RULE 4:10 PRETRIAL DISCOVERY

4:10-1 Discovery methods

Except as otherwise provided by R. 5:5-1 (discovery in family actions), parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. Unless the court orders otherwise under R. 4:10-3, the frequency of use of these methods is not limited.

Note: Former rule deleted (see R. 4:14-1) and new R. 4:10-1 adopted July 14, 1972 to be effective September 5, 1972; amended December 20, 1983 to be effective December 31, 1983.

¶ 4:10-1.01 Bochet's Practice Tips to Rule 4:10-1

Strategic Point: When the frequency of use of discovery methods becomes oppressive, counsel should seek a protective order under N.J. Ct. R. 4:10-3. The motion should outline the reasons the discovery pursuit falls within the provisions of that rule, such as stating that the requests are annoying, embarrassing, or unduly time consuming.

Timing: Discovery methods may be employed in any sequence, provided that interrogatories are propounded in accordance with the time limits prescribed in N.J. Ct. R. 4:17-1(b)(2) (uniform interrogatories are deemed automatically served with complaint containing cause of action requiring their use) and N.J. Ct. R. 4:17-2 (requiring plaintiff's initial interrogatories to be served within 40 days of service of defendant's answer).

Exception: Although N.J. 4:10–1 indicates unlimited frequency for use of the discovery modalities listed, there are limitations on interrogatories in automobile property damage, medical malpractice and most personal injury cases. *See* N.J. Ct. R. 4:17-1(b)(1).

4:10-2 Scope of discovery; treating physician

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

(a) In General. Parties may obtain discovery regarding any matter, not

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

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

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

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

neously recorded.

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

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

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

(3) A party may discover facts known or opinions held by an expert (other than an expert who has conducted an examination pursuant to R. 4:19) who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means. If the court permits such discovery, it shall require the payment of the expert's fee provided for by R. 4:10-2(d)(2) and unless manifest injustice would result, the payment by the party seeking discovery to the other party of a fair portion of the fees and expenses which had been reasonably incurred by the party retaining the expert

in obtaining facts and opinions from that expert.

(4) A party shall not seek a voluntary interview with another party's treating physician unless that party has authorized the physician, in the form set forth in Appendix XII-C, to disclose protected medical information.

(e) Claims of Privilege or Protection of Trial Preparation Materials.

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

(2) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved.

(f) Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court nevertheless may order discovery from such sources if the requesting party establishes good cause, considering the limitations of R. 4:10-2(g). The court may specify conditions for the discovery.

(g) Limitation on Frequency of Discovery. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance

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of the proposed discovery in resolving the issues. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties.

Note: Source—R.R. 4:16-2, 4:23-1, 4:23-9, 5:5-1(f). Amended July 14, 1972 to be effective September 5, 1972 (paragraphs (d)(1) and (2) formerly in R. 4:17-1); paragraph (d)(2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d)(1) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (d)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) adopted July 10, 1998 to be effective September 1, 1998; paragraph (d)(1) amended July 12, 2002 to be effective September 3, 2002; corrective amendments to paragraph (d)(1) adopted September 9, 2002 to be effective immediately; caption amended, paragraphs (a), (c), and (e) amended, and new paragraphs (d)(4), (f), and (g) adopted July 27, 2006 to be effective September 1, 2006.

¶ 4:10-2.01 Bochet's Practice Tips to Rule 4:10-2

⊠ **Strategic Point:** Counsel must thoroughly understand the extent to which expert witnesses may be examined at depositions. This also pertains to documentary discovery of report drafts, correspondence with counsel and other aspects of the collaborative process that leads to the final report. A September, 2002 amendment to N.J. Ct. R. 4:10-2 keeps these out of play. The prior practice of full exploration between attorney and expert has been revoked.

⊠ **Strategic Point:** If a demand for discovery of electronically stored information is unduly costly or burdensome, counsel should seek a protective order pursuant to N.J. Ct. R. 4:10-3. The court should be asked to determine issues of cost allocation, the cumulative effect of the request and availability of information from other sources. Also to be considered is whether or not the expense or burden of production outweighs the benefit of receipt of the material by the requesting party.

