Chapter 1

Trial Calendar and Pretrial Information Exchange

1-1 TRIAL CALENDAR

1-1:1 New Jersey Court Rule 4:36-3. Trial Calendar

(a) Notice of Trial. The court shall advise all parties of the initial trial date no less than ten weeks prior thereto. Cases scheduled for trial shall be ready to proceed on the initial trial date. If a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain after consultation with counsel provided, however, that no case shall be relisted for trial sooner than four weeks from the initial trial date without agreement by all counsel. The court shall issue written notice confirming the new trial date.

(b) Adjournments, Generally. An initial request for an adjournment for a reasonable period of time to accommodate a scheduling conflict or the unavailability of an attorney, a party, or a witness shall be granted if made timely in accordance with this rule. The request shall be made in writing stating the reason for the request and that all parties have consented thereto. The written adjournment request, which shall be submitted to the civil division manager, shall also include a proposed trial date, agreed upon by all parties, to occur as soon as possible after the problem requiring the adjournment is resolved. If a consent cannot be obtained or if a second request is made, the court shall determine the matter by conference call with all parties. Requests for adjournment should be made as soon as the need is known but in no event, absent exceptional circumstances, shall such request be made later

than the close of business on the Wednesday preceding the Monday of the trial week. No adjournments shall be granted to accommodate dispositive motions returnable on or after the scheduled trial date.

(c) Adjournments, Expert Unavailability. If the reason stated for the initial request for an adjournment was the unavailability of an expert witness, no further adjournment request based on that expert's unavailability shall be granted, except upon a showing of exceptional circumstances, but rather that expert shall be required to appear in person or by videotaped testimony taken pursuant to R. 4:14-9 or, provided all parties consent, the expert's de bene esse deposition shall be read to the jury in lieu of the expert's appearance. If appropriate, given the circumstances of the particular case, the court may order that no further adjournments will be granted for the failure of any expert to appear.

1-1:2 Discussion

Rule 4:36-3 controls the necessity for adjournments, which often arises due to the last-minute unavailability of expert witnesses, lay witnesses, or the parties themselves.[1] Rule 4:36-3 provides that a first request for adjournment will essentially be granted pro forma due to the unavailability of a party or a key witness, so long as the parties have consented and the party requiring the adjournment provides a written request to the Civil Division Manager so advising and including a proposed trial date agreed upon by all the parties. The rule specifically provides that an initial request for an adjournment for a reasonable period of time "to accommodate a scheduling conflict or the unavailability of an attorney, a party, or a witness shall be granted if made timely in accordance with the rule." The party requesting the adjournment must also do so no later than the Wednesday before the Monday trial date. Any request being made after this time, which will only be granted upon "exceptional circumstances," is very rarely granted.

A request for a second adjournment, however, is not mandatory. When a second adjournment is requested, the court will hold a conference call with all parties to determine whether that adjournment will be granted. Similarly, if the parties do not consent to the initial adjournment request, the court will hold a telephone conference with all parties. Unlike the second adjournment, the court will normally grant a first request for an

1. *See* Chapter 21, § 21-19 below, for a discussion of the adjournment of trials due to an expert's unavailability.

extension on the telephone conference so long as the requesting party has complied with the rule's requirements. In 2020, paragraph (c) was added to this rule to require the parties to take an expert's videotaped testimony or, upon consent, a de bene esse deposition if the initial adjournment request was based on an expert's unavailability.

In addition, Rule 4:46-1, which governs summary judgment motions, provides that if a trial court's decision on a summary judgment motion is not communicated to the parties at least ten days prior to the scheduled trial date, an application for adjournment shall be liberally granted. This makes eminent sense since the parties may not have sufficient time to properly prepare for their trial depending on the nature of the rulings on a motion for summary judgment and in particular if certain claims are dismissed. Moreover, if a motion for summary judgment is granted in total, it is deemed unfair to the parties to have expended time and money preparing for a trial that otherwise would be obviated by such a grant of summary judgment.

1-2 FAILURE TO APPEAR AT TRIAL

There is a specific court rule that applies to a failure of a party to appear at the trial. Specifically, Rule 1:2-4(a) provides as follows:

> **Failure to Appear. If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, . . . or on the day of trial, . . . the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.**[2]

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2. N.J. Ct. R. 1:2-4(a).

