, doesn't mean you should
    i. Why are you filing?
        1. Are you likely to succeed?
        2. If not, do you have some other strategic purpose?
        3. Will the filing antagonize the Court?
    ii. Expect the unexpected!
    iii. Special considerations for particular motions
        1. Motions to dismiss (*R.* 4:6-2)
            a. Many judges do not favor these, as they prefer cases to be decided on the merits and there is no prejudice in denying one, especially considering NJ's liberal pleading standards
        2. Discovery motions/to compel (*R.* 4:23-5)
            a. Can the issue be resolved with a conference? (Chancery court judges generally prefer this route).
            b. Many judges are of the "pox on both your houses" philosophy

3. Motions to appoint a fiscal agent
    a. Some judges take an exacting or pragmatic view, and will not grant unless there are extraordinary circumstances given the burden/cost.
    b. Other judges view them as efficient ways to break deadlock and fast track settlement discussions.
4. Applications for injunctions (*R.* 4:52)
    a. Motion v. OSC
    b. You don't want to start a case with a loss (OSC)
    c. Although preservation of the status quo and avoidance of irreparable harm is the main purpose, many courts take a strict view of the standard and require substantial proof of all elements.
        i. *See Waste Mgmt. of New Jersey, Inc. v. Union County Util. Auth.*, 399 N.J. Super. 508, 534 (App. Div. 2008) (a "court may issue an interlocutory injunction on a less than exacting showing if necessary to prevent the subject matter of the litigation from being destroyed or substantially impaired").

        ii. *See also Waste Mgmt. of New Jersey, Inc. v. Morris County Mun. Util. Auth.*, 433 N.J. Super. 445, 454 (App. Div. 2013) ("This less rigid approach, for example, permits injunctive relief preserving

the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.").

5. Motions to extend time (*R.* 4:6-1(c))
    a. Judges do not look favorably upon these; however, unlike many of the other motions discussed here, it is the *opposing* party that has usually run afoul of the Court. Try to grant reasonable extensions of time to respond to initial pleadings where feasible.
6. Motions for summary judgment (*R.* 4:46-2)
    a. MSJ's are a good strategic move (to show aggressiveness and zealous advocacy for/to your client), but must be deployed judiciously so as not to bury your strongest points or antagonize the court.
    b. Should be targeted, efficient, not omnibus
        i. If a motion is overly long, then it sends the message there must be an issue of fact (or many of them) buried in there somewhere.

ii. If you move on every possible claim/count (unless the case is clear), you risk obscuring your strongest arguments and having the Court dismiss the baby with the bath water.

7. Motions for reconsideration (*R.* 4:49-2)
    a. Where in the case are you?
        i. If you are seeking reconsideration of a final order, there is very little downside (other than cost, as such motions are usually unlikely to succeed).
        ii. If you are seeking reconsideration mid-case, make sure it is an issue worth fighting over. You risk antagonizing the Court by relitigating an issue already decided and impugning the Court's judgment.
        iii. As much as you must be an advocate for your client, it pays to step back and view various strategies/maneuvers as neutrally as possible to make sure that a gambit that may please your client does not endanger there case in the long run by losing credibility with the Court. (This goes for just about any step in the case).

8. Motions in limine
    a. Once again, there is a strategic balance to be considered: zealous advocacy v. burdening the Court with issues that can better be addressed pre-trial.
    b. Of course, a well-made *in limine* motion that is denied may still "prime the pump" for a favorable ruling when the evidentiary issue is actually ripe.
    c. ***In limine* motions are not the appropriate forum for dispositive rulings, including as to expert reports needed to prove a predicate of a party's case.**
        i. *Rule* 4:25-8(a)(1): "a motion in limine is defined as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case. A dispositive motion falling outside the purview of this rule would include, but not be limited to, an application to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain a party's burden of proof."

        ii. *See also Cho v. Trinitas Reg. Med. Ctr.*, 443 N.J. Super. 461, 470-71 (App. Div. 2015) (Noting that *in limine* rulings are generally disfavored, in particular when

> they seek the exclusion of an expert's testimony, "an objective that has the concomitant effect of rendering a plaintiff's claim futile. … The fact that this misuse of the motion *in limine* occurs sufficiently often to win our notice, despite our repeated cautions against such practice, leads us to conclude it necessary to state clearly what a motion *in limine* is not. It is not a summary judgment motion that happens to be filed on the eve of trial. When granting a motion will result in the dismissal of a plaintiff's case or the suppression of a defendant's defenses, the motion is subject to *Rule* 4:46, the rule that governs summary judgment motions."); *Krzak v. Faso*, A-2588-17, 2019 WL 1040958, at *5 (N.J. Super. Ct. App. Div. Mar. 5, 2019) (disapproving of "**disguised motions for summary judgment** filed as motion[s] in limine returnable on the day of trial").

9. Motions for directed verdict (and related relief).
    a. Unlikely to succeed, but must be made to preserve issues for appeal/post-trial motion practice. There is no downside to making them and trial judges expect them (unlike some motion practice, you do not risk antagonizing the court with frivolous application).
    b. *Rule* 4:37-2(b): The defendant may move for dismissal after plaintiff has completed its presentation on all issues save for damages.

i. Should be denied if the plaintiff has proven a *prima facie* case.
ii. A prima facie case is one where there is any evidence, including any favorable inference to be drawn therefrom, which could sustain a plaintiff's verdict. *See Pron v. Carlton Pools, Inc.*, 373 N.J. Super. 103, 111 (App. Div. 2004).

c. *Rule* 4:40-1: *Either party may move for judgment at* the close of all evidence, or the close of all evidence offered by an opponent (i.e. before submission to the fact finder).

d. *Rule* 4:40-2(b) (JNOV): provides for renewal of motion made pursuant to *R.* 4:40-1, which may include a new trial motion (*R.* 4:49-1) *in the alternative*.

i. As such, **a JNOV cannot be entered absent a predicate motion during trial**. Pressler & Verniero, *Current N.J. Court Rules*, comment 3 on *R.* 4:40 (2021).

ii. However, the predicate motion **need not necessarily be a motion for judgment** (*R.* 4:40-1), so long as the motion would have provided the same relief as is sought on the JNOV motion. *Id.*

iii. This can include a motion for dismissal under *R.* 4:37-2(b). *See Hoke v. Pioneer State Bank*, 167 N.J. Super. 410, 416 (App. Div. 1979) ("Whether defendants moved for a dismissal or judgment at the end of plaintiffs' case or moved for judgment at the end of the entire case, the procedural method does not affect the ultimate

result, namely, that the court erred in submitting the case to the jury.").

iv. It can also include a plaintiff's motion to strike a defense or objection to a jury interrogatory. *See Spaulding v. Hussein*, 229 N.J. Super. 430, 441-42 (App. Div. 1988); *Logan v. N. Brunswick Twp.*, 129 N.J. Super. 105, 108-09 (App. Div. 1974).

10. Motions for new trial

a. More "holistic" than directed verdict/JNOV, etc.

b. Very little downside (although beware of cross-motions, which can have unintended consequences, for both sides sometimes).

b. Motion for directed verdict is *not* a predicate for a new trial motion. *Kimmel v. Dayrit*, 301 N.J. Super. 334, 355 (App. Div. 1997).

c. A new trial motion is governed by a more discretionary (and less mechanical) standard than motions under *Rules* 4:37-2(b) and 4:40. *Id.* (citing *Lanzet v. Greenberg*, 126 N.J. 168, 174 (1991)).

d. However, the standard for granting a new trial is still high. The court may not substitute its judgment for that of the jury merely because it would have reached the opposite conclusion. *Jackowitz v. Lang*, 408 N.J. Super. 495, 504 (App. Div. 2009).

e. New trial is required where "the verdict [is] against the weight of the evidence so as to

constitute a miscarriage of justice." *Dolson v. Anastasia*, 55 N.J. 2, 12 (1969).

f. Cumulative errors can require a new trial. *State v. T.J.M.*, 220 N.J. 220, 238 (2015) ("When the aggregation of legal errors renders a trial unfair, a new trial is required."); *see also State v. Sanchez-Medina*, 231 N.J. 452, 469 (2018).

g. The judge's extreme hostility towards and disparagement of a party and its counsel can require a new trial. *Mercer v. Weyerhauser Co.*, 324 N.J. Super. 290 (App. Div. 1999).

h. New trial is appropriate where a party resorts to "golden rule" arguments and the judge's curative, if any, is insufficient, or does not prevent further such conduct. *See Jackowitz v. Lang*, 408 N.J. Super. 495 (App. Div. 2009).

i. New trial on the basis of erroneous jury instructions or verdict sheet is appropriate only where the jury is confused or mislead *as a whole*, even if a part of the charge, standing alone, might be incorrect. Litigants are entitled to trials free of prejudicial error, not **perfect trials**. *Maleki v. Atlantic Gastroenterology Assocs., P.A.*, 407 N.J. Super. 123, 128 (App. Div. 2009) (reversing grant of new trial where jury verdict sheet contained typographical error referring to single defendant as "defendants").

b. Additur and remittitur (a subset of new trial motions)

i. The power to grant them springs from the court's power to grant a new trial. *He v. Miller*, 207 N.J. 230, 248 (2011).

ii. Additur is an order denying plaintiff's new trial motion on the condition that the defendant consent to an increase in the damage verdict, as specified by the trial judge. *Tronolone v. Palmer*, 224 N.J. Super. 92, 97 (App. Div. 1988).

iii. Similarly, remittitur is the opposite: an order denying defendant's new trial motion on the condition that the plaintiff accept a decreased judgment. *Id.*

iv. They both leave the liability verdict undisturbed. *Id.* at 98.

v. Both are legitimate mechanisms that have historical roots and have survived constitutional scrutiny. *Id.* at 97-98.

vi. Indeed, their use helps avoid the unnecessary expense and delay of new trials. *He*, 207 N.J. at 248.

vii. Not every excessive damages verdict is amenable to remittitur. Where the verdict is so excessive as to demonstrate prejudice, partiality, and passion, the liability verdict may also be tainted sufficiently to require an entirely new trial. *Tronolone*, 224 N.J. Super. at 98; *but see Fertile ex rel. Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 499 (2001) ("passion, prejudice, or bias warranting a new trial on liability generally cannot be established by the excessiveness of the damages aware, regardless of its size … [there must be] some other indicia or bias, passion, or prejudice impacting on the liability verdict").

viii. Likewise, not every low damages verdict is amenable to additur. Indeed, it may signal a fault in the liability verdict (i.e. that perhaps liability should not have been found in the first place). *Id.*

ix. In analyzing a motion for additur or remittitur, the court must recognize its power is limited and that there is a presumption the verdict is correct, which should only be upset if the result shocks the conscience, not if it is supportable (but generous or penurious). *See He*, 207 N.J. at 249-50.

