SUBCOMMITTEE ON THE OFFER OF JUDGMENT RULE
DRAFT REPORT, PROPOSED AMENDMENTS, AND RECOMMENDATIONS
Supplemental Report - August 2021

This Supplemental Report includes an additional Part III, featuring illustrations of how the Proposed Rule would operate in practice. The Supplemental Report also includes updates to the text of Proposed Rule 4:58-4(b)(1)(E) as had been previously submitted to the Committee, made for the purpose of clarity. The balance of the Report remains as submitted in April 2021.

At the October 22, 2020 Meeting of the Civil Practice Committee, New Business Item **F. Proposed Amendments to *Rule* 4:58** was assigned to the Subcommittee on the Offer of Judgment Rule ("the Subcommittee"). The Subcommittee was convened, in part, to address an ambiguity in the context of a global offer to multiple defendants in the Offer of Judgment Rule. As the Court observed in Willner v. Vertical Reality, Inc., "the rule leaves unclear the circumstances triggering the imposition of sanctions on an individual defendant when a single plaintiff makes a global offer to multiple defendants, there is no acceptance of the offer, and no counteroffer is made in response." 235 N.J. 65, 82-83 (2018).

The Subcommittee includes Assignment Judge Michael A. Toto (Middlesex); Presiding Judge Joseph P. Quinn (Monmouth); Hon. Michael F. O'Neill (Hunterdon); Hon. Jean S. Chetney (Salem); Barry J. Muller, Esq. (Fox Rothschild, LLP); Amos Gern, Esq. (Starr, Gern, Davison & Rubin, PC); Robert B. Hille, Esq. (Greenbaum Rowe Smith & Davis, LLP); Herbert Kruttschnitt, III, Esq. (Dughi, Hewit & Domalewski, PC); Jonathan H. Lomurro, Esq. (Lomurro Munson Comer Brown & Schottland); and Deborah L. Mains, Esq. (Costello & Mains, LLC).

In this Draft Report, the Subcommittee proposes a series of amendments designed to address ambiguities in the Rule, particularly in the area of multiparty litigation.

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PART I: BACKGROUND & HISTORY OF OFFER OF JUDGMENT RULE, SUBCOMMITTEE

A. Background and History of the Offer of Judgment Rule

Broadly speaking, Rule 4:58, the Offer of Judgment Rule, is designed to promote settlement by shifting litigation expenses incurred when a party unreasonably declines a settlement offer. Initially modeled on Federal Rule of Civil Procedure 68, R. 4:58 now departs in major ways from the Federal Rule. For example, only defendants can make offers of judgment under F.R.C.P. 68, whereas plaintiffs can make offers of judgment under R. 4:58. Also, under F.R.C.P. 68, attorneys' fees are recoverable only if a statute defines such fees to be part of the costs, whereas attorneys' fees are recoverable under R. 4:58 without any such limitation.

Before 1994, R. 4:58 had scant impact because it capped attorney's fees at $750. A 2000 amendment allowed for the recovery of "all reasonable litigation expenses," such as discovery expenses and expert fees, "incurred following non-acceptance" of the offer. With these two amendments, use of R. 4:58 increased, and fears arose that it would undermine the traditional, Federal Rule.

At various points in the early 2000s, the Civil Practice Committee seriously considered eliminating R. 4:58. At the time, R. 4:58 was criticized as functioning "mainly as a good weapon for defense counsel." Memorandum of Suzanne Goldberg 1 (October 27, 2005) (internal quotations and citations omitted). Commentators authored reports favoring retention or abolition of the Rule. Judge Jack M. Sabatino wrote a separate report calling for "an empirical study of the Rule's present application," and specifically proposed that "a segment of civil litigators[,] perhaps the roster of certified civil trial lawyers," be canvassed with "a questionnaire that asks them about their experiences with the Rule." Separate Report of Judge Sabatino on the Offer of Judgment Rule.

The Rule was not abolished. Instead, it was amended in 2006 to include both an "undue hardship" exception and an exception where a fee allowance "would conflict with the policies underlying a fee-shifting statute or rule of court."

Other amendments have addressed more specific issues, including the Rule's application in multi-defendant cases (2000), the elimination of the dichotomy between liquidated and unliquidated damages (2004), and the Rule's application in uninsured and underinsured motorist cases (2016).

B. The 2015-2016 Rules Cycle and Proposals by NJ PURE

During the 2015-2016 rules cycle, the Civil Practice Committee decided to reexamine of the Offer of Judgment Rule, including the Rule's long-standing feature that insulated plaintiffs from fee-shifting in no-cause-verdict situations. A Subcommittee formed to comprehensively review R. 4:58 and to review submissions by Eric Poe, Chief Complex Claims Litigation Officer of New Jersey Physicians United Reciprocal Exchange ("NJ PURE") and the Chief Operating Officer of CURE Auto Insurance. NJ PURE set forth suggested amendments to R. 4:58 in multi-defendant litigation, seeking significant changes that would make R. 4:58 more widely applicable. Poe's Memorandum identified four perceived "major concerns" with the language of the Rule as written:

> (1) [T]he language of the OOJ Rule did not fairly apply to both plaintiffs and defendants and resulted in defendants not getting equal protection under the OOJ Rule;
>
> (2) [T]he use of the word "nominal" in the rule causes confusion and ambiguity in the application of the rule when there is a nominal damages award, thus preventing a defendant from recovering fees;
>
> (3) [T]he "undue hardship" exception allows judges to avoid awarding counsel fees and costs if such an exception would prevent plaintiffs from recovering anything, and even having to pay out of pocket to a defendant, thus rendering the penalty under the rule without consequence; and
>
> (4) [T]he application of the OOJ Rule in a multi-defendant litigation is precluded when the offering defendant is less culpable than its co-defendants as there is no provision for a pro rata calculation of the offering defendant's determined liability.

In-depth discussion of these issues, however, was ultimately deferred until the following rules cycle.

C. 2017-2018 Rules Cycle, 2018 Report of the Subcommittee on the Offer of Judgment Rule

In 2017-2018, the Subcommittee reconvened, ultimately drafting a Report whose findings were adopted in the Civil Practice Committee's 2018 Report. The Civil Practice Committee noted that there have long been calls to completely abolish R. 4:58. The Committee recognized, however, that because the Rule is designed to foster settlement, instances where it worked as designed to

produce settlement were unlikely to come to the attention of outside observers. Indeed, even in instances where R. 4:58 failed to produce settlement, litigation expenses might be imposed without controversy under the Rule. More than with other Rules, a focus on written judicial opinions would provide a distorted view of the efficacy of the Rule, exaggerating its costs and hiding its benefits.