As set forth in Rule 1:2-4(a), the failure to appear at trial is subject to several different sanctions, including the payment of costs to the court, payment of the adversary's attorneys' fees or dismissal of the complaint or other pleadings or the striking of an answer and the entry of judgment by default.[3] Another sanction sometimes imposed by the New Jersey courts, which is not specifically referenced in this court rule is to impose an adverse inference charge on the non-appearing party.[4]

Trial courts are granted broad discretion in determining whether to grant or deny a request to adjourn the trial. The appellate courts only consider whether the trial court "pursue[d] a manifestly unjust course."[5]

Failure to appear at the trial can result in serious consequences as provided by the court rule. In *Ochoa v. Okasha*,[6] six days prior to the trial call, defendant's counsel wrote a letter to the trial judge advising that he had another trial in the same courthouse on the same date before a different judge with an older docket number, and that he would be selecting a jury and trying that case. Defense counsel therefore requested in his letter that the trial in the *Ochoa* matter be marked "subject to his other trial." On the same date, plaintiff's counsel wrote to the same trial judge also seeking an adjournment of the trial. Plaintiff's counsel adjournment request was based on the fact that the plaintiff's surgeon determined that he was in need of lumbar spinal surgery. Plaintiff's counsel also advised the trial court that defense counsel had consented to the adjournment. The trial court did not respond to either communication. Defendant's counsel appeared for the trial call, but plaintiff's counsel did not. The trial judge therefore dismissed plaintiff's case without prejudice. Nine months thereafter the plaintiff's counsel filed a motion to reinstate the complaint and to reopen and extend discovery that the court denied. The dismissal was affirmed on appeal.

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3. In *Kornbleuth v. Westover*, NO. A-5182-16T1, 2018 N.J. Super. Unpub. LEXIS 2036 (N.J. Super. App. Div. Sept. 6, 2018), *aff'd*, 241 N.J. 289 (2020), the court assessed attorney's fees of $8,500 against the attorney who refused to proceed at trial to reinstate the case after dismissing the case without prejudice.

4. *Nause v. Atlanticare Reg'l Med. Ctr.*, NO. A-2649-17T2, 2019 N.J. Super. Unpub. LEXIS 266 (N.J. Super. App. Div. Feb. 4, 2019).

5. *Kornbleuth v. Westover*, NO. A-5182-16T1, 2018 N.J. Super. Unpub. LEXIS 2036 (N.J. Super. App. Div. Sept. 6, 2018), *aff'd*, 241 N.J. 289 (2020).

6. *Ochoa v. Okasha*, NO. A-3008-16T1, 2018 N.J. Super. Unpub. LEXIS 1100 (N.J. Super. App. Div. May 11, 2018), *certif. denied*, 235 N.J. 181 (2018).

1-3 DESIGNATION OF TRIAL COUNSEL UNDER RULE 4:25-4

1-3:1 New Jersey Court Rule 4:25-4. Designation of Trial Counsel

Counsel shall, either in the first pleading or in a writing filed no later than ten days after the expiration of the discovery period, notify the court that designated counsel is to try the case, and set forth the name specifically. If there has been no such notification to the court, the right to designate trial counsel shall be deemed waived. No change in such designated counsel shall be made without leave of court if such change will interfere with the trial schedule. In Track I or II tort cases pending for more than two years, and in Track III or IV tort cases, other than medical malpractice cases, pending for more than three years, the court, on such notice to the parties as it deems adequate in the circumstances, may disregard the designation if the unavailability of designated counsel will delay trial. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar. Designations of trial counsel shall presumptively expire in all Track III medical malpractice cases pending for more than three years.

1-3:2 Discussion

Rule 4:25-4 is a salutary rule that protects counsel and their clients from compelling another attorney in a law firm who is not familiar with the case to try the case where the primary attorney handling the case is unavailable. Indeed, the New Jersey courts have specifically held that the purpose of this rule "is to protect attorneys and their clients from the trial court compelling them to substitute a partner or associate for an unavailable attorney and to proceed to trial, even if the partner or associate was unfamiliar with the file or inexperienced in the area of practice."[7] Thus, where an attorney designated herself as trial counsel pursuant to Rule 4:25-4, courts will normally adjourn the trial where that attorney is committed to another trial.[8] The trial court, however, has the discretion to disregard the attorney

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7. *Tapia v. Alam*, NO. A-2611-18T1, 2020 WL 5754994, at *12 (N.J. Super. App. Div. Sept. 28, 2020), *certif. denied*, 245 N.J. 65 (2021).