B. Rules of Civil Procedure: Top Attorney Oversights

1. Many attorneys get these wrong!

2. ***Rule* 4:4-4(b)(1)(C) (In Personam Jurisdiction by Substituted or Constructive Service … mailing):**

    a. "If it appears by **affidavit satisfying the requirements of R. 4:4-5(b)** that despite diligent effort and inquiry **personal service** cannot be made in accordance with **paragraph (a)** of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows: … **mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, and, simultaneously, by ordinary mail to**: (1) a competent individual of the age of 14 or over, addressed to the individual's dwelling house or usual place of abode; (2) a minor under the age of 14 or a mentally incapacitated person, addressed to the person or persons on whom service is authorized by paragraphs (a)(2)and (a)(3) of this rule; (3) a corporation, partnership or unincorporated association that is subject to suit under a recognized name, addressed to a registered agent for service, or to its principal place of business, or to its registered office."

    b. Thus, so long as you attempt personal service first (or have a compelling reason why you cannot), you can effectuate good service via mail.

    c. Many attorneys are unaware of this provision or confuse it with *R.* 4:4-4(c), "Optional Mailed Service," which provides for service *in lieu* of personal service pursuant to subsection (a) (i.e., it "absolves" the serving party of attempting actual personal service or having a compelling reason for not attempting personal

service), but is good service "only if the defendant answers the complaint or otherwise appears in response thereto."

d. For good service under *R*. 4:4-4(b)(1)(C), you could likely file your proof of service and proof of diligent inquiry as one document. However, the better practice is to file them as separate documents. Indeed, they are pursuant to separate rules, *R*. 4:4-5(b), and *R*. 4:4-7 ("The person serving the process shall make proof of service thereof on the original process and on the copy. Proof of service shall be promptly filed with the court within the time during which the person served must respond thereto either by the person making service or by the party on whose behalf service is made.'). File the affidavit of diligent inquiry before/contemporaneous with mailed service, then file the proof of service after receipt of the green card (or, if not received, after sufficient time has passed without return of the regular mailing as undeliverable, etc.).

3. *Rule* 4:6-2(e) (motions to dismiss for failure to state a claim)

a. Pursuant to 2020 rule revision, the timeframe for filing/response is now the same as summary judgment ("A motion to dismiss based on defense (e), and any opposition thereto, shall be filed and served in accordance with the time frames set forth in R. 4:46-1.").

i. (The motion must be filed 28 days before the return date, with opposition to be filed 10 days prior.)

b. This makes sense, as a motion to dismiss is convertible to one for summary judgment. ("If, on a motion to dismiss based on defense (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.").

4. *Rule* 4:18-1(c) (responding to document demands):

a. Responses must now contain a "Certification or Affidavit of Completeness," as follows:

"I hereby certify (or aver) that I have reviewed the document production request and that I have made or caused to be made a good faith search for documents responsive to the request. I further certify (or aver) that as of this date, to the best of my knowledge and information, the production is complete and accurate based on ( ) my personal knowledge and/or ( ) information provided by others. I acknowledge my continuing obligation to make a good faith effort to identify additional documents that are responsive to the request and to promptly serve a supplemental written response and production of such documents, as appropriate, as I become aware of them. The following is a list of the identity and source of knowledge of those who provided information to me:"

5. ***Rule* 4:18-2 ("early discovery"):** "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."
    a. *Rubin v. Tress*, 464 N.J. Super. 49, 54 (App. Div. 2020): "the violation of [*R.* 4:18-2] made the complaint subject to dismissal."
    b. Pressler & Verniero, *Current N.J. Court Rules*, comment on *R.* 4:18-2 (2022): "The sanctions of R. 4:23-4 apply to failure of compliance with this Rule."
        i. This rule pertains to a party's failure to attend his own deposition. As such, the commentary in the Rules (which cites *Rubin*, which cites the comment) may not be entirely correct. The court in *Rubin* intimated as much, referencing *Rule* 4:23-4's incorporation of *Rule* 4:23-2(b), which permits a court to address a party's failure to obey an order to provide or permit discovery. 464 N.J. Super. at 56. The court went on to note that "*Rule* 4:23-5 also permits a party to move to dismiss or suppress a pleading if a demand for discovery pursuant to *R.* 4:18 is not complied with." *Id.* at 56-57 (internal quotation marks omitted).

6. *Rule* 4:32-3 v. *N.J.S.A.* 14A:3-6.3:

a. Not strictly a Rule misinterpretation per se
b. The provision and Rule both address derivative actions

c. The Rule provides: "The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as is desired, and the reasons for the failure to obtain such action or the reasons for not making such effort."

d. The Statute sets forth:

> No shareholder may commence a derivative proceeding until:
>
> (1) a written demand has been made upon the corporation to take suitable action; and
>
> (2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

e. Under the statute's plain language, all that may be excused on account of individual circumstances is the 90-day *post demand waiting period*, if there is irreparable harm.

f. Demand absolutely must be made; there is no demand futility requirement for *corporations*.

g. Some plaintiffs have argued that the Rule and statute conflict such that demand futility is still availing.

h. However, by its own terms, the Rule is one of *pleading*, not substance (or even procedure, for that matter).

i. Moreover, given that derivative suits may be made in other contexts (e.g., LLC's, *see N.J.S.A.* 42:2C-68(b); condominium associations, *see, e.g., Riccuitti v. McEwan*, A-2303-14, 2015 WL 10015196, at *4 (N.J. Super. Ct. App. Div. Feb. 10, 2016); and corporations that opt out of the application of *N.J.SA.* 14A:3-6.3, *see N.J.S.A.* 14A:3-6.9), the Rule is not rendered moot by the passage of *N.J.S.A.* 14A:3-6.3.

j. While no state court has explicitly held that the statute eliminates demand futility, the District of New Jersey has:

> Here, the statute is clear on its face that, in a derivative action, pre-suit demand is mandatory in all circumstances. … The statute provides no exceptions to this requirement, which is particularly notable because, in the same statutory section, the drafters *did* in fact include two other exceptions to the requirement that a shareholder must wait 90 days after the demand has been made until filing suit …. Clearly, having contemplated certain exceptions, the drafters could have—but did not—include a futility exception to the demand requirement. … Thus, on its face, *N.J.S.A.* 14A:3-6.3, 6.9 makes pre-suit demand on a corporation mandatory prior to filing a derivative suit, unless a corporation opted out of that requirement in its certificate of incorporation. … Indeed, that the drafters did not include a demand futility exception in the text is not surprising because the statute at issue was modeled after a nearly identical provision in the Model Business

> Corporation Act ("MBCA"). … Courts in other jurisdictions interpreting similar MBCA-modeled statutes have uniformly rejected arguments that these statutes did not eliminate the demand futility exception. … These courts recognized that nothing in these MBCA-modeled statutes supports the existence of an implied demand futility exception, and I agree the same is true under the NJBCA here.
>
> [*Hirschfeld v. Beckerle*, 405 F. Supp. 3d 601, 608-09].

k. The Court in *Hirschfeld*, 405 F. Supp. 3d at 610-11, expressly rejected the argument that *Rule* 4:32-3 (referenced in the decision as *R*. 4:23-5, the prior citation before Rule amendment in 2006) preserves the futility doctrine in the face of the statute, noting (a) it is a "*procedural* rule" established by the New Jersey Supreme Court, "rather than the source of substantive law," which, as a matter of established law, "must yield to legislation" (emphasis in original); and (b) that the statute contains an "opt-out" provision, such that a corporation, by virtue of its certificate of incorporation, can expressly retain the futility doctrine if it so chooses (*see N.J.S.A.* 14A:3-6.9), such that the demand futility wording of *Rule* 4:32-3 would still be efficacious with regard to corporations.

7. ***Rule* 4:46-2(a):** "The motion for summary judgment shall be served with a brief and a separate statement of material facts with or without supporting affidavits."
    a. Common error: not including one and reliance on certification
        i. May result in denial of motion. *See* Pressler & Verniero, *Current N.J. Court Rules*, comment 1.2 on *R.* 4:46 (2022).
    b. Common error: including it as part of the brief, not *separately*. *See id.* ("The statement of material facts is a document separate from the brief.")
        i. While this likely will not result in motion denial, why take the chance? (Or the chance of alienating the Court, which has multiple motions every cycle and needs them presented in the most efficient way possible.)
8. ***Rule* 4:49-2:** "… a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it."

a. Time limitation (20 days) only applies to final orders. Interlocutory orders may be reconsidered at any time. Pressler & Verniero, *Current N.J. Court Rules*, comment 1 on *R*. 4:49-2 (2022).