Accordingly, the Committee undertook the sort of empirical analysis Judge Sabatino suggested a dozen years earlier. The Subcommittee on the Offer of Judgment Rule prepared another survey and mailed it to certified civil trial attorneys. The Presiding Civil Judges of every county also distributed the survey in their courtrooms for attorneys to complete during Monday morning calendar calls and provided the survey to trial judges for distribution among attorneys in the various civil courtrooms. One hundred and thirty-six (136) attorneys responded. Eighty-nine (89) identified themselves as primarily plaintiffs' attorneys, thirty-six (36) as primarily defendants' attorneys, and eleven (11) identified as both.

The survey's most significant finding was that, among cases in which reporting attorneys served offers of judgment and which ultimately settled, fifty-six percent (56%) believed that the offers of judgment were factors leading to settlement. Similarly, if less dramatically, among cases in which reporting attorneys *received* an offer of judgment and which ultimately settled, thirty-four percent (34%) believed that the offers of judgment were factors leading to settlement. In other words, a majority of those surveyed who had served offers of settlement believed those offers were factors leading to settlement, and about a third of those surveyed who had received offers believed the same.

These results suggested that the Offer of Judgment Rule promoted settlement in a significant number of cases. While a review of judicial opinions would not reveal that impact, a survey of lawyers did. With the survey results as a guide, the Subcommittee recommended that the Offer of Judgment Rule not be abolished. The Committee declined to amend the rule, but stated:

> The Committee determined that there should be a reexamination of the offer of judgment rule, including the Rule's long-standing feature that plaintiffs should be insulated from fee-shifting in no-cause verdict situations. A subcommittee was formed to take a comprehensive review of *Rule* 4:58.

This issue was ultimately deferred until the next rules cycle.

D. Willner Decision

Issues concerning R. 4:58 in the context of multi-party litigation arose shortly thereafter. In Willner v. Vertical Reality, Inc., Plaintiff Josh Willner was injured while climbing a rock wall owned by his employer, Ivy League Day Camp. 235 N.J. 65, 69 (2018). Willner sued the Camp and the entities that manufactured the wall and its parts, Vertical Reality, Inc. and ASCO Numatics, respectively, alleging strict products liability claims and negligence. Id. Before trial, Willner made a single offer of judgment to the defendants under R. 4:58 in the amount of $125,000. Id. No defendant accepted the offer or counteroffered. Id. A jury ultimately returned a verdict in favor of Willner, awarding him $358,000, and assigning Numatics thirty (30) percent of the liability and Vertical Reality seventy (70) percent. Id. The judge then granted Willner's motion for attorney's fees and costs under R. 4:58. Id. Numatics appealed, among other things, the judge's award of attorney's fees and costs under R. 4:58. Id. at 70.

On appeal, the New Jersey Supreme Court concluded that the effect of the Rule, and how it should operate in a multi-defendant joint and several liability situation, was "unclear." Id. at 85. Focusing on R. 4:58-4(b), the Court held that mandating a defendant in a multi-defendant case to consider a global offer of judgment that was more than its share was unfair, and directed that the Rule must balance plaintiffs' and defendants' competing interests. Id. at 84-85. However, the Court did not provide any explanation as to how to achieve that "balance." See id. Also, while the Court ruled in Numatics' favor on the fee-shifting issue, the Court left unresolved whether advance notice of the Rule's consequences to a defendant, regarding that defendant's failure to accept a global offer, would permit fee shifting under R. 4:58. See id. at 85. Willner did not refer these issues to the Civil Practice Committee so they could be addressed.

E. Current Evaluation

At the October 22, 2020 Meeting of the Civil Practice Committee, New Business Item F. Proposed Amendments to R. 4:58 was assigned to the Subcommittee on the Offer of Judgment Rule ("the Subcommittee"). This Subcommittee's current examination of the Offer of Judgment Rule was prompted in part by the Willner decision and the renewal of proposed amendments from NJ PURE in the wake of that decision. Poe and NJ PURE renew their proposal previously considered and rejected by the Committee, and ultimately by the Court in the 2017-2018 rules

cycle. The excerpt setting forth the Committee's decision, as well as the Offer of Judgment Subcommittee report, are appended to this Report as part of Poe's February 21, 2020 letter to the Civil Practice Committee.

In its discussions, the Subcommittee, as it expressed in its 2018 Draft Report, has maintained that R. 4:58 has settlement benefits, and that perceived shortcomings in the Rule should be addressed through amendment rather than abolition. Several members of the Subcommittee proposed working drafts of an amended Rule, which formed the basis for the group's discussion. After additional discussion and revisions, a draft of the Rule was submitted to the Subcommittee for approval. Part II of this Draft Report contains the full drafted Rule, as well as itemized analysis and commentary on the Rule's provisions.

PART II: PROPOSED AMENDMENTS TO R. 4:58 AND DISCUSSION

A. Proposed R. 4:58: As Completed

The following is the Subcommittee's completed, unabridged proposal for R. 4:58:

Rule 4:58-1. Time and Manner of Making and Accepting Offer

(a) Except in a matrimonial action or action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.

(b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

(c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court. An offer voluntarily withdrawn by the offeror shall not be subject to this Rule.

Rule 4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that

such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Rule 4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2.

(b) A favorable determination qualifying for allowances under this rule is a judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Rule 4:58-4. Multiple Claims; Multiple Parties

(a) Per Quod and Derivative Plaintiffs. If a party joins as plaintiff for the purpose of asserting a *per quod* claim or if one or more plaintiffs seek a claim that is derivative of the claim of another plaintiff, the claimants may make a single unallocated offer. Otherwise, multiple claimants may file and serve any offer individually.

(b) Multiple Defendants. Where there are multiple defendants, offers shall be made as follows:

(1) **Global Offer.** Claimant may make a global offer to multiple defendants. If claimant obtains a money judgment in an amount that is 120% of the global offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, those allowances as prescribed in R. 4:58-2(a). In such case, the assessment of costs and fees shall be applied as follows:

(A) **No Response.** When there is a rejection of, or no response to, plaintiff's global offer, each defendant will be jointly and severally responsible for the entire allocation set forth pursuant to R. 4:58.