8. *Harmon Cove II Condo. Ass'n, Inc. v. Hartz Mountain Indus.*, 258 N.J. Super. 519, 522 (App. Div. 1992).

trial designation where cases have been pending for the time periods set forth in the rule.

1-3:3 Practice Point

It is mandatory for trial counsel who knows that they are the attorneys who will be trying the case to always identify themselves in the initial pleading (whether a complaint or answer) as the designated trial counsel under Rule 4:25-4. As set forth in the case law above, failure to do so can result in the court ordering another attorney in that attorney's law firm to try the case. Of course, this could lead to an unmitigated disaster as the attorney who is most familiar with the case and may also have the most trial experience cannot try her own case, often to the great detriment of the client. Thus, invoking this rule will avoid a situation where a case has been diligently prepared by trial counsel only to lose at the trial because the case was tried by either an inexperienced attorney and/or an attorney who is not conversant with that client's case.

1-4 ATTORNEY AS WITNESS

1-4:1 RPC 3.7 - Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

1-4:2 Discussion

When an attorney designates herself as trial counsel under Rule 4:25-4, she must be sanguine that she would not be a witness at the trial, as sometimes counsel for clients participate in communications or other activities which would make them a pertinent witness at the trial. RPC 3.7

specifically provides that an attorney cannot serve as trial counsel where that attorney is likely to be a witness at trial. There are only a few exceptions as set forth in the rule itself including, for example, if the attorney's testimony relates to an uncontested issue or to that attorney's legal services and also where the disqualification of the attorney would work substantial hardship on the client.

The Rule does allow another attorney in the disqualified attorney's firm to serve as trial counsel, so long as there is no conflict of interest.

1-4:3 Practice Point

At times, adversary counsel seeks to gain a strategic advantage by filing a motion to dismiss trial counsel when that attorney will be a witness at the trial on the eve of the trial itself. Such motions should generally be dismissed under RPC 3.7(a)(3) which disallows such a motion where disqualification would work substantial hardship on the client. This is particularly so where the trial counsel is a sole practitioner as new counsel would have to be appointed which would result in a substantial delay of the trial.

1-5 ATTORNEY CONFERENCES; EXCHANGE OF INFORMATION

1-5:1 New Jersey Court Rule 4:25-7. Attorney Conferences; Exchange of Information

(a) Prior to Pretrial. In cases that are to be pretried, the attorneys shall confer before the date assigned for the pretrial conference in order to reach agreement on as many matters as possible.

(b) Exchange of Information. Except as otherwise provided by paragraph (d) of this rule, in cases that have not been pretried, attorneys shall confer, and seven days prior to the initial trial date, exchange the pretrial information as prescribed by Appendix XXIII to these rules. At trial and prior to opening statements, the parties shall submit to the court the following in writing: (1) copies of any Pretrial Information Exchange materials that have been exchanged pursuant to this rule, and any objections made thereto; and (2) stipulations reached on contested procedural, evidentiary, and substantive issues. In addition, in jury trials, the parties shall also exchange and submit (1) any proposed voir dire questions, (2) a list of proposed jury instructions

pursuant to [New Jersey Court Rule] 1:8-7, with specific reference either to the Model Civil Jury Charges, if applicable, or to applicable legal authority, and (3) a proposed jury verdict form that includes all possible verdicts the jury may return. Failure to exchange and submit all the information required by this rule may result in sanctions as determined by the trial judge.

(c) Continuing Obligation. Attorneys shall have the continuing obligation to report to the court any stipulations reached during the course of the trial.

(d) Waiver of Exchange. The parties may, in writing, waive the requirement of the exchange of information as set forth in paragraph (b) of this rule, but such waiver shall not affect the obligation to provide that information to the court at the commencement of trial.

1-5:2 Discussion

On September 5, 2000, the Pretrial Information Exchange procedure was incorporated in the New Jersey Court Rules. New Jersey Court Rule 4:25-7 provides that in cases that have not been pre-tried by the court, all parties in civil litigation are required to engage in this exchange of information.[9] It is a substantial undertaking and should be commenced well before the scheduled trial date.

Under this rule, the parties are required to submit to each other within one week of the trial date all items set forth in Appendix XXIII that correlates to New Jersey Court Rule 4:25-7(b).[10] The parties must exchange the following information:

1. A list of witnesses.
2. A list of pre-marked Exhibits, including all demonstrative exhibits. The parties are required to confer in advance to stipulate the admission of as many exhibits as possible.
3. A list of the proposed deposition and interrogatory readings, including page and line number or question number.