9. *Rules* 4:102 - :105 (Complex Business Litigation Part ("CBLP" Rules):

a. The CBLP is appropriate for complex cases that might otherwise benefit from active case management by a Chancery Judge familiar with complex business issues but that are not of an equitable nature.

i. *R*.4:102-5: "The CBLP is designed to streamline and expedite service to litigants in complex business litigation. Cases are generally assigned either to the complex commercial case type or to the complex construction case type and are individually managed by a CBLP judge with specialized training on business issues. The Supreme Court established the Program, which became effective on January 1, 2015, to resolve complex business, commercial, and construction cases."

b. *R*. 4:102-2, "Cognizability":

i. The matters presumptively assigned to the CBLP shall be those cases with an **amount in controversy of at least $200,000** that are designated either **complex commercial (case type 508) or complex construction (case type 513)** on the **Civil Case Information Statement**.

ii. Cases appropriate for the CBLP arise from business or **commercial transactions** or **construction projects** that involve potentially **significant damages awards**. Program cases may have **complex or novel factual or legal issues**;

large numbers of separately represented **parties**; large numbers of lay and expert **witnesses**; a substantial amount of documentary **evidence**, including electronically stored information; or require a substantial amount of time to complete **trial**.

iii. The CBLP does not include matters that are otherwise handled by General Equity, or matters primarily involving consumers, labor organizations, personal injury, or condemnation.

c. Still an underutilized/unfamiliar resource. Generally speaking, the CBLP judges are looking forward to receiving cases.

d. *R.* 4:103: Case Management

e. *R.* 4:104: Discovery Rules of Part IV otherwise applicable

f. *R.* 4:105: Motions

C. Bringing Improper Behavior to the Judge's Attention/Sanctions

1. Make sure the conduct is truly egregious; generally, courts expect attorneys to act as professionals and resolve disputes between themselves.

2. **You do not always need to address improper conduct via formal application/notification.** Rather, you can seed the field by addressing the conduct through other motion practice/correspondence (i.e. make sure to highlight the behavior

where appropriate in other filings, without necessarily making that behavior the focus of the application/papers).

3. Allow OC enough rope to hang themselves. Generally, if opposing counsel's conduct is egregious to you, it will be irksome/improper to the Court. Stay calm and trust that the Judge sees what you see (pointing it out professionally, where appropriate).

4. *R.* 1:4-8 and *N.J.S.A.* 2A:15-59.1 address frivolous conduct by attorneys and litigants. However, judges generally do not award sanctions pursuant to these rules.

a. If you are going to seek sanctions pursuant to the *Rule*, remember that **your demand must be precise**: "The certification shall have annexed a copy of that notice and demand, which shall (i) state that the paper is believed to violate the provisions of this rule, (ii) **set forth the basis for that belief with specificity**, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand." (*R.* 1:4-8(b)(1) (emphasis added)).

i. You should usually cite *which* provision of *Rule* 1:4-8(a) OC has broken.

b. Generally speaking, the procedural requirements of *N.J.S.A.* 2A:15-59.1 are the same as those required by

the Rule. *See Toll Bros., Inc. v. Twp. of West Windsor*, 190 N.J. 61, 65 (2007) ("requiring all sanction applicants to comply with the *Rule's* minimal procedural requirements will result in promoting the purposes of the legislative scheme").

5. **The best chance of a sanctions award is OC's non-compliance with an Order of the Court itself.** This is because the conduct is clearly teed up for the Judge to see as improper and flouts the Court's authority.

6. Beware of the difference between sanctions applications in state v. federal court. In state court, you must send a demand letter (*R.* 1:4-8(b)(1)). In federal court, you must send a draft of the *motion* itself. *See FRCP* 11(c)(2) ("The motion must be **served** under Rule 5, **but it must not be filed or be presented to the court** if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." (emphasis added)).

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Perfecting Those Critical First Steps

I. Parties and Venue

a. Parties

i. *Rule* 4:28-1(a), "Persons to Be Joined if Feasible":

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest ….

1. A party is indispensable if it has an "interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." *Jennings v. M & M Transportation Co.,* 104 N.J. Super. 265, 272 (Ch. Div. 1969).

2. Whether a party is indispensable is a fact-sensitive issue. *Toll Bros., Inc. v. Twp. of West Windsor*, 334 N.J. Super. 77, 90 (App. Div. 2000).

3. State is an indispensable party to an inverse condemnation action where trial court held there was no taking because the plaintiff retained a right of access over State land. *Fox v. Twp. of West Milford*, 357 N.J. Super. 123, 130-31 (App. Div. 2003).

4. Creditor bringing action on note executed by partnership was required to sue all partners, given concept of joint liability amongst them pursuant to partnership statute and the rights of the partners for cross-claims for contributions against each other. *La Mar Gate, Inc. v. Spitz*, 252 N.J. Super. 303, 309-10 (App. Div. 1991).

5. In an action pursuant to the Business Corporation Act or Revised Uniform LLC Act for dissolution, the entity should be joined as a party. *See N.J.S.A.* 14A:12-7; *N.J.S.A.* 42:2C-48.

ii. Fraudulent transfer claims, *N.J.S.A.* 25:2-20 to -36

1. *N.J.S.A.* 25:2-29(a):

a. Creditor may obtain attachment of the asset transferred or other property of the *transferee*; an injunction against further disposition by the

transferee; appointment of a receiver for the asset or other property of the *transferee*. *See also N.J.S.A.* 25:2-30 (regarding defenses of transferee).

b. As such, the transferee is a necessary party. *See N.J. Dept. of Enviro. Prot. v. Caldeira*, 338 N.J. Super. 203, 223-26 (App. Div. 2001) (collecting cases from other jurisdictions), *rev'd on other grounds*, 171 N.J. 404 (2002), *cited with approval by Perlman v. Virtua Health, Inc.*, Civil No. 01-0651 (RBK), 2005 WL 8174806, at *7 (D.N.J. April 12, 2005); *see also In re Halpert & Co.*, 254 B.R. 104, 116 (Bankr. D.N.J. 1999) ("Both the transferor and transferee should be named as necessary parties to a fraudulent transfer suit" under the bankruptcy code.).

iii. Suing attorneys (who didn't represent your client)

1. A "member of the bar owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his professional capacity." *Albright v. Burns*, 206 N.J. Super. 625, 633 (App. Div. 1986); *see also Atlantic Paradise Associates, Inc. v. Perskie, Nehmad & Zeltner*, 284 N.J. Super. 678, 685 (1995) ("the mere absence of an attorney-client or fiduciary relationship

is no longer a basis to deny a legal malpractice claim asserted against a law firm by a non-client"); *Banco Popular N. Am v. Gandi*, 184 N.J. 161, 178 (2005) (plaintiff was entitled to assert conspiracy claim against attorney of borrower who allegedly counseled transfer of assets to avoid collection).

iv. Alter ego claims/Piercing the veil (a tactic to gain leverage against corporate defendants)

1. Courts, in recognition of the "basic premise that a corporation is an entity separate from its stockholders," "generally will" only "pierce the corporate veil to impose liability on the corporate principals" in the case of "fraud or injustice." *Lyon v. Barrett*, 89 N.J. 294, 300 (1982).

a. For alter ego liability to adhere, the owner must be "**abusing the corporate form** in order to advance his **personal interests**." *In re Casini*, 307 B.R. 800, 811-12 (Bankr. D.N.J. 2004) (emphasis added); *see also State, Dept. of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500-01 (1983) (veil-piercing appropriate where a subsidiary is a mere "instrumentality" of its parent corporation, meaning that the "parent so dominated the subsidiary that [the subsidiary]

had no separate existence but was merely a conduit for the parent").

2. "Alter-ego liability is **not a separate cause of action**; it is a remedy." *N.J. Dep't of Envtl. Prot. v. Occidental Chem. Corp.*, ESX-9868-05, 2014 WL 12847119, at *9 (Law Div. 2014) (emphasis added) (citing *Casini*, 307 B.R. at 811-12 (noting "[v]eil piercing is an equitable *remedy*" (emphasis added))); *see also Verni ex rel. Burstein v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 199 (App. Div. 2006) ("Veil piercing is an equitable *remedy*" to prevent "fundamental unfairness" from arising as a result of the existence of the corporate shield. It is "not technically a mechanism for imposing 'legal' liability ...." (emphasis added, internal quotation marks omitted)).

3. Should be based on actual suspicion of comingling, not mere concern with ultimate collection

a. *N.J.S.A.* 14A:12-9 provides that even a dissolved corporation "shall continue its corporate existence" and "may sue and be sued in its corporate name" (among other things).

b. *See, e.g., Karo Marketing Corp., Inc. v. Playdrome America*, 331 N.J. Super. 430, 442-44 (App. Div. 2000) (permitting judgment creditor to pierce

the veil based on its "inability to collect on its **judgment**"), *abrogated on other grounds by Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 170-75 (2005).

4. The **participation theory** is a related doctrine permitting claims against individual owners/officers for corporate torts.

> [A] corporate officer *can* be held personally liable for a ***tort*** committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct. New Jersey cases that have applied the participation theory to hold corporate officers personally responsible for their tortious conduct generally have involved ***intentional torts***. More specifically, the majority of the cases have involved fraud and conversion.
>
> [*Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 303-04 (2002) (emphasis added); *see also Charles Bloom & Co. v. Echo Jewelers*, 279 N.J. Super. 372, 381-82 (App. Div. 1995) ("A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character, but, *a director or officer who commits a tort, or who directs the tortious act to be done, or participates or cooperates therein*, is liable to third persons injured thereby, even

though liability may also attach to the corporation for the tort." (emphasis added)).]

v. Be careful not to over-plead in order to seek more pockets. This will subject you to motions to dismiss, potentially enable tangentially related defendants to coordinate/compound strategy or motion practice, and increase your burdens during discovery, summary judgment motion practice, and trial.

b. Venue

i. Is there a venue provision in the governing documents?

ii. *Rule* 4:3-2(a):

Where Laid. Venue shall be laid by the plaintiff in Superior Court actions as follows: (1) actions affecting title to **real property** or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, in the county in which any affected property is situate; (2) actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; (3) except as otherwise provided by R. 4:44A-1 (structured settlements), R. 4:53-2 (receivership actions), R. 4:60-2 (attachments), R. 5:2-1 (family actions), R. 4:83-4 (probate actions), and R. 6:1-3 (Special Civil Part actions), the venue in all other actions in the Superior Court shall be laid in **the county in which the cause of action arose**, or in which **any party to the action resides** at the time of its commencement, or in which the summons was served on a nonresident defendant….

