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VIA EMAIL
Comments.mailbox@njcourts.gov
Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attn: Comments on C.B.L.P Rules
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Complex Commercial and Complex Construction Matters

Dear Judge Grant:

The following are comments with regard to the proposed rules relating to complex commercial and complex construction matters. For background, you should be aware that my primary area of expertise is in the area of complex construction matters. Over the course of my 43 years of practice, I have represented numerous developers, condominium associations, individuals, contractors, etc., in cases involving from as much as $30,000,000 to as little as $100,000. If permitted, I would be happy to provide additional comments to you or the Committee related to complex litigation matters. The comments will relate to specific rules that are being proposed.

R. 4:102-3. In certain counties where a CBLP Judge has been assigned to these types of cases, the Judge assigned is also serving as one of the Chancery Judges in that vicinage. This has caused considerable problems with regard to case management and the ability of these judges to conduct case management conferences and to monitor the movement of these cases. Judge Katie Gummer had been serving as the CBLP Judge for Monmouth County. In light of the fact that she has now been assigned to serve in the Chancery Division, it has been determined that she will no longer be handling CBLP cases. This is the right way of handling these matters and should be the rule rather than leaving it up to individual counties to determine.

R. 4:102-4(a). Opt-In / Opt-Out only refers to complex business related issues and not complex construction issues. It should apply to both in my opinion and the Rule should read as such.

R. 4:103-1. As stated by the Rule, it is the purpose of the case management rules to "streamline and expedite service to litigants . . ." First, reference to complex business litigation should also include complex construction litigation. Merely because one of the purposes of these Rules is to "expedite service", does not constitute the end all and be all since these cases are extremely complex and should not be expedited for the sake of moving such cases through the court system. This is especially true if these cases can be mediated and settled as the litigation proceeds, which is often the case in complex construction cases.

R. 4:103-2. Utilizing the federal rule is a good idea; however, very often the parties involved, especially defendants in these cases, have serious problems in locating their clients and learning who are the appropriate witnesses and sources of information might be. Very often counsel are appointed by insurance companies and the clients may, at this point, be out of business. My suggestion is that the times for making initial disclosure should vary. The time for plaintiff should be 14 days as indicated in the proposed Rule; but the time for defendants should be extended at least to 30 days after they have filed their answer(s). As an example, a case that I had before Judge Gummer involved originally some 30 different parties, and it turned out that 20 of them should not have been in the case in the first place. Those 20 could not have possibly satisfied the requirements of this Rule.

R. 4:103-3. I do not know how the parties could possibly know in advance when 21 days before the scheduled conference is unless the conference itself is not held for at least 60 days after the Complaint and Answers have been served.

As it relates to complex construction cases, as I noted above, counsel for defendants often do not have any idea about the nature of the claims against their clients, or whether any of the claims are really against their particular client. I don't know how R. 4:103-3(b) can be utilized without a significant amount of built-in flexibility. This is particularly true in instances when a plaintiff has been unable to serve individuals or entities and are still waiting for counsel to file an Answer. These Rules may be very accommodating if there are only 2 parties involved. However, this would be the rare exception and not the rule. In most of the cases in which I am either a plaintiff or the primary defendant, the number of other parties generally range between 10 and as much as 30 or 40.

R. 4:103-4. As it relates to the timing of the scheduling order, the trigger should be when a defendant or defendants have filed their answers, not when the complaint has been served or when a single defendant has appeared. This is especially true when you have multiple defendants. As it relates to the joinder of other parties, very often plaintiff or defendants do not

know what subcontractors were involved in a matter five years earlier. This is especially true when a lawsuit is filed by a homeowners' association after taking control of that association several years after the buildings have been constructed. Unfortunately, Judges may be too focused on setting unnecessary deadlines and not considering the reality of the issues and the parties joined. Though the listed matters to be considered at a pre-trial conference are generally appropriate, certain of these matters for pre-trial conference purposes are too early in the proceeding. This is particularly true as it relates to identifying witnesses, documents, whether or not a Special Master is required, the need for special procedures for managing the case and whether separate trials might be necessary.

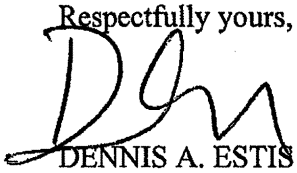
R. 4:104. This is the rule that in my mind has the greatest problems for clients and attorneys involved in complex construction cases. As it relates to depositions, it would be impossible to handle these cases when depositions are only limited to 10. If you have 20, 30 or more parties involved, it would be impossible to limit depositions to 10. In a recent case with which I was involved, my client had 4 experts and the plaintiff had 5 experts. In addition, each of the parties had at least 2 or 3 fact witnesses who it was necessary to depose. This means that you are looking at between 30 and 50 fact witnesses to be deposed. In addition, limiting any depositions per deponent to 7 hours would be impossible. If I am deposing the foreman on a job where the damages are claimed to be in excess of $10,000,000, and the number of defects asserted are numerous, as often is the case, it would be impossible to depose a foreman on the site of a developer or general contractor for only 7 hours and expect that this limited amount of time is sufficient to interrogate such persons and cover all of the issues. Leaving this up to the Court without specific direction in the Rules would be extremely unfair, particularly since non-complex construction cases still have the ability to take depositions of witnesses for more than one day and for more than 7 hours. This issue alone will discourage many parties from opting into complex construction cases under these Rules. In addition, if there are 10, 20 or 30 different parties, counsel for each of those parties, which could number 20 or 30 attorneys, are permitted to participate in the depositions of both fact witnesses and expert witnesses. It would be impossible to take a 7 hour deposition where all counsel have a chance to question the witness and conclude that deposition in one day.

R. 104-4. Interrogatories. If complex construction cases were between 2 parties and were similar to a slip and fall case, the concept of 30 days would make sense. Just the opposite is true however in complex construction cases. To suggest that interrogatories can be answered in only 30 days in these very complex matters is totally unrealistic. Furthermore, to limit the number of interrogatories to 15 including subparts is contrary to the consent of having separate management of complex construction cases. The federal rules may permit this and the New York Supreme Court may provide for this, but this would not be of any help in complex construction cases. Anyone who has ever been involved in one of these cases knows that it requires a great deal of specificity as it relates to interrogatories. The more that can be provided through interrogatories the less time that must be spent on depositions of those same parties.

R. 4:105-4. It would be very helpful if the Rules included an ability of the judge handling the matter to appoint a Special Master to deal with discovery issues rather than having to burden the Court with this obligation. This has worked very well in several complex construction cases that I have been involved in over the last several years.

There may be additional concerns that I have with specific proposed rules, but I believe that the issues raised above incorporate the most difficult and substantive issues that needed to be raised.

Respectfully yours,



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