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9. This Rule does not apply to Special Civil Part cases. *Williams v. Am. Auto Logistics*, 226 N.J. 117, 125-27 (2016).

10. Appendix XXIII can be found at https://www.njcourts.gov/sites/default/files/attorneys/rules-of-court/appxxiii-pretrial-information-exchange.pdf (last visited, Apr. 9, 2024).

4. Any in limine or trial motions, including supporting briefs. Those motions are to be heard on the trial date, and not the regular motion calendar.
5. Any response or opposition to the motions in limine must be filed two days prior to the trial date.
6. Any objections to the proposed admission into evidence of any exhibit or any reading by the other party must be exchanged two days before the trial date.
7. A listing of all anticipated problems with regard to the introduction of evidence such as hearsay problems with legal memoranda supporting the parties' position with respect to such evidence.
8. This Pretrial Information Exchange is to be submitted to the court on the date of trial by both parties.
9. In addition to the above, the following must be submitted by the parties to the court on the trial date:
   A. All stipulations reached by the parties with respect to any evidentiary issues.
   B. In a jury trial any special voir dire questions.
   C. A list of proposed jury instructions with specific reference to the Model Civil Jury Charges, if applicable.
   D. Any special jury instructions with applicable legal authority.
   E. A proposed jury verdict sheet.

The parties can also waive the one week requirement for making the Pretrial Information Exchange and simply submit all of these items on the date of the trial.[11] However, counsel is well advised to exchange all in limine motions a week in advance in order to give the other party an opportunity to file any objections within two days of the trial.

Serious consequences can ensue when a party fails to submit all the information required by Rule 4:25-7, including the imposition of sanctions and even the striking of the jury demand.[12]

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11. N.J. Ct. R. 4:25-7.

12. N.J. Ct. R. 4:25-7(b); *Williams v. Am. Auto Logistics*, NO. A-2375-10T3, 2012 N.J. Super. Unpub. LEXIS 1666, at *3 (N.J. Super. App. Div. July 12, 2012). In *Lauckhardt v. Jeges*, NO. A-1970-13T4,

1-5:3 Misuse of Rule 4:25-7

Before the enactment of Rule 4:25-8, discussed in Section 1-5:5 below, some attorneys used the very limited time constraints in New Jersey Court Rule 4:25-7(b) to take unfair advantage of their adversary. Motions in limine are meant for evidentiary issues such as the exclusion of hearsay statements, the exclusion of an expert report as a net opinion and the like. However, it was a common practice for some attorneys to file a motion in limine that sought more than a ruling on an evidentiary issue, and requested dismissal of a specific claim or the entire lawsuit.[13] Thus, instead of spending the week before the trial preparing for the trial testimony, the adversary must spend his time responding to substantive motions that should have been filed and decided well before the trial date.

Prior editions of this volume pointed out that the Pretrial Information Exchange was being abused by practitioners. As noted, attorneys were improperly filing what were in effect motions for summary judgment or to dismiss the plaintiff's complaint which they were falsely couching as motions in limine. Those tactics were formally rebuked for the first time in *Berger v. Holmes*.[14] The court chastised the offending party and delineated the detrimental consequences of such tactics:

> But the motion was not a motion in limine. A motion in limine is a "pretrial request that certain inadmissible evidence not be referred to or offered at trial." *Black's Law Dictionary* 1109 (9th ed. 2009). Here, Holmes and Ocean sought a judgment dismissing with prejudice the

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2015 N.J. Super. Unpub. LEXIS 2393 (N.J. Super. App. Div. Oct. 20, 2015), *certif. denied*, 224 N.J. 281 (2016), the court invoked the equitable doctrine of laches and equitable estoppel to preclude the defendants from challenging the qualifications of plaintiff's expert where they failed to raise this issue as a motion in limine in their pretrial information exchange. The court held, "Any challenge to Dr. Bagnell's qualifications should have been included in defendants' pretrial information exchange submissions and the issue addressed prior to opening statements. Because this issue was not timely raised, plaintiff proceeded to open to the jury and present trial testimony and evidence focusing, in significant part, on the alleged substandard care of defendant nurses, something plaintiff would not have done if defendant nurses had successfully raised this issue in a timely manner. Plaintiff obviously changed her position to her detriment."