1. Only pertinent to original parties, not parties joined as third-parties. Pressler & Verniero, *Current N.J. Court Rules*, comment 1 on *R.* 4:3-2.

iii. *Rule* 4:3-3: Motion to change venue

1. If on the grounds venue not properly laid in the first place (4:3-3(a)(1)), **respondent bears the burden**. *See* Pressler & Verniero, *Current N.J. Court Rules*, comment on *R.* 4:3-3.

2. A defendant must move in timely fashion, within 10 days of the time for service of the last permissible responsive pleading pursuant to *R.* 4:6-1. If not filed within 10 days, it is waived.

II. Initial Complaint and Responsive Pleadings

a. *Rule* 4:5-1, General requirements:

i. CIS

ii. Notice of other actions/potentially liable persons (a good way to put the court and defendants on notice of other potential defendants, if you are not confident you have sufficient factual basis to identify them as defendants in the complaint itself).

iii. Certification of compliance with *Rule* 1:38-7(c) (not necessary in Law Division, Civil Part, as contained within CIS) ("The first filed pleading of any party in an action in the Chancery

Division, General Equity Part, the Chancery Division, Probate Part, or in the Law Division, Special Civil Part shall include….").

b. *Rule* 4:5-2, "Claim for Relief":

i. A "a pleading which sets forth a claim for relief … shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement."

1. The pleading must adequately apprise the adverse party of the claims and issues raised. A complaint is entitled to a liberal reading in determining its adequacy but must nevertheless allege sufficient facts to give rise to a cause of action. Conclusions and reference to future discovery are inadequate. *See* Pressler & Verniero, *Current N.J. Court Rules*, comment 1 on *R*. 4:5-2 (2022); *see also R*. 4:6-2(e) (motion to dismiss for failure to state a claim).

ii. "Relief in the alternative or of several different types may be demanded."

1. *See also R*. 4:5-6: "A party may set forth 2 or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When 2 or more statements are made in the alternative and one of them, if made independently, would be sufficient, the

pleading is not made insufficient by the insufficiency of one or more of the alternative statements. As many separate claims or defenses as the party has may be stated regardless of their consistency and whether based on legal or on equitable grounds or on both."

a. However, a plaintiff may not *recover* on inconsistent theories. *See New York-Connecticut Dev. Corp. v. Blinds-To-Go (U.S.) Inc.*, 449 N.J. Super. 542, 557 (App. Div. 2017).

iii. *Rule* 4:5-8

1. Subsection (a): Fraud to be pled with particularity

a. *Rule* 4:5-8 is applicable to "***any* ... fraud-based cause of action.**" *See In re Contest of November 8, 2005 General Election for Office of Mayor of Twp. of Parsippany-Troy Hills*, 192 N.J. 546, 570 (2007). If an action "**sounds in fraud**," the particularity requirement is applicable. *See Labree v. Mobil Oil Corp.*, 300 N.J. Super. 234, 237 (App. Div. 1997).

b. The purpose of *Rule* 4:5-8(a) is "to require the pleader to state the facts ... with enough particularity to enable the person charged to deny or disprove or explain these facts." *Evangelista v. Pub. Serv. Coordinated Transp.*, 7 N.J. Super. 164, 168-69 (App. Div. 1950).

c. The rule sets forth "heightened ... pleading requirements" mandating that a court dismiss a complaint alleging fraud if the allegations do not set forth with specificity the elements of said fraud. *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 484-85 (App. Div. 2006).

d. Because "fraud is a conclusion of law, it may not be charged in general terms. The pleadings must state the facts which are relied on as constituting the fraud." *Kadison v. Horton*, 142 N .J. Eq. 223, 225 (E. & A. 1948).

e. Under *Fed. R. Civ. P.* 9(b), which is analogous to *Rule* 4:5-8(a), a plaintiff pleading fraud must plead the "**who, what, when, where, and how**" of the events at issue. *Kanter v. Barella*, 489 F.3d 170, 175 (3d Cir. 2007).

f. To the extent possible, identify specific statements constituting the fraud.

2. Subsection (f): "items of special damage claimed shall be specifically stated …."

a. Special damages are a form of damages for defamation "in the form of pecuniary or economic harm to … reputation." *Ricciardi v. Weber*, 350 N.J. Super. 453, 475 (App. Div. 2002).

iv. *Rule* 4:5-3 regarding form of answer:

1. An answer shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adversary relies.

2. A pleader who is without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state and, except as otherwise provided by R. 4:64-1(c) (foreclosure actions), this shall have the effect of a denial.

3. Denials shall fairly meet the substance of the allegations denied.

4. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder.

5. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs.

v. Relatedly, *Rule* 4:5-5 provides: "Allegations in a pleading which sets forth a claim for relief, other than those as to the amount of damages, are admitted if not denied in the answer thereto."

1. However, "Allegations in any **answer** setting forth an affirmative defense shall be taken as denied if not avoided in a reply." *See also Johnson v. Metropolitan Life Ins. Co.*, 53 N.J. 423, 427-28 (1969) (emphasis added).

vi. *Rule* 4:5-4, regarding affirmative defenses: "accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, frustration of purpose, illegality, impossibility of performance, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver."

1. A good starting point/tutorial for pleading affirmative defenses.

2. Affirmative defenses are waived if not pled. However, they may also be waived if not actively pursued during litigation. Pressler & Verniero, *Current N.J. Court Rules*, comment 1.2.1 on *R.* 4:5-4 (2022).

III. Troubleshooting Process Issues

a. *Rule* 4:4-1: be mindful of the timeline for summons issuance (15 days from date of track assignment).

i. Attorneys may issue summons. Make sure it is in the form compliant with the Rules, available on the Court website. (*See R.* 4:4-2 addressing).

b. *Rule* 4:4-4(a)(1): be mindful that an individual other than the defendant can be served only at his/her dwelling place, not place of business.

c. *Rule* 4:11-4: two methods for subpoenas for foreign actions:

i. Petition (subsection (a)) and direct service (subsection (b)).

ii. Better practice is to move under subsection (a) as the subpoena receives court imprimatur and cannot be challenged for failures of technical compliance with the Rule.

IV. Scheduling Conference

a. *Rule* 4:5B-2:

i. In Track I, II, and II cases, "the designated pretrial judge *may* sua sponte or *on a party's request* conduct a case management conference *if it appears that such a conference will assist* discovery, narrow or define the issues to be tried, address issues relating to discovery of electronically stored information, or otherwise promote the orderly and expeditious progress of the case." (Emphasis added).

ii. "In **Track IV cases**, except for actions in lieu of prerogative writs and probate and general equity actions, an *initial* case

management conference *shall* be conducted as soon as practicable after joinder and, absent exceptional circumstances, within 60 days thereafter."

iii. "In actions in lieu of **prerogative writs**, case management conferences *shall* be held pursuant to R. 4:69-4."

1. *R.* 4:69-4: "Within 30 days after joinder and in order to expedite the disposition of the action the managing judge shall conduct a conference, in person or by telephone, with all parties to determine the factual and legal disputes, to mark exhibits and to establish a briefing schedule. The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order. At least five days in advance of the conference, each party shall submit to the managing judge a statement of factual and legal issues and an exhibit list."

iv. "In **probate actions**, case management conferences *may* be scheduled at the discretion of the judge."

v. "In **all actions in general equity**, except summary actions pursuant to R. 4:67 and foreclosure actions, an *initial case management conference* shall be held within 30 days following the filing of the answers of all defendants initially joined, and the court may hold *such additional case management conferences* as it deems appropriate."

b. *Rule* 4:103-3(a)(1) (CBLP): "An initial case management conference must be convened with the parties' attorneys and any unrepresented parties, and thereafter a scheduling order must be issued."

i. (a)(2): "The scheduling order must be issued as soon as practicable, but absent good cause for delay, within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared."

ii. (b): "Additional Case Management Conferences. The court in its discretion may convene additional case management conferences at any time. …"

iii. (c)(2): "Matters for Consideration at a Case Management Conference."

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Applying the Rules of Evidence in Civil Cases

I. General Provisions

a. *NJRE* 104(a), "Preliminary Questions":

(1) The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege and Rule 403.

(2) The court may hear and determine such matters out of the presence or hearing of the jury.

b. Motions in limine

i. An *in limine* motion is not necessarily sufficient to preserve an issue for appeal. Object again at trial. *See Tillett v. Elefante*, 2010 WL 1753136, at *3 (N.J. Super. Ct. App. Div. Apr. 28, 2010) ("Arguably, defendant did not preserve this issue for appeal beyond the decision on the *in limine* motion, because her counsel did not object to … [the] trial testimony concerning the statement ….").

ii. Courts must be sensitive to the need to revisit pre-trial ruling in light of the developing record at trial, which may differ from the record developed at the motion stage. In fact, courts may wait until the end of trial to rule on certain evidentiary issues. *See State v. Cordero*, 438 N.J. Super. 472, 484-86 (App. Div. 2014).

1. **The Takeaway:** Don't hesitate to revisit *in limine* rulings in the context of trial. In fact, it may be *necessary* to preserve the issue for appeal.

iii. *In limine* motions are not the appropriate forum for dispositive rulings, including as to expert reports needed to prove a predicate of a party's case.