Exception: Absent inadvertence, revelation of privileged information generally waives any privilege. Electronically stored material provides a particular problem due to the sheer breadth of information which can be stored and turned over. N.J. Ct. R. 4:10-2 essentially permits a party to retrieve privileged material.

¶ 4:10-2.02 Bochet's Annotations to Rule 4:10-2

***Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 895 A.2d 405 (2006).** The trial court prevented the defendants from calling a psychiatrist as a witness because he had been earlier named an expert witness by the plaintiff. The Supreme Court disagreed with that ruling. A party has no proprietary interest in an expert witness. If the witness is willing, defendants may call the expert to testify on their behalf. For this and other reasons, the court reversed the trial and appellate courts.

***Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 559–560, 691 A.2d 321 (1997).** After defendant obtained a protective order for all documents sought by plaintiff in pursuit of her Law

Against Discrimination claim, the court required that a balance be struck between the interests of all parties and stated that a blanket protective order was inappropriate. "The court should begin with the presumption that all of the documents sought by plaintiff are discoverable, given their relevance to plaintiff's claim that defendant did not effectively remediate the alleged harassment and to defendant's affirmative defense that it did. The court then should provide the defendant with the opportunity to make particularized assertions of privilege or confidentiality regarding specific documents."

***Graham v. Gielchinsky*, 126 N.J. 361, 373, 599 A.2d 149 (1991).** The plaintiff in this medical malpractice case consulted an expert who opined that no malpractice had occurred. The expert then testified for the defendant at trial. The jury found for the defendant and the Supreme Court affirmed. Supreme Court found that although the expert should not have been permitted to testify for the defense, there was no abuse of discretion because no precedent existed to dictate the trial court's decision. The opinion stated, however, "in the absence of exceptional circumstances, as defined under *Rule* 4:10-2(d)(3), courts should not allow the opinion testimony of an expert originally consulted by an adversary."

***Snyder v. Mekhjian*, 125 N.J. 328, 593 A.2d 318 (1991).** A patient brought suit alleging that he became infected with AIDS as a result of a transfusion of contaminated blood. The court allowed plaintiff access to donor information under court supervision despite the confidentiality of such records.

***Rivard v. American Home Prods.*, 391 N.J. Super. 129, 917 A.2d 286 (App. Div. 2007).** Discovery issues were raised in these vaccine injury cases. Defendants claimed attorney-client and work product privileges as to documents plaintiff sought to have produced. The trial court appointed a special master to review the documents and rule on the privilege issues. Defendants took exception to some of the master's findings. The trial court held that it was the defendants' responsibility to raise specific objections to each ruling before the court or seek a stay of production of certain documents. While criticizing the trial court's over-reliance on the master's rulings, the Appellate Division affirmed the trial court on the issue.

***In re A Grand Jury Subpoena (Galasso)*, 389 N.J. Super. 281, 913 A.2d 78 (App. Div. 2006).** The attorney for a social club was subpoenaed to testify before a grand jury in connection with alleged gambling activity at the club. He moved to quash the subpoena on grounds of attorney-client privilege. The prosecution opposed the motion with an ex parte certification that was examined by the court in camera. The trial court ordered the attorney to testify and refused to allow access to the ex parte certification. The Appellate Division affirmed. The attorney must appear for testimony, but could claim privilege to specific questions. The trial judge had the discretion to accept the ex parte certification.

***Wylie v. Mills*, 195 N.J. Super. 332, 478 A.2d 1273 (Law Div. 1984).** Plaintiff was involved in an automobile accident in the course of his employment. His employer investigated the incident for the purpose of improving safety procedures. Other parties sought to obtain the report of that investigation through discovery. The court held that factual information was discoverable but that the "evaluative" portions were not, citing the privilege of self-critical analysis.

***Jenkins v. Rainner*, 69 N.J. 50, 350 A.2d 473 (1975)** (defendant ordered to turn over to

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plaintiff copy of surveillance film taken of plaintiff).