13. Depending on how the motion is couched, a party may be able to argue that it is the equivalent of a motion for summary judgment, which must be filed at least 30 days before the trial date. N.J. Ct. R. 4:46-1. However, one still must oppose the motion since a party will not know until the trial date how the court will rule.

14. *Berger v. Holmes*, NO. A-1953-09T2, 2012 N.J. Super. Unpub. LEXIS 890 (N.J. Super. App. Div. Apr. 23, 2012). *See also Cho v. Trinitas Reg'l Med. Ctr.*, 443 N.J. Super. 461, 471 (App. Div. 2015), *certif. denied*, 224 N.J. 529 (2016) (A motion in limine cannot be "a summary judgment motion that happens to be filed on the eve of trial."). A motion in limine that has a dispositive effect on the case filed at the threshold of the trial is procedurally improper. *Id.* at 470.

> first count of Chesney's cross-claim. In other words, they sought summary judgment.
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> The procedure employed here is inherently unfair to both the party opposing such a motion and to the court. It deprives the opposing party of the time afforded by *Rule* 4:46-1 to frame and prepare a response to a summary judgment motion. It potentially deprives a party of the opportunity to adequately prepare for and present evidence at a *Lopez* hearing. And it results in the possibility (in this case the reality) of the opposing party spending time and money unnecessarily preparing for trial.
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> Such belated filings also deprive the court of the opportunity to evaluate pleadings and narrow the issues to be decided if a hearing is required. The confusion in this case—about whether the discovery rule was implicated, or, instead, whether Holmes and Ocean were asserting that Chesney had settled a disputed claim—illustrates the problems that can occur when a party untimely files a summary motion in the guise of a motion in limine.[15]

In *Russo v. Friedrich*,[16] the defendant filed a motion to dismiss plaintiff's wrongful death action based on alleged lack of pecuniary losses five days before trial, which the trial court granted. The Appellate Division reversed, holding that the motion in limine was in reality "a last-minute summary judgment motion in disguise." The court emphasized that a motion in limine "is permissible only when it addresses preliminary or evidentiary issues."

The court in *Lizzie v. Creamer*[17] chastised defendants' counsel for filing a motion in limine to strike the plaintiff's expert report as a net opinion on the date of the trial contrary to the time requirements of the rule. The court held that "[h]eightened caution is appropriate when the motion in limine is made on the day of trial and has the potential to summarily dispose of the case."[18] The Appellate Division reversed the dismissal of the case and

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15. *Berger v. Holmes*, NO. A-1953-09T2, 2012 N.J. Super. Unpub. LEXIS 890, at *11-13 (N.J. Super. App. Div. Apr. 23, 2012).

16. *Russo v. Friedrich*, NO. A-0883-16T2, 2018 N.J. Super. Unpub. LEXIS 2228 (N.J. Super. App. Div. Oct. 10, 2018).

17. *Lizzie v. Creamer*, NO. A-0478-11T4, 2013 N.J. Super. Unpub. LEXIS 868 (N.J. Super. App. Div. Apr. 18, 2013).

18. *Lizzie v. Creamer*, NO. A-0478-11T4, 2013 N.J. Super. Unpub. LEXIS 868, at *12 (N.J. Super. App. Div. Apr. 18, 2013).

instructed that a Rule 104 hearing of the expert's testimony was required and the court should further consider granting a continuance of the trial if necessary to allow for admission of the expert testimony.

The Appellate Division in *McKenna v. Kessler Institute for Rehabilitation, Inc.* buttressed these proscriptions by reversing a court's ruling that dismissed the plaintiff's constructive discharge complaint at the commencement of the trial before the jury selection.[19] The court dismissed plaintiff's lawsuit on the basis that she lacked the requisite evidence to prove her case. The ruling was made by the court without inclusion of an in limine motion in the defendant's Pretrial Information Exchange. The Appellate Division held that the trial court's dismissal violated due process as it had failed to provide notice and an opportunity to plaintiff to address this issue. The court then specifically addressed the practice of attorneys filing substantive motions in their Pretrial Information Exchange. The court referenced to Rule 4:46-1, which it noted required a 30-day return period before the scheduled trial for the filing of a motion for summary judgment. The court further held that:

> We have repeatedly reminded trial courts that consideration of motions in limine should be made with great caution . . . . This case illustrates the inequities and inherent unfairness that can occur when a party raises a summary judgment-like action in the guise of a motion in limine, or when the court considers claims submitted in violation of our court rules. The rules are in place for a reason; to ensure fairness in the litigation process. Unfortunately, that did not happen here.[20]

Similarly, the court in *Yoon v. Effah*[21] struck a motion in limine that sought to dismiss the plaintiff's claims for non-economic damages including pain and suffering based on the verbal threshold that was applicable to the plaintiff. The court held that the motion in limine was in reality a summary judgment motion under Rule 4:46-1 because it relied on medical reports that were not part of the pleadings and requested dismissal of certain claims. The court ruled that the motion in limine was untimely

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19. *McKenna v. Kessler Inst. for Rehab., Inc.*, NO. A-1541-12T3, 2014 N.J. Super. Unpub. LEXIS 2497 (N.J. Super. App. Div. Oct. 20, 2014), *certif. denied*, 220 N.J. 574 (2015).

20. *McKenna v. Kessler Inst. for Rehab., Inc.*, NO. A-1541-12T3, 2014 N.J. Super. Unpub. LEXIS 2497, at *11 (N.J. Super. App. Div. Oct. 20, 2014), *certif. denied*, 220 N.J. 574 (2015).

21. *Yoon v. Effah*, NO. A-5908-17T2, 2019 WL 3003441 (App. Div. July 10, 2019).

because a summary judgment motion requires 28 days' notice and must be returnable at least 30 days before the trial. The Appellate Division adopted a somewhat divergent holding in *Kupuscenski v. Hess Corp.* in relaxing the motion in limine procedure, but it emphasized that there was no surprise to the adverse party because the same motion had been filed during the course of the litigation.[22]

In that case, physicians who had been third partied in a medical malpractice action failed to file any motions to dismiss as part of their Pretrial Information Exchange. At the commencement of the trial, they filed motions to dismiss on the basis that the third-party complaint should be dismissed for insufficient expert testimony. They acknowledged that the motions did not fit the definition of a motion in limine because the motions "did not seek to limit or bar any evidence or testimony." Instead, the court indicated that the motions were for judgment as provided by Rule 4:37-2(b) in that the third-party defendants sought dismissal of the third-party complaint. The court held that Rule 4:25-7(b) governing the pretrial information exchange "did not preclude the third-party defendants from making their motions during the trial, or asking the judge to relax the rules so that the motions can be considered before the trial began."

The Appellate Division further noted that the trial court did not abuse its discretion by electing to consider the motions "before starting what was expected to be a lengthy jury trial." The Appellate Division also pointed out that the defendants had previously raised the issue set forth in their motion several months before the trial and therefore the third-party plaintiff should have expected that they would seek a ruling on this issue at some point before or during the trial. The trial judge afforded the plaintiff a full opportunity to respond to the motions. The Appellate Division therefore concluded:

> We are therefore convinced that the judge did not err by relaxing the applicable requirements of the court rules in order to avoid the unjustifiable expense and delay that would have resulted if the judge had waited until the end of [plaintiff's] case to consider the motions to dismiss. R.1-1:2(a).[23]

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22. *Kupuscenski v. Hess Corp.*, NO. A-2202-12T3, 2014 N.J. Super. Unpub. LEXIS 627 (N.J. Super. App. Div. Mar. 24, 2014).

23. *Kupuscenski v. Hess Corp.*, NO. A-2202-12T3, 2014 N.J. Super. Unpub. LEXIS 627, at *13 (N.J. Super. App. Div. Mar. 24, 2014).

1-5:4 Practice Point

Preparation of the Pretrial Information Exchange is a weighty project in that it involves several tasks and must be accurately prepared. For example, a failure to include certain deposition excerpts in the Pretrial Information Exchange might make it difficult to include additional deposition transcripts at the time of the trial (except for items that may not have been anticipated or are submitted in rebuttal to the other parties readings). Thus, preparation of the Pretrial Information Exchange must preferably commence at least one month before the trial date and even a longer period in a complex case.

Litigants and courts must also be guided by the reality that motions in limine should rarely be granted, especially substantive motions, before any evidence has been presented.[24] The Pretrial Information Exchange was instituted to expedite trials by counsel's exchanging this information beforehand. While it has served a salutary purpose, it has also been susceptible to some abuse. This prior abuse has now been rectified with the enactment of Rule 4:25-8.

1-5:5 New Jersey Court Rule 4:25-8. Motions in Limine

(a) Definition; Procedures; Timeframes.