1. *Rule* 4:25-8(a)(1): "a motion in limine is defined as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case. A dispositive motion falling outside the purview of this rule would include, but not be limited to, an application to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain a party's burden of proof." *See Jeter v. Sam's Club*, 250 N.J. 240, 250 (2022).

2. *See also Cho v. Trinitas Reg. Med. Ctr.*, 443 N.J. Super. 461, 470-71 (App. Div. 2015) (Noting that *in limine* rulings are generally disfavored, in particular when they seek the exclusion of an expert's testimony, "an objective that has the concomitant effect of rendering a plaintiff's claim futile. … The fact that this misuse of the motion *in limine* occurs sufficiently often to win our notice, despite our repeated cautions against such practice, leads us to conclude it necessary to state clearly what a motion *in limine* is not. It is not a summary judgment motion that happens to be filed on the eve of trial. When granting a motion will result in the dismissal of a plaintiff's case or the suppression of a defendant's defenses, the motion is subject to *Rule* 4:46, the rule that governs summary judgment motions."); *Krzak v. Faso*, A-2588-17, 2019 WL 1040958, at *5 (N.J. Super. Ct. App. Div. Mar. 5, 2019)

(disapproving of "**disguised motions for summary judgment** filed as motion[s] in limine returnable on the day of trial").

iv. However, *in limine* motions, like summary judgment motions, may be utilized to make a favorable impression on the judge with regard to issues that may arise during trial, even if the court does not grant the motion before trial.

II. Judicial Notice

a. *N.J.R.E.* 201:

i. (a): Notice of law: "Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries."

ii. (b): Notice of Facts:

1. Generalized knowledge/universally known
2. Generally known *within the area pertinent to the event*
    a. Judge can rely on his knowledge of an intersection to determine commission of traffic violation. *State v. Bell*, A-1454-12T2, 2014 WL 1796436, at *3 (App. Div. May 7, 2014).
    b. That a college is a non-profit institution organized exclusively for educational purposes

is judicially noticeable. *Bloom v. Seton Hall Univ.*, 307 N.J. Super. 487, 491 (App. Div. 1998).

c. NJ state geography and distance also noticeable. *State v. Perry*, A-5118-11T4, 2014 WL 7920945, at *10, n. 13 (App. Div. Feb. 27, 2015).

3. Generalized knowledge of facts/propositions *capable of immediate determination* by resort to *sources of unquestionable accuracy*

a. Studies and statistics from suitable sources. *J.H. v. R&M Tagliareni, LLC*, 239 N.J. 198, 226, n.2 (2019); *Lindquist v. City of Jersey City Fire Dep't*, 175 N.J. 244, 273 (2003).

4. Court records

III. Relevancy and its Limits

a. Interestingly, the Rule does not specifically speak to irrelevance or contain an expression prohibition on irrelevant evidence; rather, it merely states that "[a]ll relevant evidence is admissible." *See N.J.R.E.* 402.

b. *N.J.R.E.* 403: exclusion of *relevant* evidence on account of undue prejudice/delay

i. Evidence excluded on grounds of undue prejudice is still relevant; the undue prejudice does not make the evidence irrelevant.

ii. The prejudice must be "undue." "[A]ll relevant evidence is prejudicial." *See U.S. v. Bertoli*, 854 F. Supp. 975, 1062 (D.N.J. 1994) (subsequently overturned on other grounds); *State v. Cole*, 229 N.J. 430, 448 (2017) ("Damaging evidence usually is very prejudicial but the question … is whether the risk of undue prejudice [is] too high.").

1. The "probative value" is merely "outweighed" by the risk of undue prejudice. *See State v. Vargas*, 463 N.J. Super. 598, 609 (App. Div. 2020).

iii. Objecting to cumulative evidence under Rule 403(b) can be a good technique for speeding up a long a trial where your adversary is belaboring a point. Be careful, of course, to read the Court and don't make the objection prematurely or you will risk its efficacy later on. This is likely a more effective strategy in a bench trial, as the Court, as fact-finder, is in a position to decide when it has received sufficient evidence on an issue for the point to be made.

1. Testimony as to deviation from standard of care by two experts was not cumulative, given that: corroborative testimony "can be important in seeking the truth"; "[i]n the field of medicine, second opinions are often sought to test the accuracy of a diagnosis or the benefits and risks of proposed treatment"; and testimony was "on

the central issue" in the case. *McLean v. Liberty Health Sys.*, 430 N.J. Super. 156, 166-68 (App. Div. 2013).

2. Usually evidence is not excluded on grounds of being cumulative alone, in particular where the testimony is to the "central dispute in the case." *Id.* at 167.

3. Video tape of expert working with "exemplar" automobile to show design defects in wrongful death/products liability suit was not cumulative where it "did not depict simulated accidents or experiments of any sort" but merely "gave the jurors a unique opportunity to correlate the testimony and physical evidence, which could not be provided by testimony in court and a separate viewing of the cars in the parking lot of the courthouse." *Rider v. Twp of Freehold*, 2008 WL 2699805, at *6-8 (App. Div. July 14, 2008).

c. *N.J.R.E.* 408: "When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim**, is not admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim**. **Such evidence shall not be excluded when offered for another**

purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations."

i. Does not operate as a universal bar to all settlement discussions.

1. Settlement offer with respect to "get" (Jewish bill of divorce) was admissible to demonstrate that refusal to secure get was not based on religious beliefs, but was issue of monetary gain. *Burns v. Burns*, 223 N.J. Super. 219 (Ch. 1987) ("Plaintiff initially claimed that granting the defendant a 'get' was not necessary since it was contrary to his current religious beliefs. Plaintiff further asserted that his First Amendment right to practice his religion without interference from the State would be abridged if he were forced to compromise his religious beliefs. A true religious belief is not compromised as the amount of money offered or demanded is increased. An offer to secure a 'get' for $25,000 makes this a question of money not religious belief. This 'offer,' which is not denied by the plaintiff, takes this issue outside the First Amendment. This so-called 'offer' is akin to extortion.").

ii. Must involve an actual settlement offer:

1. Check for $2,500.00 that orthopedic surgeon sent patient following office visit in which patient learned she had fractured tibia as result of knee surgery was not offer of compromise or settlement, and thus could not be excluded in patient's medical malpractice action, where surgeon testified he wrote check out of compassion, empathy and to fulfill his "obligation and duty to be Godly." *Cipriani v. Valley Hosp., Inc.*, A-3836-16T3, 2019 WL 1224624 (App. Div. Mar. 15, 2019).

IV. Witnesses

a. *N.J.R.E.* 601: Every person is competent to be a witness unless they (a) cannot be understood, even with the aid of an interpreter or (b) cannot understand the duty to tell the truth.

   i. Declared policy of NJ law is that, generally, all people are qualified to testify and give relevant evidence. *State v. G.C.*, 188 N.J. 118, 133 (2006).

   ii. Any claim of witness disqualification must be strictly construed against exclusion and in favor of the admission of relevant testimony which the witness might offer. The determination of whether a person is competent to be a witness lies within the discretion of the trial court. *State v. R.W.*, 104 N.J. 14, 19 (1986).

   iii. Competency is determined upon preliminary examination by the court. *State v. Krivacska*, 341 N.J. Super. 1, 33 (App. Div. 2001).

   iv. To determine competency, a court may examine the witness or order him/her to undergo a medical/psychiatric examination to aid the determination. *Marsico v. Marsico*, 436 N.J. Super. 483, 494-95, N.6 (App. Div. 2013) (citing *State v. Butler*, 27 N.J. 560, 600-01 (1958)).

b. ***N.J.R.E.* 602, "Lack of personal knowledge":** "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Evidence to prove personal knowledge may consist of the witness' own testimony. This rule does not apply to expert testimony under Rule 703."

i. One of the central rules for trial practice!

ii. Even if you know the witness has a basis for his/her knowledge, make sure the foundation is established. Don't give opposing counsel a free pass. Some attorneys have trouble framing questions to elicit foundational knowledge. (Make sure you are not one of them. In preparing for trial, think about how you will establish the predicate for necessary testimony, including the basis for the witness's knowledge/how they came into position to observe the facts as to which they will testify.)

c. *N.J.R.E.* 603: "Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief."

i. No particular form or litany is required. The purpose of the requirement is to ensure the witness understands the obligation to tell the truth. *State v. Bueso*, 225 N.J. 193 (206); *State v. G.C.*, 188 N.J. 118 (2006); *State v. Zamorsky*, 159 N.J. Super. 273 (App. Div. 1978).

d. *N.J.R.E.* 604: "The court shall determine the qualifications of a person testifying as an interpreter. An interpreter shall take an oath or make an affirmation or declaration to interpret accurately and shall be subject to all provisions of these rules relating to witnesses."

i. An interpreter should be a disinterested person who does not aid the witness testimony in any way, including rendering a summary; he/she should translate word for word. *State in re R.R.*, 79 N.J. 97 (1979).

1. As such, the court must assess not only the interpreter's qualifications, but also must be satisfied he/she lacks bias for/against any party/witness. *State v. Rodriguez*, 294 N.J. Super. 129, 140 (Law Div. 1996).

2. In certain circumstances, colloquy on this issue may be warranted.

ii. Decision as to necessity of interpreter is left to the sound discretion of the Court. *R.R.*, 79 N.J. 97.

1. There is a "low threshold for the appointment of a court interpreter—whether a party's understanding of the proceedings or ability to communicate is 'inhibited' by his lack of English proficiency. … the trial judge … should view the interpreter as something potentially indispensable to the discharge of justice rather than some frivolous, burdensome, or evasive machination. In order to assess properly the need for a court interpreter, the trial judge must first understand the role that court interpreters fulfill. Primarily, the court interpreter levels the playing field so that all participants in a judicial proceeding, including the parties, their attorneys, the judge, and any witnesses, may understand and be understood at a common basic

level. Significantly, the benefits inherent in this arrangement do not inure solely to the non-English-speaking defendant, for the finder of fact is also aided in performing its ultimate function: determining what actually happened in the case. In short, when a court interpreter can improve the ability of all participants in a court proceeding to comprehend and to communicate, this increases the likelihood that the just result will be reached." *Rodriguez*, 294 N.J. Super. at 138-39.