(B) **Global Counteroffer.** When there is a global counteroffer from defendants and plaintiff obtains a favorable determination qualifying for allowances under this rule, each defendant will be responsible for the portion of expenses and fees equal to the percentage that they were individually adjudicated responsible. Subject to R. 4:58-3(c), in the event the defendants obtain a global favorable determination, plaintiff will be responsible for the expenses and fees payable pro rata to each defendant in accordance with that defendant's proportionate share of the Offer.

(C) **Counteroffer to Claimant's Global Offer by One Defendant.** When a single defendant makes a counteroffer to a global offer, it shall be treated as a counteroffer limited to that defendant's share.

a. If that defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If that defendant's final adjudication is greater than 120% of their counteroffer, they should be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(D) **Counteroffers by Multiple but not All Defendants.** When multiple defendants individually make a counteroffer representing only their individual share of responsibility, they shall indicate that.

a. If any responsive individual defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If any responsive individual defendant's final adjudication is greater than 120% of their counteroffer, they shall be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(E) **All Defendants Respond Individually.** When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed 100% of allowances. The allowances will be assessed based on their adjudicated percentage share of responsibility of the allowances and the combination of the remaining defendants must equal 100% of the allowances. However, if all defendants have individually offered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment but 120% of the combined counteroffer amount is less than the

claimant's global offer, then each defendant will be responsible for the portion of expenses and fees equal to the percentage that the defendant was adjudicated responsible.

(2) **Defendants Against Whom No Joint and Several Judgment Is Sought.** If there are multiple defendants and there are defendants against whom no joint and several judgment is sought, claimant may file and serve individual offers on those defendants against whom no joint and several judgment is sought as prescribed by this rule. Similarly, those defendants against whom no joint and several judgment is sought may file and serve individual offers as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be and subject to the provisions of this rule.

(3) **Individual Offer.** If there are multiple defendants, individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

Rule 4:58-5. Application for Fee; Limitations

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

Rule 4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

Rule 4:58-7. Acceptance of Offer Not Deemed a Judgment; Payment of Accepted Offer

(a) Except as provided for in (b), acceptance and payment of an offer under R. 4:58 will not be deemed a judgment against the offeree and will not require the filing of a Warrant of Satisfaction.

(b) Absent leave of court, or the agreement of the offeror and offeree, full payment of the accepted offer shall be made within 30 days after the date of service of notice of acceptance. Within 7 days of full payment, the offeror and the offeree shall file a Stipulation of Dismissal With Prejudice as to all claims that are the subject of the accepted offer. If full payment is not made within 30 days, then

the party entitled to receive payment may (i) withdraw its offer or acceptance, or (ii) apply for relief consistent with R. 1:6-2(a) for entry of final judgment. The court shall award reasonable expenses, including reasonable fees and costs for the application for final judgment unless the court finds that the failure to make payment was substantially justified or that other circumstances make an award of expenses unjust.

B. Proposed R. 4:58: As Amended, with Discussion

This Section contains the Subcommittee's completed proposal for R. 4:58 with discussion.

Rule 4:58-1. Time and Manner of Making and Accepting Offer

(a) Except in a matrimonial action or action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.

(b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counteroffer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

(c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court. An offer voluntarily withdrawn by the offeror shall not be subject to this Rule.

With the exception of a matrimonial action, Special Civil action, or those where the relief is not solely monetary in nature, ***any party*** *prior to twenty days before the actual trial date may file with the court and serve on* ***any adverse party*** *an offer (1) to take a specified sum as a monetary judgment including costs if the claimant or (2) against it if it is the party responding to a monetary claim such as a defendant or plaintiff defending a counterclaim. R. 4:58-1(a).*[1] *While the Rule says the offer is without prejudice, it does not specify to what. Because the term is not defined in the Rule, it is presumed the offer is "without prejudice" to proving all claims or defenses and to making a subsequent offer under the Rule and not to*

[1] The Rule only says costs. The question of whether to include a prevailing party's entitled court costs was raised but not answered in Kas Oriental Rugs Inc. v. Ellman, 407 N.J. Super. 538, 554 (App. Div.), cert. denied, 200 N.J. 476 (2009) and Comment 2. Perhaps a reference to R. 4:42-8: Whether to define costs should be considered.

the ability to withdraw at any time. That meaning would convert the Rule primarily to a fee-shifting tool against its purpose. Therefore, clarification of that term might be advisable. Further, it may be prudent to clarify within R. 4:58 that it is inapplicable in Special Civil Part matters. See Bandler v. Maurice, 352 N.J. Super. 158, 165 (App. Div. 2002).[2]

An offer is deemed withdrawn if it is not accepted by the earlier of the actual trial date or 90 days of its service. R. 4:58-1(b). If deemed withdrawn, an offer is only admissible in a post-trial proceeding to fix costs, interest, and attorney's fee. Id. An offer is accepted by serving the offer and filing with the court a notice of acceptance. A new offer may be made in the same or another amount or as specified in the offer, but the new offer constitutes a withdrawal of the prior one.[3] *Id.*

The Rule is silent as to whether the offer can be withdrawn prior to its expiration period under the Rule, and there are conflicting trial-level decisions on the issue. See Estate of Okhotnitskaya, ex rel. Gazarkh v. Lezameta-Benalcaz, 400 N.J. Super. 340, 348-349 (Law Div. 2007) (suggesting that an offer cannot be withdrawn except as under the Rule, where defendants accepted an offer within the ninety-day window, despite plaintiff's effort to confirm an arbitration award that fell within that window), but see Order Denying Motion for Reconsideration, Li v. McNay, ESX-L-8096-16 (Law Div. Jul. 6, 2018)(attached hereto) (limiting the holding of Estate of Okhotnitskaya to its unique facts and leaving open the question of whether an offer can be withdrawn prior to its expiration).