***Costanza v. Costanza*, 66 N.J. 63, 328 A.2d 230 (1974)** (party who refuses to testify at depositions due to self-incrimination privilege forfeits right to testify at trial).

***Halbach v. Christopher Boyman & Boyman & Assocs., P.C.*, 377 N.J. Super. 202, 872 A.2d 120 (App. Div. 2005)** (legal theories formulated by attorney for himself have same work product privilege as those for client).

***Christy v. Salem*, 366 N.J. Super. 535, 841 A.2d 937 (App. Div. 2004)** (plaintiff sought hospital's peer review report in medical malpractice case; Appellate Division ordered that only factual portions are discoverable).

***Kinsella v. Welch*, 362 N.J. Super. 143, 827 A.2d 325 (App. Div. 2003)** (unused videotape by defendant news organization is protected by Shield Law (NJS 2A:84A-21 *et seq.*), except for portions it planned to use at trial).

For additional cases, *see* N.J. Ct. R. 4:10-2 at www.lexis.com.

4:10-3 Protective orders

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

(a) That the discovery not be had;

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

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

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

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

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

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

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

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

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a proper showing pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

Note: Source—R.R. 4:20-2. Former rule deleted (see R. 4:14-3(a)) and new R. 4:10-3 adopted July 14, 1972 to be effective September 5, 1972 (formerly R. 4:14-2); paragraph (e) amended July 29, 1977 to be effective September 6, 1977; amended July 27, 2006 to be effective September 1, 2006.

¶ 4:10-3.01 Bochet's Practice Tips to Rule 4:10-3

Strategic Point: N.J. Ct. R. 4:10-3(e), (f), (g) and (h) are exceptions to the overall policy that court proceedings be open and that records not be sealed. N.J. Ct. R. 1:2-1. These paragraphs protect information divulged during the course of discovery from being revealed to anyone other than persons specified by court order. Protective orders are used most frequently to protect trade secrets, preserve confidentiality and ensure privacy.

Strategic Point: Counsel should take affirmative action to restrict discovery rather than objecting and awaiting enforcement by the adversary under N.J. Ct. R. 4:23 (prescribing sanctions for failure to comply with discovery requests). The advantages of a proactive motion are as follows:

1. By seeking the Court's attention, the party conveys the importance of the issue.
2. The moving party controls the timing and the relief sought.
3. There is an unstated implication of obstruction and/or delay in a mere objection. A motion pursuant to N.J. Ct. R. 4:10-3 puts the adversary on the defensive to justify the discovery request.
4. The risk of exposure to N.J. Ct. R. 4:23 sanctions for failure to make discovery is diminished.

Warning: Product manufacturers frequently insist upon consent to protective orders before providing documentary evidence, particularly with regard to internal safety studies of their products. Counsel are advised not to execute boilerplate consent orders, as they have implications throughout the case, including that protected material may later be attached to court documents, becoming part of public records and potentially revealing confidential information. Thereafter, there is risk of having the material subpoenaed by

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outside parties and inadvertent revelation. If an order cannot be negotiated with reasonable conditions, the best course of action is a motion to compel the discovery.

Exception: N.J. Ct R. 4:10-3 provides that a non-party to litigation may intervene to challenge a protective order or equivalent stipulation. This provides the non-party a means to obtain the information without a party having to violate the order.

¶ 4:10-3.02 Bochet's Annotations to Rule 4:10-3

***Estate of Frankl v. Goodyear*, 181 N.J. 1, 853 A.2d 880 (2004).** Plaintiffs were passengers in a vehicle involved in a rollover accident, allegedly caused by defective tires made by defendant. The parties entered into a consent order pertaining to the confidentiality of certain documents to be produced by defendant in discovery. A dispute arose and the parties moved for a ruling on the confidentiality of certain documents. A consumer safety organization moved to intervene and sought access to the documents. The Supreme Court affirmed the Appellate Division's denial of access. The court held that a protective order under N.J. Ct. R. 4:10-3 is a "procedural device" for protection of documents in discovery. The order does not confer upon the public a right to access to unfiled documents.