2. Trial practice note/consideration: even if your client may be more fluent in another language, is his/her English sufficiently difficult to understand that it will be more impactful through an interpreter?

e. *N.J.R.E.* 607, Impeachment:

> (a) For the purpose of attacking or supporting the credibility of a witness, any party, including the party calling the witness, may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, subject to the exceptions in (a)(1) and (2).
>
> (1) This provision is subject to Rules 405 and 608.
>
> (2) The party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless (i) the statement is in a form admissible under Rule 803(a)(1), or (ii) the court finds that the party calling the witness was surprised.
>
> (b) A prior consistent statement shall not be admitted to support the credibility of a witness except: (1) to rebut an express or implied charge against the witness of recent fabrication or of

improper influence or motive, and (2) as otherwise provided by the law of evidence.

i. Admission of extrinsic evidence affecting a witness's credibility is permitted regardless of whether that evidence is relevant to any other issue in the case. *State v. Parker*, 216 N.J. 408 (2014).

ii. Although extrinsic evidence may be admitted to impeach a witness, its probative value as impeachment evidence must be assessed independently of its potential value as substantive evidence. *Green v. New Jersey Mfrs. Ins. Co.*, 160 N.J. 480 (1999).

iii. **Five acceptable modes of attack upon credibility of witness** are recognized: prior inconsistent statements; partiality; defective character; defective capacity of witness to observe, remember, or recount matters; and proof by others that material facts are otherwise than as testified to by witness under attack. *State v. Silva*, 131 N.J. 438, 621 A.2d 17 (1993).

iv. Evidence of police officer's state of mind and psychological health was admissible to challenge his perceptions and ability to make observations in Civil Rights Act concerning shooting. *Velazquez v. City of Camden*, 447 N.J. Super. 224 (App. Div. 2016).

    1. Similarly, neuropsychiatrist expert testimony in employment discrimination suit as to employee's psychosis and delusions was relevant in assessing plaintiff's credibility. T.*S. v. Township of Irvington*, 2019 WL 1220780 (App. Div. 2019).

v. Evidence that injured elevator passenger had episodes of passing out prior to elevator accident was admissible in passenger's negligence action against elevator maintenance

and repair companies for purpose of impeaching credibility of passenger's testimony that she was "in perfect health" and had never had "any problem with blacking out" prior to accident. *Allendorf v. Kaiserman Enters.*, 266 N.J. Super. 662 (App. Div. 1993).

vi. Video recording taken by defendant's uncle at scene of crime, showing defendant's family members attempting to speak with police officers about what they had witnessed, was admissible extrinsic evidence that contradicted detective's testimony that she canvassed crime scene looking for witnesses but found none other than victim and his wife. *State v. Garcia*, 245 N.J. 412 (2021).

vii. For the purpose of attacking credibility it may be shown on cross-examination that a witness is a **disbarred attorney**. *Fuschetti v. Bierman*, 128 N.J. Super. 290, 319 A.2d 781 (Law Div. 1974).

viii. Where witness on cross-examination denies facts asserted to demonstrate bias, party may establish such facts by extrinsic evidence. *State v. Smith*, 101 N.J. Super. 10 (App. Div. 1968)

ix. Plaintiff's attorney may not attack defendant's credibility as witness by alleging that she was responsible for **discovery delays and deficiencies** which were not demonstrably attributable to her. *Lovenguth v. D'Angelo*, 258 N.J. Super. 6 (App. Div. 1992).

x. Plaintiff's **investigator's notes from witness interview** not permissible to impeach witness, as same were neither stenographic nor sworn and signed. *Carbis Sales, Inc. v. Eisenberg*, 397 N.J. Super. 64 (App. Div. 2007).

xi. Prior consistent statement of witness not admissible to bolster testimony, but is admissible to rebut charge of recent

fabrication. *Palmisano v. Pear*, 306 N.J. Super. 395, 402-03 (App. Div. 1997).

f. ***N.J.R.E.*** **608: "**Evidence of a Witness' Character for Truthfulness or Untruthfulness"

i. limited to criminal matters

g. ***N.J.R.E.*** **609:** Use of prior conviction to impeach credibility

h. ***N.J.R.E.*** **611:**

(a) Control by Court; Purposes. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on **direct examination except as necessary** to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

i. Trial judges are vested with broad discretion over the mode of interrogation (in particular, cross examination) to make the interrogation effective for ascertainment of the truth, and protect witnesses from harassment or undue embarrassment.

State v. Bueso, 225 N.J. 193 (2016); *State v. Wormley*, 305 N.J. Super. 57 (App. Div. 1997); *Janus v. Hackensack Hosp.*, 131 N.J. Super. 535 (App. Div. 1974).

ii. Hostile Witnesses

1. *N.J.S.A.* 2A:81-6: "[i]n all civil actions in any court of record a party shall be sworn and shall give evidence therein when called by the adverse party."

2. "[U]nder the rule, leading questions are ordinarily permissible on cross-examination because actual antagonism towards the examiner's case is usually present in witnesses being cross-examined. Similarly, the rule expressly permits leading questions on direct when an adverse party is called to testify." Biunno, *Current New Jersey Rules of Evidence*, comment 8 on *N.J.R.E.* 611 at 614 (2022).

3. Beware that judges may differ on their orientation as to hostile witness cross-examination. Some judges will not permit a pre-examination declaration and will require demonstration of actual hostility.

iii. Demonstrative Exhibits

1. *Cross v. Robert E. Lamb, Inc.*, 60 N.J. Super. 53, 73-75 (App. Div. 1960):

> Blackboards are frequently used by trial counsel for three purposes: explanation, specification and argument, and sometimes one or more of these in combination.
>
> ... Anything which counsel has the right to argue as a legitimate interpretation of or inference from

> the evidence he is free, within the discretionary control of the trial court, to write upon the blackboard.

2. Visual representations of expert testimony should not go to the jury, as the testimony should control. However, if the Court is to admit such aids, it must do so in a fair and balanced fashion, such that both sides have the opportunity to do so. *See Fiorino v. Sears Roebuck & Co.*, 309 N.J. Super. 556, 569-70 (App. Div. 1998).

i. *N.J.R.E.* 612: Writing used to refresh recollection

i. Where witness' memory has been refreshed, **the admissible evidence is the recollection of the witness**, and not the extrinsic paper, and test is whether the witness puts before the court his independent recollection and judgment. *State v. Carter*, 91 N.J. 86 (1982).

1. Cannot be used to bolster testimony. *State v. Spano*, 69 N.J. 231 (1976).

ii. **Witness need not have authored the document**; nurse's notes admissible to refresh doctor's recollection as to what nurse told him. *Evans v. Meadowlands Hosp.*, 2015 WL 2359829 (App. Div. 2015).

j. *N.J.R.E.* 613(a): "When examining a witness about the witness' prior statement, whether written or not, **a party need not show it or disclose its contents to the witness**. But the party must, upon request, show it or disclose its contents to an adverse party's attorney or a self-represented litigant, unless the self-represented litigant is the witness."

i. (Deposition testimony)

ii. Witness must be afforded opportunity to explain inconsistency. *State v. Yough*, 208 N.J. 385 (2011); *Clayton v. Freehold Twp. Bd. of Educ.*, 130 N.J. Super. 198 (App. Div. 1974), *aff'd*, 67 N.J. 249 (1975).

k. *N.J.R.E.* 615: Sequestration

i. Within court's sound discretion. *State v. Popovich*, 405 N.J. Super. 324 (App. Div. 2009).

ii. Purpose of the rule is to enable witnesses to testify as to their own recollection simply and unbiased. *State v. Williams*, 404 N.J. Super. 147 (App. Div. 2008).

iii. Inapplicable to experts, who do not testify as to their personal knowledge anyway. *Popovich*, 405 N.J. Super. 324.

V. **Opinions and Expert Testimony**

a. *N.J.R.E.* 701: Lay opinion "rationally based on witness' perception" that "will assist in understanding the witness' testimony or determining a fact in issue."

i. Evidentiary rule regarding opinion testimony permits lay witness testimony regarding common knowledge based on observable perceptions, such as whether someone was intoxicated, exceeding the speed limit, or appeared wild, mad and crazy. *In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson*, 194 N.J. 276 (2008).

ii. For opinion testimony of a lay witness to be admissible, the witness must have actual knowledge, acquired through the use of his or her senses, of the matter to which he or she

testifies. *Estate of Nicolas v. Ocean Plaza Condominium Ass'n, Inc.*, 388 N.J. Super. 571 (App. Div. 2006).

iii. Lay testimony admissible as to meaning of slang terms used by defendant. *State v. Johnson*, 309 N.J. Super. 237, 706 A.2d 1160 (App. Div. 1998).

iv. Opinion testimony as to profession's pay scale and co-worker's capacity for advancement permissible (in context of damages calculation of future earnings). *Tirrell v. Navistar Intern., Inc.*, 248 N.J. Super. 390 (App. Div. 1991).

v. Lay testimony can be used to identify signatures, footprints, and voices. *Appeal of Darcy*, 114 N.J. Super. 454 (App. Div. 1971); *State v. Carminati*, 170 N.J. Super. 1 (App. Div. 1979); *State v. Johnson*, 120 N.J. 263 (1990).

vi. Lay opinion may not cross into realm of expert testimony, such as whether certain injuries resulted from an accident. *See Bardis v. First Trenton Ins. Co.*, 397 N.J. Super. 138, 153 (App. Div. 2007).