Under the existing Rule, it appears that an offer cannot be withdrawn by the party making it unless (1) it is accepted, (2) the time under the Rule expired, or (3) a new offer is made. The rationale behind the prohibition on withdrawal does not make sense given the fact that an offeror can withdraw the prior offer automatically by simply making a new offer. The current prohibition on withdrawal could result in the filing of a new offer for the sole purpose of withdrawing the former offer. Under the current rule, an attorney may not be savvy enough to know that even though the offer cannot be withdrawn, the attorney can simply file a new offer for an amount that would never be accepted, but would accomplish the withdrawal of the offer. The proposed amendment eliminates this anomaly.

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[2] Noting "some ambiguity respecting Part IV applicability" in the Special Civil Part, the comments to R. 6:1-1 specify that the Offer of Judgment rule is inapplicable in that context, citing Bandler for support. Pressler, Current N.J. Court Rules, comment 1 on R. 6:1-1 (2021).

[3] The Rule is silent as to what "or as specified therein" means as to a new offer. R. 4:58-1(b). A counteroffer will not affect the viability of the original offer. That will remain open until accepted or withdrawn. Nor will a second offer negate the first and the date of that first offer will control. See Comment 2 and Palmer v. Kovacs, 385 N.J. Super. 419, 427 (App. Div.), cert. denied, 188 N.J. 356 (2006). In Palmer, plaintiff made an offer that was not accepted under the Rule and later made another offer that was not accepted. The verdict was more than 120% of both offers. In using the date for the first offer as the trigger for the Rule's allowances, the court noted the Rule is designed to promote early settlement and creates a disincentive to reject reasonable offers and requires a recipient to act in a prompt fashion. Subsequent offers promote settlement but giving the recipient a second chance with a late offer should not deprive the effect of the first offer that was rejected under the Rule.

The last sentence of subsection (b) comports with the Rule's purpose of promoting settlement and discouraging its use as a fee shifting tool. See Comments 1 and 3 to R. 4:58-1 et seq., Willner v. Vertical Realty, Inc., 235 N.J. 65, 81 (2018) (as to fundamental purpose to induce settlement); Frigon v. DBA Holdings Inc., 346 N.J. Super. 352 (App. Div. 2002) (fee-shifting use in derogation of Rule); see also R. 4:58-3 and Comment 5 (concerning how the Rule seeks to avoid improper fee shifting use). Clarification is probably warranted here.

Rule 4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

The first part of the Rule excludes claimants in actions against an automobile insurance carrier for UM/UIM benefits. R. 4:58-2(a). For all other claimants to obtain relief under the Rule, they must obtain a money judgment of 120% of the offer or more, excluding prejudgment interest and counsel fees. R. 4:58-1(b). If they do, they ***shall be allowed****, in addition to costs of suit, (1) all reasonable litigation expenses incurred after non-acceptance, (2) pre-judgment interest of 8% inclusive of what R. 4:42-11(b) prescribes from the later of the date of non-acceptance or completion of discovery, and (3) reasonable attorney's fees compelled by the non-acceptance. R. 4:58-2(b). The timing in 4:58-2(b)(2) is designed to afford the offeree a reasonable opportunity to evaluate the offer. See Comment 2.*

In cases involving actions against automobile carriers for UM/UIM benefits, a claimant is entitled to the Rule's allowances if that claimant obtains a jury or non-jury verdict for a net monetary judgment, ***after a reduction for claimant's share of comparative negligence*** *and exclusive of prejudgment interest and counsel fees, that is 120% or more of the offer. R. 4:58-2(b).*[4]

Despite the language in the Rule, the court may refuse to grant any allowances if it would impose undue hardship to the extent of such undue hardship. R. 4:58-2(c).

Rule 4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2.

(b) A favorable determination qualifying for allowances under this rule is a judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

While Mr. Poe proposed eliminating the first three exceptions contained in R. 4:58-3(c), the Subcommittee was provided with nothing to warrant their elimination. R. 4:58-3(c) does, as written, place the claimant in a more advantageous position than the party against whom the claim is made by insulating the claimant from an allocation in the described circumstances. However, these limitations are intended to "prevent the transformation of the offer-of-judgment rule into a general fee-shifting rule." Schettino v. Roizman Development, Inc., 158 N.J. 476, 486 (1999). The inability of a defendant to take advantage of the offer of judgment rule when the plaintiff recovers nothing is also a feature of Federal Rule of Civil Procedure 68, as interpreted by the Supreme Court of the United States. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

While NJ PURE, along with some survey respondents, contend that the current Rule's "most egregious problem" is its "prohibition against a successful defendant's recovery of counsel fees and costs when a plaintiff's case is dismissed or a no-cause has been rendered." The Subcommittee was presented

[4] Language in bold here reflects the difference between the UM/UIM claimants section and that for other claimants.

with no evidence of how that limitation on the rule's applicability was subverting the Rule's stated purpose to promote settlement while also avoiding its use as a fee shifting tool to undermine the American Rule or as a devise to chill a party from exercising its right to a jury trial. Consequently, the Subcommittee does not recommend deleting the first three exceptions in R. 4:58-3(c).

The Subcommittee also chooses to retain the "undue hardship" exception in this Rule in the face of contentions that it disproportionately benefits plaintiffs' attorneys. The survey data do suggest that plaintiffs are more likely to receive at least a partial award of costs and fees, with only one defense attorney reporting success in obtaining such an award. But even if the exception has a disparate impact upon plaintiffs and defendants, this disparity may adequately be explained by the fact that plaintiffs are more likely to suffer undue hardship when forced to pay their adversary's litigation expenses. If it is suggested that trial judges are not applying a rule evenhandedly, the remedy should be appellate review, not wholesale elimination of this exception.

The Subcommittee also declines to modify the exception for cases where a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court. Some survey respondents called to amend the rule to flatly exempt certain statutory fee-shifting cases; the Subcommittee declines to adopt this change for two reasons. First, a list of such statutes risks being incomplete when drafted and will become incomplete as more such statutes are enacted. Second, the case law is clear that while "a defendant can never he awarded fees under R. 4:58 in a case involving CEPA, the PWA, or a similar fee-shifting statute," it is permissible for a trial judge to "take into account a plaintiff's unreasonable rejection of an offer of judgment in calculating plaintiffs award under such a statute." Best v. C&M Door Controls, Inc., 200 N.J. 348, 354 (2009). Changing the Rule to provide that it does not apply at all would suggest that offers in such cases are impermissible and risks being interpreted to change the governing principle that a plaintiff's unreasonable rejection of an offer of judgment can be relevant in calculating a fee award.