(1) Definition. In general terms and subject to particular circumstances of a given claim or defense, 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. A motion in limine shall be part of the pretrial exchange under R. 4:25-7(b).

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24. *Bellardini v. Krikorian*, 222 N.J. Super. 457, 464 (App. Div. 1988) ("We have noted an increase in in limine rulings on evidence questions in recent times. Such rulings are often in the abstract and not in the context of facts adduced at trial. Requests for such rulings should be granted only sparingly and with the same caution as requests for dismissals on opening statements."). *Accord McAlonan v. Tracy*, NO. A-6034-07T2, 2010 N.J. Super. Unpub. LEXIS 588 (N.J. Super. App. Div. Mar. 16, 2010), *certif. denied*, 202 N.J. 347 (2010). *See Rubanick v. Witco Chem. Corp.*, 242 N.J. Super. 36, 46-47 (App. Div. 1990), *modified and remanded on other grounds*, 125 N.J. 421 (1991) (noting that a hearing on the in limine motion required the judge to make factual determinations more properly left to the jury).

As a result, the filing of such motions shall not trigger any filing fee.

(2) Motion Deadlines. Unless otherwise ordered or permitted by the court, the parties shall submit, serve and respond to all motions in limine for which pretrial rulings are sought pursuant to the timeframes found under R. 4:25-7(b) and paragraph 4 of Appendix XXIII ("Pretrial Information Exchange"). Such motions shall be attached as exhibits to the pretrial exchange.

(3) Briefs. To the extent practicable, each motion in limine shall embrace one issue. The respective briefs of the movant and respondent shall comply with the line and type-point requirements of R. 1:6-5, except that the page limitation shall be five pages, exclusive of any tables of contents or authorities. No reply briefs by movant shall be permitted unless requested by the court. If more than one motion is submitted, the collective page limit for all motions by a single party shall not exceed 50 pages, exclusive of any tables of contents or authorities. A party may apply to the court to submit an over-length brief or seek relief from the collective page limit in the same manner described under R. 1:6-5.

(4) Rulings. The court shall rule on all motions submitted under this rule in a timely manner based on the issue raised in the particular motion. In the event the motion is not decided before opening statements, the court shall direct the litigants on whether or to what extent they may refer to the disputed evidence or other issue raised in the motion in the opening statements or otherwise, until such time as the motion is decided.

(b) Non-compliance. Motions not submitted in accordance with paragraph (a)(2) need not be decided pursuant to paragraph (a)(4), unless good cause is shown for the non-compliance, with an opportunity for any party opposing the late submission to be heard. Good cause may include but not be limited to the circumstance under which a party receives information as part of the pretrial exchange and such information forms a good faith basis regarding the admissibility of evidence.

(c) Preservation of rights. The failure to submit a motion in limine under this rule shall not preclude a party from seeking to admit evidence, or objecting to the admission of evidence, during trial.

(d) Preservation of rulings. A trial court's ruling on a motion in limine shall not preclude the court from reconsidering or modifying that ruling, sua sponte or at the request of a party, based on later developments at trial.

1-5:6 Discussion

In order to rectify the abuse of Rule 4:25-7 as detailed above, Rule 4:25-8 was adopted and became effective on September 1, 2020. As this Rule now makes clear, a party can no longer file a motion in limine that would "have a dispositive impact on a litigant's case." The rule further elaborates that this would include but is not limited to an application to bar an expert's testimony where such testimony is required to sustain a party's prima facie case. The new rule would also bar filing any other motion in limine which in effect would result in the dismissal of a plaintiff's lawsuit, including some of the examples of such dispositive motions set forth above in the discussion of Rule 4:25-7. This new rule thus confirms the essential premise of motions in limine, that is, to request the court to make circumscribed rulings on limited evidentiary issues.

Rule 4:25-8(c) also makes it clear that the failure to submit a motion in limine with respect to an evidentiary issue is not a bar to a party's making an evidentiary motion during the course of the trial. This makes eminent sense since evidentiary issues often do not become ripe until the actual testimony of a witness or the attempt to admit certain demonstrative evidence. Similarly, Rule 4:25-8(d) provides that a court's ruling at the initial stage of the trial will not preclude the trial court from reconsidering its ruling on a motion in limine during the course of the trial. Again, this also is a salutary rule as the full scope of an evidentiary issue sometimes is not clear until it is aired out at the time of trial.