1. Admission of lay opinion testimony in an area properly a subject for an expert may be harmless error where the lay witness could otherwise be qualified as an

expert or the area does not require complex scientific knowledge, such as a narcotics detective's testimony that beepers are commonly used by drug dealers. *See State v. Kittrell*, 279 N.J. Super. 225, 235-36 (App. Div. 1995).

b. *N.J.R.E.* 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

   i. Pursuant to Rule 702, "the baseline for the admissibility of expert testimony" is that: (1) the intended testimony is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness has sufficient expertise to offer the intended testimony. *In re Accutane Litig.*, 234 N.J. 340, 349 (2018).

      1. Under the Rule, an "expert must demonstrate the validity of his or her reasoning." *Id.* at 392. Experts may not "selectively choose lower forms of evidence" or "cherry-pick" in reaching their conclusions. *Id.* at 395.
      2. In determining the admissibility of expert testimony, the court must "assess both the methodology used by the expert to arrive at an opinion and the underlying

data used in the formation of the opinion." *Id.* at 396-97. "Methodology, in all its parts, is the focus of the reliability assessment, not outcome." *Id.* at 397.

3. Hence, "[a]n expert offering scientific opinion testimony must do so within a reasonable degree of certainty or probability." *State v. Fortin*, 178 N.J. 540, 597 (2004).
    a. *Schrantz v. Luancing*, 218 N.J. Super. 434, 439 (Law. Div. 1986). "Reasonable medical probability or certainty refers to the general consensus of recognized medical thought and opinion concerning the probabilities of conditions in the future based on present conditions." (Providing supplemental reasoning for court's prior oral decision to strike testimony where the expert did not understand the meaning of the phrase "reasonable medical certainty").
        (1) Opinions as to mere "possibility" are inadmissible. *Vuoccolo v. Diamond Shamrock Chems. Co.*, 240 N.J. Super. 289, 299-300 (App. Div. 1990) (citing *Johnesee v. Stop & Shop Cos.*, 174 N.J. Super. 426, 431 (App. Div. 1980); *Schrantz*, *supra*, 218 N.J. Super. at 439).

4. However, the testimony need not be totally reliable and unassailable because in some areas scientific theory of casusation has not yet reached general acceptance. *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 449 (1991).
    a. In almost every case, there are some variables that may impact the ultimate conclusion of the expert. *State v. Wanczyk*, 196 N.J. Super. 397, 401-02 (Law Div. 1984).

ii. The "modern tendency is to permit expert testimony wherever it would help the jury decide the ultimate issue of the case." *State v. Chatman*, 156 N.J. Super. 35 (App. Div.), *certif. denied*, 79 N.J. 467 (1978).

iii. The test has been stated as whether the subject matter of the testimony is "so esoteric that jurors of common judgment and experience cannot form a valid judgment" as to the fact in issue without expert testimony. *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 283 (1982).
    1. Indeed, in such cases of esoteric subject matter (such as a claim of mental illness impacting behavior), expert testimony is required and jurors should not be allowed to deliberate without. *See Kelly v. Berlin*, 300 N.J. Super. 256, 268 (App. Div. 1997); *Mullarney v. Bd. of Rev.*, 343 N.J. Super. 401, 408 (App. Div. 2001).

2. However, expert testimony is unnecessary in matters of common knowledge. *Campbell v. Hastings*, 348 N.J. Super. 264, 270 (App. Div. 2002).
    a. For example, whether a nude male standing in front of a window would endanger child welfare, or whether a loosely-placed ladder could be jarred from position. *See State v. Hackett*, 89 N.J. 270, 283 (1982); *Dodge v. Johns-Manville Sales Corp.*, 129 N.J.L. 65 (E. & A. 1942).

c. *N.J.R.E.* 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."
    i. "*N.J.R.E.* 703 addresses the foundation for expert testimony." *Townsend v. Pierre*, 221 N.J. 36, 53 (2015).
        1. It mandates that expert opinions be grounded in facts or data derived from: (1) the expert's personal observations; (2) evidence admitted at trial; or (3) data relied upon by the expert which is not necessarily admissible, but of the type normally relied upon by experts. *Id.*
    ii. The "**net opinion rule**" is a "corollary" of Rule 703, "which forbids the admission into evidence of conclusions by the

expert not supported by factual evidence or other data." *Id.* at 53-54 (internal quotations omitted).

1. The rule requires that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and methodology are reliable." *Id.* at 55 (internal quotation marks omitted).
2. An expert's conclusion "is excluded if it is based merely on unfounded speculation and unquantified possibilities." *Id.* at 63 (internal quotation marks omitted). When "an expert speculates, he ceases to be an aid to the trier of fact." *Id.* (internal quotation marks omitted).
    a. "By definition, unsubstantiated expert testimony cannot provide to the factfinder the benefit that *N.J.R.E.* 702 envisions: a qualified specialist's reliable analysis of an issue beyond the ken of the average juror." *Id.*
3. Testimony from an expert that, without basis, contradicts that of a party/eyewitness, is an inadmissible net opinion. *Id.* Where defendant driver testified she had an unobstructed view of the road before turning and striking motorcyclist, motorcyclist's estate's expert testimony that hedges on adjoining property obstructed the defendant's view and

contributed to the accident was properly stricken as it "diverged from the evidence and reconstituted the facts." *Id.* at 44-49, 57-58.

4. Expert testimony that decedent's cancer was caused by chemical plant explosion that released toxin in 1960 was inadmissible net opinion, where decedent moved to the area in 1971 and passed away in 1981, and plaintiff presented no independent evidence that the decedent was ever exposed to the toxin. *Vuoccolo*, 240 N.J. Super. at 291-92, 299-300.

iii. Expert testimony need not be given any greater weight than other evidence nor more weight than it otherwise deserves in light of common sense and experience merely because it is from an expert. *In re Yaccarino*, 117 N.J. 175, 196 (1989).

1. Final determinations lie with courts, not experts. *In re D.C.*, 146 N.J. 31, 59 (1996).
2. Even the results of generally reliable and accepted tests should not be regarded as conclusive. *R.K. v. Dept. of Human Servs.*, 215 N.J. Super. 342, 346-47 (App. Div. 1987).

iv. Once expert opinion is deemed admissible, the data and totality of facts forming its basis must be made known to the fact finder in order to evaluate the validity of the opinion and accord it whatever weight appropriate. *Bowen v. Bowen*, 96 N.J. 36, 50 (1984).

v. Experts may rely on personal observation, but it is generally not essential that they examine the subject matter of the lawsuit. *Bucklew v. Grossbard*, 87 N.J. 512, 530 (1981).

d. *N.J.R.E.* 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

i. As long as the opinion does not address the actual issue of law to be decided (liability/guilt), but merely characterizes the defendant's conduct based on facts in evidence in light of his/her specialized knowledge, an expert's opinion is not objectionable. *State v. Summers*, 350 N.J. Super. 353, 364 (App. Div. 2002) (also noting the expert opinion is admissible even though it is expressed in terms that parallel statutory language when that language also constitutes the "ordinary parlance or expressions of persons in ever day life"), *aff'd*, 176 N.J. 306 (2003).

ii. This rule does not save an opinion from being barred on other grounds, for example, net opinion. *See Mandel v. UBS/PaineWebber, Inc.*, 373 N.J. Super. 55, 70-71 (App. Div. 2004) ("Plaintiffs contend that the motion judge ignored their expert's report and dismissed its critical value. They argue that [the] report embraced the ultimate issue of fact and was therefore admissible under *N.J.R.E.* 704. … We disagree with plaintiff's assertion that an unrebutted expert opinion is

admissible per se because it addresses the ultimate issue of fact. The trier of fact has no duty to give controlling effect to uncontradicted expert testimony and it need not accord the expert testimony greater weight than other evidence.") (essentially an inversion of the purpose of the rule).

e. *N.J.R.E.* 705: "Unless the court orders otherwise, an expert may testify in the form of an opinion or inference, state an opinion, and give reasons for it, without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination. Questions calling for the opinion of an expert witness need not be hypothetical in form unless in the court's discretion a hypothetical is required."
    i. Attacking an expert witness's opinion/credibility:
        1. Attack the field of expertise: just because he/she is *allowed* to testify does not mean the field is beyond reproach
        2. Attack his/her qualifications
        3. Expose bias (tendency to testify for one side or the other, tendency to testify frequently, compensation). However, do not do so for areas where your own expert is similarly "compromised."
        4. Attack his facts – an opinion is only valid if based on suitable factual predicate; <u>often, experts with scientific</u>

backgrounds are trained to be objective and will readily acknowledge their own shortcomings when asked.

5. Provide/vary a hypothetical – utilize the inclusion/omission of different facts to create a hypothetical favorable to your position.

VI. Hearsay

a. The Rule: "Hearsay is not admissible except as provided by these rules or by other law." *N.J.R.E.* 802.

   i. Hearsay is inadmissible because it is "untrustworthy and unreliable." *State v. White*, 158 N.J. 230, 238 (1999); *see also State v. Williams*, 169 N.J. 349, 358 (2001).

b. Definition: Hearsay is a "statement" that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers to prove the truth of the matter asserted. *N.J.R.E.* 801(c).

   i. Not all out of court statements are hearsay! If the statement is not offered for the truth of the matter asserted, it is not hearsay (and therefore not inadmissible under the hearsay rule, although it may be inadmissible for other reasons, i.e., undue prejudice, *N.J.R.E.* 403(a)). *See State v. Long*, 173 N.J. 138, 152 (2002) ("It follows, therefore, that if evidence is not offered for the truth of the matter asserted, the evidence is not hearsay and no exception to the hearsay rule is necessary to introduce that evidence at trial.").