Rule 4:58-4. Multiple Claims; Multiple Parties

The Subcommittee's most extensive revisions pertain to R. 4:58-4, specifically in the context of multidefendant cases. Essentially, this Rule attempts to fairly apply its mechanism for inducing settlement to three complex situations. These are where there are multiple plaintiffs, multiple defendants, and multiple claims. These situations are addressed in turn:

(a) Per Quod and Derivative Plaintiffs. If a party joins as plaintiff for the purpose of asserting a *per quod* claim or if one or more plaintiffs seek a claim that is derivative of the claim of another plaintiff, the claimants may make a single unallocated offer. Otherwise, multiple claimants may file and serve any offer individually.

*R. 4:58-4(a), as written, focuses only on those who join to assert a per quod claim. In that instance, the claimants **may** make a single unallocated claim. This was a codification of Wiese v. Dedhia, 354 N.J. Super. 356, 364-65 (App. Div. 2002), aff'd. 188 N.J. 587, 590 (2006).*

*As Comment 6.2 points out, this section of the Rule addresses situations such as when spouses are joined **only** to assert a per quod claim **and** there is **no conflict between them**. Although the use of "may" suggests that these plaintiffs have the option of making separate offers, Comment 6.2 notes that the "Wiese rule" has not been extended to allow a single unallocated offer beyond the per quod context where there is no conflict. See also Jacobsen v. Dara, 430 N.J. Super. 190, 195-96 (Law Div. 2011). Therefore, in those situations, outside the permissive exception scenario contemplated under the Wiese rule as embodied in R. 4:58-4(a), the Rule suggests that individual claimants should file individual offers. Consequently, clarification may be warranted here.*

The Subcommittee's revisions to R. 4:58-4(b) are its most extensive. Below is the Subcommittee's analysis of the current rule:

*As to multiple defendants, the first part of subsection R. 4:58-4(b) focuses on the situation where a joint and several judgment is sought against them and one of the defendants offers less than its pro-rata share in response to a claimant's offer (was "less than" intended and if not, should it be removed). In that case, claimant's offer is deemed not accepted. However, the second part of R. 4:58-4(b) allows one of the multiple defendants to gain the benefits of the allowances under the rule. To do so, it must offer to take judgment against it that includes all the monetary claims by the offeror against all defendants. R. 4:58-4(b); see also Willner, supra. While R. 4:58-1 suggests that any defendant may file an offer on co-defendants, R. 4:58-4 is silent on whether a defendant can serve and file an offer for contribution against the other joint and several defendants. Confusing is the language in R. 4:58-4(b) that deems a non-acceptance of claimant's offer because one defendant (or less than all) offers in response **less than** a pro-rata share. This language raises questions.*

The first is whether by inference a claimant is required or permitted by Rules 4:58-1 and 4:58-4(b) to serve and file an offer on a claimant or in response to a claimant's offer that is based only on that party's share of claimed responsibility. If so, the next question is whether that option is equally applicable where the defendants are jointly and severally liable.

Another question is whether there are situations involving multiple defendants where some are, and some are not jointly and severally liable. Does the Rule require or permit claimant to file separate offers as to the defendants who are not jointly and severally liable and a global offer as to those who are?

Another question is, if not permitted, whether the Rule should permit joint and several defendants to make separate offers based on their share of responsibility. As a question of fairness where one or more

defendants were willing to accept their share of responsibility, should those defendants be entitled to relief from the Rule's allowances under those circumstances?

Another question is whether all defendants should be required to participate in an offer.

Comment 6.1 describes the intention of R. 4:58-4 to ***permit*** *claimant to deal exclusively with a total judgment rather than* ***require*** *acceptance of individual defendant's pro-rata shares. Because each defendant's responsibility is dependent upon the outcome as to all, the claimant is spared the risk of miscalculating the defendant's shares in accepting partial offers for less than the total value of the ultimate judgment. It also relieves the claimant from facing an empty chair defense at trial. Comment 6.1 notes that an offer by a single defendant to pay that defendant's pro-rata share should not be considered an offer proposition under the Rule. In support, Comment 6.1 cites Schettino v. Roizman Development, 310 N.J. Super. 159, 167-68 (App. Div. 1998), aff'd., 158 N.J. 476 (1999). Comment 6.1 also cites Debrango v. Summit Bancorp., 328 N.J. Super. 219, 225-26 (App. Div. 2000) and Wiese v. Dedhia, 354 N.J. Super. 356, 364-65 (App. Div. 2002), aff'd. 188 N.J. 587, 590 (2006).*

In the multiple-defendant context, Comment 6.1 notes the lack of clarity as to the circumstances that trigger the imposition of the Rule's sanctions, and references in support Willner v. Vertical Realty, Inc., 235 N.J. 65, 81-85 (2018).

Comment 6.1 also suggests that where a defendant offers to pay a pro-rata share that is 80% or less of that defendant's obligation after trial, it may be inequitable to charge that defendant with the financial consequences of R. 4:58-2. In that circumstance, Comment 6.1 presumes the court will take that defendant's offer into account when fixing the award and allocating responsibility under the Rule to respective defendants. However, R. 4:58-2(c) only limits relief to circumstances of undue hardship and not where the result to an individual defendant would be inequitable. Further, caselaw is not instructive. Therefore, clarification appears to be warranted for R. 4:58-4 generally and revision to R. 4:58-2(c) necessary to prevent inequitable results beyond undue hardship.

As a consequence of Schettino, Comment 6.1 notes the Rule was changed to allow a single defendant to gain the benefit of the OOJ allowances if it met the Rule's requirement as to total damages regardless of whether that offer was intended to represent that defendant's pro-rata share. However, Willner did not deem the Schettino decision or the Rule's language sufficient to put the defendant on notice of that consequence and to sustain allowances thereunder.

Comment 6.1 to this subsection of R. 4:58-4(b) ends by noting that the rule has been construed to require all defendants to participate in an offer to claimant citing Cripps v. DeGregorio, 361 N.J. Super. 190, 194-95 (App. Div. 2003) (holding that the OOJ Rule did not apply where two of three defendants made individual offers totaling more than plaintiff's recovery) and Finderne Mgt. Co., v. Barrett, 402 N.J. Super. 546, 581-82 (App. Div. 2008), cert. denied, 199 N.J. 542 (2009) (defendant's individual offers after their

aggregate offer was rejected by Plaintiff were deemed a withdrawal of their aggregate offer and no longer imposing on Plaintiff the obligation to accept the aggregate offer). In this latter case, one can question whether the outcome might have been different if defendants had not made subsequent individual offers.