***Hammock by Hammock v. Hoffman La Roche*, 142 N.J. 356, 662 A.2d 546 (1994).** In this products liability suit, defendants sought a protective order to prevent access to trade secrets and other allegedly proprietary information. The trial court and Appellate Division found that most of the documents discovered in plaintiff's medical malpractice action should remain under seal. The Supreme Court reversed this holding, stating that policies favor public access except where denial of access is necessary to preserve trade secrets or privileged information.

***Gero v. Cutler*, 66 N.J. 443, 332 A.2d 593 (1975).** Plaintiff proceeded to trial in this personal injury case without the testimony of his surgeon. The surgeon could not appear and plaintiff's attorney sought to arrange a deposition. Defendant's attorney refused to cooperate, forcing plaintiff to unsuccessfully move to allow the deposition. Reversing the trial and appellate courts, the Supreme Court found the denial of plaintiff's motion was error and that defendant's attorney should have voiced his objection by a motion for a protective order pursuant to N.J. Ct. R 4:10-3.

***Kerr v. Able Sanitary & Envtl. Servs.*, 295 N.J. Super. 147, 155 (App. Div. 1996)** (appropriate means to object to deposition is motion for protective order under N.J. Ct. R 4:10-3, not motion to quash).

***Llerena v. J.B. Hanauer & Co.*, 368 N.J. Super. 256, 268, 845 A.2d 732 (Law Div. 2002)** (controlled access to confidential settlement agreement of related sexual harassment case).

For additional cases, *see* N.J. Ct. R. 4:10-3 at www.lexis.com.

4:10-4 Sequence and timing of discovery

Unless the court upon motion, for the convenience of parties and witnesses

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and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not, of itself, operate to delay any other party's discovery.

Note: Former rule deleted (see R. 4:16-1) and new R. 4:10-4 adopted July 14, 1972 to be effective September 5, 1972.

¶ 4:10-4.01 Bochet's Practice Tips to Rule 4:10-4

⊠ **Strategic Point:** Although discovery may be conducted in any sequence, depositions, governed by N.J. Ct. R. 4:11, are best reserved for a time after answers to interrogatories (N.J. Ct. R. 4:17) and document production responses (N.J. Ct. R. 4:18) have been received. The responses provide the factual details which should be explored at depositions and they are useful tools for deposition preparation.

Exception: Interrogatories must be served within a prescribed period at the outset of the case. N.J. Ct. R. 4:17-1. Uniform interrogatories—a set of inquiries that must be propounded in certain types of actions—are automatically deemed served when an applicable action is commenced or joined. N.J. Ct. R. 4:17-1(b)(2).

¶ 4:10-4.02 Bochet's Annotations to Rule 4:10-4

***Posta v. Chung-Loy*, 306 N.J. Super. 182, 199, 703 A.2d 368 (App. Div. 1997).** A medical malpractice plaintiff appealed from dismissal of his claim. Among the contentions was that the trial court abused its discretion in setting dates for depositions of defendant's expert and submission of a responding expert report from plaintiff. The Appellate Division disagreed, finding the order was permissible under N.J. Ct. R 4:10-4 and the plaintiff was given adequate time.

***Dick v. Atlantic City Medical Center*, 173 N.J. Super. 561, 565, 414 A.2d 995 (Law Div. 1980).** A medical malpractice defendant refused to appear for his deposition until he was served with plaintiff's expert report. The court found that there is no particular order for discovery and therefore defendant's refusal was not justified. Counsel may pursue methods of discovery as they deem appropriate.

For additional cases, *see* N.J. Ct. R. 4:10-4 at www.lexis.com.

4:10-5 Objections to admissibility [Deleted]

Note: Source-R.R. 4:16-5. Deleted July 14, 1972 to be effective September 5, 1972.

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4:10-6 Effect of taking or using depositions [Deleted]

Note: Source-R.R. 4:16-6. Deleted July 14, 1972 to be effective September 5, 1972.