      1. However, given that the line between hearsay and non-hearsay in this regard is thin, *see id.* at 152-53, the jury

should be instructed to consider the statements only for their non-hearsay purpose. *State v. Brown*, 170 N.J. 138, 181-82, n.1 (2001) (Stein, J., dissenting); *State v. Maristany*, 133 N.J. 299, 309-310 (1993).

2. Most often, the purpose of introduction of such statements is to show the statement was made and the listener took certain actions in response. *See Carmona v. Resorts Int'l Hotel*, 189 N.J. 354, 376-77 (2007); *Toto v. Princeton Twp.*, 404 N.J. Super. 604, 619 (App. Div. 2009).

ii. Non-verbal conduct can be a statement if intended as a substitute for words. *State v. Simmons*, 52 N.J. 538, 541 (1968).

1. However, emphatic spontaneous movement without communicative intent is not a statement. *State v. Williams*, 97 N.J. Super. 573 (Cty. Cty. 1967) (act of defendant in throwing his wallet and coins on table in response to police request he empty his pockets not a statement for purposes of Fifth Amendment); *see also Wyatt by Caldwell v. Wyatt*, 217 N.J. Super. 580, 585 (App. Div. 1987) (payment to defendant by third party was not statement because it was not intended as communication and therefore was not excludable as hearsay).

c. Exceptions: Still hearsay! Just admissible hearsay (because of other indicia of reliability).

d. *N.J.R.E.* 803(a): prior statements of the witness, both inconsistent (must comply with Rule 613) and consistent.
    i. If party calling witness wishes to introduce an inconsistent statement, it must be reliable, either via recording, or under oath.
e. *N.J.R.E.* 803(b): By a party opponent
    i. Admissible because the party against whom it is sought to be introduced cannot claim inability to confront. *State v. Kennedy*, 135 N.J. Super. 513 (App. Div. 1975).
    ii. Need not be contrary to interest when made. (Contrary to admission against interest rule, 803(c)(25).) *See State v. Covell*, 157 N.J. 554, 572 (1999).
    iii. Does not apply where parties are only nominally adverse and working in concert at trial. *Sas v. Strelecki*, 110 N.J. Super. 14 (App. Div. 1970).
f. 803(c)(1): present sense impression
    i. Supreme Court uses a common-sense approach requiring a "very brief time" between observation and statement. Ten minutes afterwards is too much. *State ex rel. J.A.*, 195 N.J. 324, 338 (2004). Contemporaneously or within seconds suffices. *See Polistina v. Polistina*, 183 N.J. Super. 291, 293, 297 (App. Div. 1982).
g. 803(c)(2): excited utterance
    i. Three conditions: (1) related to startling event; (2) made under the stress of excitement caused by the event; and (3) made

without opportunity to delineate or fabricate. *See J.A.*, *supra*, 195 N.J. at 340.

1. Historically, the third element was ignored, but must not be. The court must expressly analyze this factor. *See State v. Branch*, 182 N.J. 338, 344, 357-67 (2005).

h. 803(c)(3): then existing mental, emotional, or physical condition

i. Must be made in good faith.

ii. Admissible whether or not made to physician. Biunno, et al., *Current N.J. Evid. R.*, comment 1 on Rule 803(c)(3).

iii. Encompasses both an utterance ("ouch!") and narrative description. *Id.*, comment 2.

iv. The second type of statement encompassed by this exception is state of mind, for example, a testator's statement to an attorney that he and his wife had reached an agreement as to the disposition of their estates. *See Woll v. Dugas*, 104 N.J. Super. 586 (Ch. Div. 1969), *aff'd*, 112 N.J. Super. 366 (App. Div. 1970).

1. Such comments must be more or less contemporaneous to be admissible. *In re Spiegelglass*, 48 N.J. Super. 265 (App. Div.), *certif. denied*, 26 N.J. 302 (1958) (regarding testator phone call to attorney to explain handwritten will changes testator had just made).

i. 803(c)(4): for purposes of medical diagnosis

i. Also must be in good faith, as with 803(c)(3).

ii. Statements admissible under this exception must be as to symptoms, not the cause (or suspected cause) thereof. Biunno, et al., *supra*, comment on Rule 803(c)(4).

j. 803(c)(5); recorded recollection

i. Independent from refreshing recollection doctrine. Biunno, et al., comment on Rule 803(c)(5). The hearsay exception comes into play if the refreshing recollection attempt does not work. *Id*.

k. 803(c)(6): regularly recorded activity (the business records exception)

i. "The Rules reflects the realization that records trusted and relied upon by business are indispensable in commercial litigation even though they do not meet prior technical judicial standards for admissibility." Biunno, et al., comment 1 to Rule (citing *Mahoney v. Minsky*, 38 N.J. 208 (1963)).

1. That the record is self-serving goes to weight, not admissibility. *Id*. (citing *Scott v. Greengos*, 95 N.J. Super. 96 (App. Div. 1967)).

ii. Three prerequisites: (a) regular course of business; (b) prepared within a short time of the act, condition or event described; (c) source and method/circumstance of preparation must justify allowing it into evidence. *State v. Matulewicz*, 101 N.J. 27, 29 (1985).

iii. Admissibility depends on trustworthiness, and, therefore, whether there was a duty to make a truthful record on account of business necessity. Ledgers, cancelled checks, and regularly

conducted diagnostics fit the bill. A rent roll prepared by an apartment complex owner does not. Biunno, comment 2 on Rule 803(c)(6).

iv. Statement of witness contained in a report does not receive similar treatment, even if the report itself is admissible, as the witness is not under similar duty of truthfulness. *See Purdy v. Nationwide Mut. Ins. Co.*, 184 N.J. Super. 123, 129-30 (App. Div. 1982).

l. 803(c)(7): absence of records of regularly conducted activity.

i. It is not necessary to produce the records searched to locate the absent entry; however, a witness with personal knowledge of the records' ordinary storage must testify as to such absence. *State v. Antieri*, 186 N.J. Super. 20, 24 (App. Div.), *certif. denied*, 91 N.J. 546 (1982); *State v. Martini*, 131 N.J. 176, 319-20 (1993).

ii. Absence is admissible to show non-occurrence of event, not alteration of record. Biunno, comment on Rule.

m. 803(c)(25): statements against interest

i. Rationale for admission is that by human nature, people do not ordinarily tell lies that make themselves look bad, so if a person makes a disserving statement, they are likely telling the truth. *State v. Brown*, 170 N.J. 138, 148-49 (2001); *State v. White*, 158 N.J. 230, 238 (1999).

ii. Statement must be so far against declarant's interest that a reasonable man in his position would not have made the

statement unless he believed it true (i.e. the statement could not possibly be self-serving, otherwise it is more likely to have been a lie). *See White*, *supra*, 158 N.J. at 238.

iii. Statement must be against interest at the time made. *State v. Norman*, 151 N.J. 5, 31 (1997).

iv. Unliked with 803(b)(1), the declarant need not be a party. *See State v. West*, 145 N.J. Super. 226 (App. Div. 1976), *certif. denied*, 73 N.J. 67 (1977).

v. Statement still subject to jury analysis of credibility. *White*, *supra*, 158 N.J. at 246-47.

vi. With regard to a statement being against pecuniary interest, a statement to a plaintiff in a harassment suit that the declarant would file false charges against him was admissible under this exception, as such false charges would subject the declarant to liability. *See Hill v. N.J. Dept. of Corr. Com'r*, 342 N.J. Super. 273, 300-01 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002).

n. *N.J.R.E.* 805: Hearsay within hearsay

i. Remember, each element of the statement must meet an exception (or arguably not constitute hearsay).

VII. Authentication and Identification

a. Not to be confused with hearsay objections! (i.e., just because a document is not hearsay or falls within an exception does not exclude it from the authentication requirement. Too many attorneys forget/confuse this.)

b. *N.J.R.E.* 901: ", the proponent must present evidence sufficient to support a finding that the item is what its proponent claims."

i. Courts are not exacting and conduct a mere preliminary screening process of *prima facie* genuineness, with a more intense scrutiny as to genuineness and weight to be left to the jury. *See In re Blau's Estate*, 4 N.J. Super. 343 (App. Div. 1949); *see also State v. Mays*, 321 N.J. Super. 619, 628 (App. Div.), *certif. denied*, 162 N.J. 132 (1999).

1. However, as a general principle, the court does have latitude to exclude where the authentication testimony is found unworthy of credit. *See State v. Hockett*, 443 N.J. Super. 605, 614 (App. Div.) (citing *State v. Tomasi*, 443 N.J. Super. 146, 155-57 (App. Div. 2015)), *certif. denied*, 228 N.J. 408 (2016).

ii. The most expedient form of authentication is testimony from the signatory. *See State v. Moore*, 158 N.J. Super 68 (App. Div. 1978).

iii. Photographs require authentication, which is satisfied by "the witness's assertions about the approximate date they were taken, the identity of the person or persons in the photographs, and the nature of the conduct depicted," and does not require the Court to "accept the truth of the witness's description of something intangible, incorporeal, imprecise or impalpable that might have warranted some consideration of the witness's credibility." *Hockett*, 443 N.J. Super. at 614.

1. The testimony of the photographer is unnecessary; any person with knowledge of the facts presented therein may authenticate the photograph. *Id.* at 613.

iv. New Jersey courts decline to apply a higher authentication standard for social media posts; they can be forged no more easily than a traditional writing. As such, courts apply traditional authentication rules to such posts. *State v. Hannah*, 448 N.J. Super. 78, 88-89 (App. Div. 2016).

VIII. Contents of Writings

a. *N.J.R.E.* 1002, "Requirement of Original"

i. The so-called "best evidence rule"

b. *N.J.R.E.* 1003, "Admissibility of Duplicate": "A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

i. Essentially/largely does away with the best evidence rule in the modern age where copies can be made via reliable methodology.