Relying on the analysis above, the Subcommittee proposes a systemized approach to R. 4:58-4(b), reworking the current iteration in its entirety in order to expand the range of scenarios directly addressed under the Rule. The Subcommittee's full proposal for R. 4:58-4(b) is as follows:

(b) Multiple Defendants. Where there are multiple defendants, offers shall be made as follows:

(1) **Global Offer.** Claimant may make a global offer to multiple defendants. If claimant obtains a money judgment in an amount that is 120% of the global offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, those allowances as prescribed in R. 4:58-2(a). In such case, the assessment of costs and fees shall be applied as follows:

(A) **No Response.** When there is a rejection of, or no response to, plaintiff's global offer, each defendant will be jointly and severally responsible for the entire allocation set forth pursuant to R. 4:58.

(B) **Global Counteroffer.** When there is a global counteroffer from defendants and plaintiff obtains a favorable determination qualifying for allowances under this rule, each defendant will be responsible for the portion of expenses and fees equal to the percentage that they were individually adjudicated responsible. Subject to R. 4:58-3(c), in the event the defendants obtain a global favorable determination, plaintiff will be responsible for the expenses and fees payable pro rata to each defendant in accordance with that defendant's proportionate share of the Offer.

(C) **Counteroffer to Claimant's Global Offer by One Defendant.** When a single defendant makes a counteroffer to a global offer, it shall be treated as a counteroffer limited to that defendant's share.

a. If that defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If that defendant's final adjudication is greater than 120% of their counteroffer, they should be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

The intent of the language in Section (b)(1)(C) is to address fee-shifting statutes and other restrictions.

(D) **Counteroffers by Multiple but not All Defendants.** When multiple defendants individually make a counteroffer representing only their individual share of responsibility, they shall indicate that.

a. If any responsive individual defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.

b. If any responsive individual defendant's final adjudication is greater than 120% of their counteroffer, they shall be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(E) **All Defendants Respond Individually.** When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed 100% of allowances. The allowances will be assessed based on their adjudicated percentage share of responsibility of the allowances and the combination of the remaining defendants must equal 100% of the allowances. However, if all defendants have individually offered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment but 120% of the combined counteroffer amount is less than the claimant's global offer, then each defendant will be responsible for the portion of expenses and fees equal to the percentage that the defendant was adjudicated responsible.

a. (as previously submitted to the Committee): ***All Defendants Respond Individually.*** *When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount less than 120% of their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed allowances under this rule based on their adjudicated share of responsibility. However, if all Defendants have individually offered an amount less than 120% of their adjudicated responsibility of the monetary judgment but the combined counteroffer is greater than 120% of the claimant's global offer, then each Defendant will be responsible for the portion of expenses and fees equal to the percentage that the Defendant was adjudicated responsible.*

(2) **Defendants Against Whom No Joint and Several Judgment Is Sought.** If there are multiple defendants and there are defendants against whom no joint and several judgment is sought, claimant may file and serve individual offers on those defendants against whom no joint and several judgment is sought as prescribed by this rule. Similarly, those

defendants against whom no joint and several judgment is sought may file and serve individual offers as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be and subject to the provisions of this rule.

Section (b)(2) is intended to apply most specifically in non-tort contexts or the mixed non-tort/tort context.

(3) **Individual Offer.** If there are multiple defendants, individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3, as the case may be.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

The Subcommittee proposes no change to the language of R. 4:58-4(c). The focus of R. 4:58-4(c) is on two multiple claim scenarios. The first is where a claimant asserts multiple claims for relief and the second is where a counterclaim is asserted. In such circumstance, a claimant shall include in its offer all claims asserted by or against it. In the case of a counterclaimant, that party shall include in is offer all claims by and against it. R. 4:58-4(c) does not specify crossclaims, but where there are counterclaims and crossclaims, it has been held that a party may make an offer to settle all claims. Comment 6.2 and Firefreeze v. Brennan Assoc., 347 N.J. Super. 435, 441-442 (App. Div. 2002).

Rule 4:58-5. Application for Fee; Limitations

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

The Subcommittee proposes no changes to R. 4:58-5. This Rule provides for renewal of a rejected offer within 10 days after the fixing of the first trial date for a retrial by serving actual notice on offeree of the intent to renew the prior offer. The effective date is that of the original offer. Alternatively, a party may make a new offer effective as of that new offer's date. The Rule does not address the impact of the original offer where a new trial is ordered only as to some parties or issues. Therefore, clarification might be useful here.

Rule 4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

The Subcommittee proposes no changes to R. 4:58-6.

This Rule addresses the mechanism for awarding allowances and incorporates the court approval process under R. 4:42-9(b). Applications to the court must be made within 20 days after entry of final judgment. That date is when the judgment is entered on the civil docket. Comment 7 and Reid v. Finch, 425 N.J. Super. 196, 202-203 (Law Div. 2011).

This Rule also prohibits a double recovery. This Rule contemplates application for allowances and not setoffs. Presumably, the latter will only occur in response to a prevailing party's fee application. However, this Rule may be an appropriate place to reference any right to a setoff as it adopts the process in R. 4:42-9(b) and incorporates the reasonableness standards in RPC 1.5 Fees. The factors listed in RPC 1.5 (a)(1), (4) and (5) might be particularly relevant in a reduction to a fee request.

Here, consideration also needs to be given to the 2006 amendment to R. 4:58-3(c)(4) where denial of a full fee to the prevailing party would conflict with policies underlying a fee-shifting statute or rule of court. See Comments 1 and 5. Consequently, absent an express prohibition against a reduction in a fee-shifting statute or rule, an examination to ascertain the absence of a conflict with their underlying policy would be required before reducing a fee allowance under the OOJ Rule. R. 4:58-3(c) seems to address this concept, unless the Committee believes further clarification is required.