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RULE 4:11 DEPOSITIONS BEFORE ACTION OR PENDING APPEAL OR FOR USE IN OTHER JURISDICTIONS

4:11-1 Before action

(a) Petition. A person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents pursuant to R. 4:18-1 may file a verified petition, seeking an appropriate order, entitled in the petitioner's name, showing: (1) that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; (2) the subject matter of such action and the petitioner's interest therein; (3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; (4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and (6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof. The court may also grant a pre-complaint petition for depositions filed pursuant to this rule by a person asserting that due to extraordinary circumstances, which shall be explained in detail by affidavit, such depositions are necessary to enable compliance with N.J.S.A. 2A:53a-27 to -29 (Affidavit of Merit Statute).

(b) Notice and Service. At least 20 days before the date of hearing the petitioner shall serve upon each person named in the petition as an expected adverse party, in the manner provided by R. 4:4-4 and R. 4:4-5(a), a notice, with a copy of the petition attached, stating the time and place of the application for the order described in the petition. If it appears to the court after diligent inquiry that such service cannot be made, the court may order service by publication or otherwise, and shall appoint an attorney to represent persons so served, who, if such persons are not otherwise represented, may cross-examine the deponent. Such attorney's compensation may be fixed by the court and charged to the petitioner. The provisions of R. 4:26-2 apply if any expected adverse party is a minor or mentally incapacitated person.

(c) Order and Examination. If the court finds that the perpetuation of the

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testimony or evidence or the inspection may prevent a failure or delay of justice, it shall make an order designating or describing the evidence to be preserved, or the documents or property to be inspected or the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions or inspection may then be taken in accordance with these rules; and the court may make such orders as are provided for by R. 4:18 and R. 4:19.

(d) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or of the state in which it is taken, it may, in accordance with the provisions of R. 4:16-1 and R. 4:16-2, be used in any action between the same parties or their privies involving the same subject matter, which is subsequently brought in any court of this State having cognizance thereof.

Note: Source—R.R. 4:17-1. Paragraphs (c) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 12, 2002 to be effective September 3, 2002.

¶ 4:11-1.01 Bochet's Practice Tips to Rule 4:11-1

Strategic Point: N.J. Ct. R. 4:11-1 sets forth the conditions under which discovery can be obtained prior to the filing of a lawsuit. The scope of discovery that can be sought prior to filing includes not only depositions but preservation of physical evidence, inspection of property, copying of documents, as well as oral depositions of the petitioner and others.

¶ 4:11-1.02 Bochet's Annotations to Rule 4:11-1

***In re Hall by and through Hall*, 147 N.J. 379, 393, 688 A.2d 81 (1997).** Prospective medical malpractice plaintiffs petitioned for pre-litigation depositions to obtain facts upon which to base an affidavit of merit pursuant to the Affidavit of Merit Statute. N.J.S. 2A:53A-26 *et seq.* Although the issue was mooted by the filing of a complaint, the Appellate Division ruled that N.J. Ct. R. 4:11-1 did not authorize the discovery sought. The Supreme Court neither affirmed nor reversed due to the mootness of the issue. It did, however, authorize trial courts to grant petitions for pretrial discovery in malpractice cases, if it is essential.

***Johnson v. Grayce Tighe, Inc.*, 365 N.J. Super. 237, 839 A.2d 49 (App. Div. 2003).** The plaintiff estate sought pre-litigation depositions of witnesses who had knowledge of the service of alcohol to plaintiff's decedent prior to his motorcycle accident. Plaintiff obtained an order in the Chancery Division premised upon a need to determine whether a dram shop action could be filed on behalf of the estate. The Appellate Division reversed,

holding N.J. Ct. R. 4:11-1 provides the only reasons and methods for obtaining pre-suit depositions The rule does not provide for depositions for prospective plaintiffs to obtain facts necessary to prepare a cause of action.