Rule 4:58-7. Acceptance of Offer Not Deemed a Judgment; Payment of Accepted Offer

(a) Except as provided for in (b), acceptance and payment of an offer under R. 4:58 will not be deemed a judgment against the offeree and will not require the filing of a Warrant of Satisfaction.

(b) Absent leave of court, or the agreement of the offeror and offeree, full payment of the accepted offer shall be made within 30 days after the date of service of notice of acceptance. Within 7 days of full payment, the offeror and the offeree shall file a Stipulation of Dismissal With Prejudice as to all claims that are the subject of the accepted offer. If full payment is not made within 30 days, then the party entitled to receive payment may (i) withdraw its offer or acceptance, or (ii) apply for relief consistent with R. 1:6-2(a) for entry of final judgment. The court shall award reasonable expenses, including reasonable fees and costs for the application for final judgment unless the court finds that the failure to make payment was substantially justified or that other circumstances make an award of expenses unjust.

The Subcommittee proposes this additional Section to the Rule to clarify that acceptance of an offer does not result in an automatic judgment against the offeree. Thus, assuming payment is made

pursuant to subsection (a), attorneys need not execute a warrant of satisfaction. However, to protect against potential abuse, delay, further litigation, and costs, the Subcommittee proposes a 30-day time period in which payment must be made absent (i) agreement by the offeror and offeree, or (ii) leave of court. The Subcommittee believes an offeree should not be penalized by accepting an offer that the offeror either refuses to or cannot pay. The language allowing for an agreement between the parties may be needed in those circumstances where the parties agree to a payment plan over time, or for parties such as government entities that may need a little longer to issue payment (although less likely where they would already have to hold a meeting to authorize acceptance of the offer). The addition of the language at the end of subsection (b) gives the court some guidance on whether the fee award is discretionary or mandatory.

The requirement of filing a Stipulation of Dismissal upon full payment (or entry of Final Judgment under subsection (b)) will assist the parties and the court in determining the date of finality for purposes of appeal in multi-party actions.

PART III: APPLICATION OF REVISED RULES

This Part provides illustrations of various scenarios involving an Offer of Judgment, both under the current iteration of R. 4:58 as well as under the Subcommittee's proposed Amended Rule. The illustrations rely exclusively on the text of the Rule, without incorporating Comments or pertinent case law.

For purposes of this discussion, "the Allowances" shall refer to, in addition to costs of suit, (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance. See R. 4:58-2(a); R. 4:58-2(b).

Illustration #1: One plaintiff makes a demand upon one defendant

- Under the current Rule:
    - If the claimant obtains a money judgment in an amount that is 120% or more of an offer, the claimant shall be entitled to the Allowances from the defendant.
        - Example: Plaintiff obtains $120,000 after issuing a $95,000 Offer of Judgment, plaintiff will be entitled to the Allowances
- This outcome would be unchanged in the proposed Amendments to the Rule. See R. 4:58-2(a).

Illustration #2: One plaintiff makes a global offer upon multiple defendants, and no defendant responds: R. 4:58-4(b)(1)(A)

- Under the proposed Amended Rule:
    - Each defendant would be jointly and severally responsible for the entire allocation of Allowances. See Proposed Rule 4:58-4(b)(1)(A).

Illustration #3: One plaintiff makes a global offer, defendants make a global counteroffer: R. 4:58-4(b)(1)(B)

- Where a claimant offers $95K, receives a global counteroffer from defendants of $60K and obtains a $120K judgment, each defendant shall be responsible only for its adjudicated share of liability of the total allowances awarded claimant under the Rule. Therefore, if claimant is allowed granted $45K in Allowances under the rule and there were three defendants who made a global counter-offer who were each adjudicated 1/3 liable, each would be only responsible for $15K as their one-third share.

Illustration #4: One plaintiff makes a global offer upon multiple defendants, and only one defendant responds: R. 4:58-4(b)(1)(C)

- Under the current Rule:
    - If the responding defendant offers in response less than a pro rata share, that defendant shall be deemed not to have accepted the claimant's offer.

- The current rule does not expressly contemplate a scenario where Plaintiff makes a global offer upon multiple defendants, and only a single defendant responds

- Under the proposed Amended Rule:
  - The defendant's counteroffer shall be treated as a counteroffer limited to that defendant's share.
  - Examples. The total adjudicated responsibility in these illustrations is $100,000.
    - Example 1
      - For the claimant to be entitled to the Allowances, the global offer must not exceed $83,333.33. See Proposed Rule 4:58-4(b)(1).
      - If a defendant is adjudicated liable for $40,000 after a $35,000 counteroffer, the defendant will not be assessed any allowances under the Rule. See Proposed Rule 4:58(b)(1)(C)(a).
        - $40,000 liability is **LESS** than 120% of the $35,000 counteroffer amount = $42,000
        - The remaining non-responsive defendants will remain jointly and severally responsible for 100% of the total Allowances to which claimant may be entitled
      - If a defendant is adjudicated liable for $40,000 after a $30,000 counteroffer, that defendant shall be responsible for 40% of the allowances, equal to their percentage of adjudicated responsibility. See Proposed Rule 4:58(b)(1)(C)(b).
        - $40,000 liability is **GREATER** than 120% of the $30,000 counteroffer amount = $36,000
        - The non-responsive defendants shall be jointly and severally liable for the 60% balance of Allowances to which claimant is entitled.
    - Example 2
      - Plaintiff sues 4 defendants. P makes a global offer of judgment to all four defendants for $75K. D2, D3, and D4 (the main target) do not make a counteroffer. D1 makes a counteroffer of 30K, but P rejects it. The case goes to trial and P gets an award of 100K. The jury finds D1 is 10% negligent (10K), D2 is 20% negligent (20K), D3 is 30% negligent (30K) and D4 is 40% negligent (40K). The verdict of 100K is more than 20% above P's offer of 75K, so P is entitled to allowances.
        - If the defendants want to split it up based on their percentage of responsibility, the calculation would be amongst those remaining defendants. D2, D3, and D4 made up 90% of the verdict in varying amounts. The math would look like this: D1(.2x) + D2(.3x) + D3(.3x) = 100. X = 111.11. While D2, D3, and D4 are jointly and severally liable for all allowances, the total responsibilities of all defendants would be:

- D1 ($30,000 offer) (Verdict 10% - $10,000) = Doesn't owe or receive any allowances under the rule
- D2 (No offer) (Verdict 20% - $20,000) = (.2x) * 111.11 = D2 is responsible for 22.3% of the allowances
- D3 (No offer) (Verdict 30% - $30,000) = (.3x) * 111.11 = D3 is responsible for 33.3% of the allowances
- D4 (No offer) (Verdict 40% - $40,000) = (.4x) * 111.11 = D4 is responsible for 44.4% of the allowances

Illustration #5: One plaintiff makes a global offer upon multiple defendants, and multiple, but not all, defendants respond: R. 4:58-4(b)(1)(D). For this illustration to apply plaintiff would have had to prevail and obtain a verdict in plaintiff's favor.

- Under the current Rule:
  - The current Rule does not differentiate between scenarios where multiple defendants submit an Offer of Judgment.
- Under the proposed Amended Rule:
  - The defendants must indicate that their counteroffer only represents an individual share of responsibility. If they do so, the counteroffer shall be treated as a counteroffer limited to that defendant's share.
  - Example. The total adjudicated responsibility in these illustrations is $100,000.
    - For the claimant to be entitled to any Allowances, the global offer must not exceed $83,333.33. See Proposed Rule 4:58-4(b)(1).
    - If Defendant 1 is adjudicated liable for $40,000 after a $35,000 counteroffer; Defendant 2 is adjudicated liable for $20,000 after a $15,000 counteroffer; Defendants 3 and 4 do not respond:
      - Defendant 1 will not be assessed any Allowances under the Rule. See Proposed Rule 4:58(b)(1)(D)(a).
        - $40,000 liability is **LESS** than 120% of the $35,000 counteroffer amount = $42,000
      - Defendant 2 will be assessed 20% of the Allowances. See Proposed Rule 4:58(b)(1)(D)(b).
        - $20,000 liability is **GREATER** than 120% of the $15,000 counteroffer amount = $18,000. As a responsive offeree, however, the assessment of Allowances would be capped at the portion of liability.
      - Defendants 3 and 4, as non-responsive offerees, will remain jointly and severally responsible for the remaining 80% of the total Allowances to which claimant is entitled.
    - In this situation the individual defendant making the counter-offer is not entitled to an allowance even if the counter-offer is above 80% of that

defendant's adjudicated share of damages awarded. The reason for not permitting such an allowance is that the risk of such post-verdict cost-shifting otherwise could induce a plaintiff to settle with individual defendants who are anticipated to be found less culpable than other "primary target" defendants who have made no counter-offers or only "token" counter-offers.

Illustration #6: One plaintiff makes a global offer upon multiple defendants, and all defendants respond, either individually or as a global counteroffer: R. 4:58-4(b)(1)(E)

- Under the current Rule:
  - The current Rule does not set forth clear instructions for where one plaintiff makes a global offer, and all defendants respond.
- Under the proposed Amended Rule:
  - Global Counteroffer:
    - Where plaintiff qualifies for Allowances, each defendant will be responsible for the portion of Allowances to the percentage that they were individually adjudicated responsible. See Proposed Rule 4:58-4(b)(1)(B).
    - Plaintiff makes an $80,000 global offer; defendants make a $60,000 global counteroffer; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible, Defendant 2 was 70% responsible.
      - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
      - Defendant 1 will be responsible for 30% of the Allowances; Defendant 2 will be responsible for 70% of the Allowances.
  - All Defendants Respond Individually:
    - Individual responses combined and treated as global counteroffer. Each defendant who counteroffered an amount **LESS** than 120% of their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed allowances under this rule based on their adjudicated share of responsibility. See Proposed Rule 4:58-4(b)(1)(E).
      - Example 1. Plaintiff makes an $80,000 global offer; defendants make counteroffers totaling $70,000; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible but offered $40,000, Defendant 2 was 60% responsible but offered $30,000. Defendant 3 was 10% responsible but offered $10,000.
        - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
        - Defendant 1
          - 120% of $40,000 counteroffer = $48,000. $48,000 is **more** than Defendant 1's $30,000 responsibility.

Defendant 1 will not be responsible for any Allowances

- Defendant 2
  - 120% of $30,000 counteroffer = $36,000. $36,000 is **less** than $70,000 responsibility. Defendant 2 will be responsible for all of the Allowances

- Example 2. Plaintiff makes an $80,000 global offer; defendants make counteroffers totaling $50,000; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible but offered $27,500, Defendant 2 was 60% responsible but offered $22,000. Defendant 3 was 10% responsible but offered $5,500.
  - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
  - Defendant 1
    - 120% of $27,500 counteroffer = $33,000. $48,000 is **more** than Defendant 1's $30,000 responsibility. Defendant 1 will not be responsible for any Allowances
  - Defendant 2
    - 120% of $22,000 counteroffer = $26,400. $26,400 is **less** than $70,000 responsibility.
  - Defendant 3
    - 120% of $5,500 counteroffer = $6,600. $6,600 is **less** than $10,000 responsibility.
  - Defendant 2 and 3 are assessed all allowable allowances. Their responsibility was Defendant 1 (70%) and Defendant (10%). ((.7x)+(.1x)) = 100. x=125. Defendant 1 is responsible for 87.5% of the allowances. Defendant 2 is responsible for 12.5% of the allowances.

Illustration #7: One plaintiff makes an individual offer upon an individual defendant in a multi-defendant case R. 4:58-4(b)(3)

- Under the current Rule:
  - The current Rule does not set forth clear instructions for where one plaintiff makes an individual offer upon an individual defendant in a multi-defendant case
- Under the proposed Amended Rule:
  - Individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the Allowances. See Proposed Rule 4:58-4(b)(3).
    - Example. Plaintiff makes an $50,000 individual offer to Defendant 1 in a two-defendant case; Defendant 1 does not accept the offer. Verdict is for Plaintiff in the amount of $100,000. Defendant 1 was adjudicated 65% responsible. Defendant 2 was adjudicated 35% responsible.

- Defendant 1 was adjudicated responsible for $65,000. 120% of the $50,000 offer, less than the adjudicated amount. Defendant 1 is responsible for the allowances.
- Defendant 2 was adjudicated responsible for $35,000. Plaintiff did not make an offer to Defendant 2. Defendant 2 is not responsible for any allowances.

ADDITIONAL RESOURCES