***Gilleski v. Community Med. Center*, 336 N.J. Super. 646, 765 A.2d 1103 (App. Div. 2001).** The plaintiff was hurt when a chair collapsed at the defendant's hospital. Although her husband called to complain about the unsafe chair after the accident, the hospital discarded the chair. Plaintiff and her husband sued the hospital for negligence, as well as negligent spoliation of evidence. The jury found that the hospital was negligent in discarding critical evidence concerning the plaintiff's claim. The Appellate Division reversed the judgment. The defendant owed no duty to preserve the chair under the circumstances. The court pointed out that the plaintiff could have sought relief under N.J. Ct. R. 4:11-1(a) for an order to preserve the chair.

***Sturm v. Feifer*, 186 N.J. Super. 329, 452 A.2d 686 (App. Div. 1982).** Plaintiffs anticipated a will contest upon the death of their late father's wife and feared that at the time of their stepmother's death, the only witnesses to her will would also be deceased. They petitioned for discovery in anticipation of a will contest, seeking depositions to perpetuate the testimony of the defendant wife and two witnesses. The Appellate Division reversed the denial of their petition in the court below, saying that the trial court abused its discretion in barring depositions to perpetuate testimony of the sole witnesses to events surrounding the wills.

For additional cases, *see* N.J. Ct. R. 4:11-1 at www.lexis.com.

4:11-2 Pending appeal

If an appeal has been taken from a trial court judgment or before the taking of such an appeal if the time therefor has not expired, the trial court, on motion, may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further trial court proceedings. The motion shall show the names and addresses of the persons to be examined, the substance of the testimony which is expected to be elicited from each, and the reasons for perpetuating their testimony. If the court finds that perpetuation of the testimony may prevent a failure or delay of justice, it may make an order allowing the depositions to be taken and may make such orders as are provided for by R. 4:18-1 and R. 4:19. Depositions so taken may be used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

Note: Source—R.R. 4:17-2. Amended July 7, 1971 to be effective September 13, 1971.

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VER: [SC_01444-Local:20 Dec 07 15:59]**[MX-SECNDARY:** 22 Nov 07 13:59]**[TT-:** 07 Dec 07 14:50 loc=usa unit=01461-ch0003] **0**

¶ 4:11-2.01 Bochet's Practice Tips to Rule 4:11-2

[RESERVED]

¶ 4:11-2.02 Bochet's Annotations to Rule 4:11-2

***Sturm v. Feifer*, 186 N.J. Super. 329, 333, 452 A.2d 686 (App. Div. 1982)** (rules set forth in N.J. Ct. R 4:11-1 *et seq.* are to be liberally construed).

For additional cases, *see* N.J. Ct. R. 4:11-2 at www.lexis.com.

4:11-3 Perpetuation of testimony

R. 4:11-1 and R. 4:11-2 do not limit the court's power to entertain an action to perpetuate testimony or to enter an order in any pending action for the taking of a deposition to perpetuate testimony.

Note: Source—R.R. 4:17-3. Amended July 26, 1984 to be effective September 10, 1984.

¶ 4:11-3.01 Bochet's Practice Tips to Rule 4:11-3

⊠ **Strategic Point:** N.J. Ct. R. 4:11-3 is a catch-all rule, permitting the court to exercise discretion in permitting a deposition to perpetuate testimony outside of the circumstances given in N.J. Ct. R. 4:11-1 and N.J. Ct. R. 4:11-2. Such discretion may be exercised when, for example, a witness is about to die or leave the jurisdiction.

¶ 4:11-3.02 Bochet's Annotations to Rule 4:11-3

***Davila v. Cont'l Can Co.*, 205 N.J. Super. 205, 500 A.2d 721 (App. Div. 1985).** An injured worker filed a products liability suit against an unidentified saw manufacturer and its distributor using fictitious names. The plaintiff's employer, otherwise immune under the workers' compensation defense, was named as a defendant for discovery purposes. The Appellate Division upheld the trial court's denial of defendant employer's motion for dismissal, stating that the employer's participation was plaintiff's only way to pursue a remedy, and that defendant would properly be dismissed following completion of discovery. This course of action is permissible under N.J. Ct. R. 4:11-3.

For additional cases, *see* N.J. Ct. R. 4:11-3 at www.lexis.com.