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From: Bruce D. Greenberg <BGreenberg@litedepalma.com>
Sent: Monday, June 04, 2018 9:42 AM
To: Comments Mailbox
Subject: Comment on Proposed Amendment to Rule 2:11-1(b)(3)

Dear Judge Grant: In accordance with the Notice to the Bar dated May 15, 2018, I am writing to comment on the proposed amendment to Rule 2:11-1(b)(3). The views expressed here are my own, and in expressing these views, I do not purport to speak for my law firm, any client of mine or my firm, any Bar or other organization with which I am affiliated, or anyone else besides myself. For the reasons stated below, I oppose the proposed amendment.

I have over 35 years of experience in handling appellate matters in the Supreme Court of New Jersey, the Appellate Division, and the Third Circuit Court of Appeals. After clerking for Justice Daniel J. O'Hern on the Supreme Court during the 1982-83 Term, I have been in private practice continuously. During that time, I have argued 11 times in the Supreme Court, several dozen times in the Appellate Division, three times in the Third Circuit Court of Appeals, and once in the Colorado Court of Appeals, that state's intermediate appellate court. I have briefed many other appeals that others have argued. I have been a panelist on numerous continuing legal education programs regarding appellate practice, and have written articles on appellate subjects as well. Finally, since 2010, I have been the author of the New Jersey Appellate Law blog, http://appellatelaw-nj.com, New jersey's foremost appellate blog. In that capacity, I have written over 1,400 posts relating to issues of appellate law and practice in New Jersey, including the New Jersey Court Rules. (What appears below has already been published on my blog, in essentially the same form.) Based on that experience, I believe that I am well-qualified to offer an opinion regarding this proposed rule amendment.

The current language of Rule 2:11-1(b)(3) permits parties to decide whether they want to have two counsel split an oral argument. The proposed amendment transfers that decision to the appellate court. Though I have recently been involved in a few split arguments, all in complex mass tort Multi-County Litigation involving the drug Accutane, I have never before been involved in a divided argument. In connection with my blogging, and as an appellate practitioner even before beginning my blog, I follow the decisions of the Supreme Court and the Appellate Division. I have observed comparatively few cases where more than one attorney argues for a party on appeal. There thus seems no need to take the choice of oral argument counsel away from the parties.

It is not as though parties who use two attorneys get extra argument time. The very same rule states that, regardless of whether one or two counsel argue for a party, "[e]ach party will be allowed a maximum of 30 minutes for argument in the Supreme Court, unless the Court determines more time is necessary, and 30 minutes in the Appellate Division, but the court may terminate the argument at any time it deems the issues adequately argued." Allowing a party to share argument between two counsel thus does not take more court time.

Financial disincentives to the use of more than one oral advocate help ensure that divided arguments are uncommon. In an appeal where counsel are billing hourly, the client who opts for a divided argument is paying two attorneys for their time instead of one. In contingent matters, a law firm or firms are investing the time of two attorneys rather than just one. Rational appellate litigants do not choose to use two attorneys unless the financial stakes and/or the complexity of the case justify that, which is why that does not often occur. It is not clear what problem this proposed amendment is intended to fix.

Finally, the amendment seems to contemplate that a party seeing to divide argument would have to do so by motion. That is an added step that unnecessarily causes expense to that party and adds to the motion burden of our appellate courts. It also enables the other party to oppose that request, which is in tension with the practice

under Rule 2:11-1(b)(2) that oral argument is granted if any party requests it. Just as one party cannot veto an oral argument request made by the other party, one party should not be able to try to dictate how the other party presents oral argument.

In my view, there is no "problem" with divided argument, a relatively rare occurrence in any event, that needs to be "fixed." The current rule has worked well over the course of many years. It does not require amendment. For the foregoing reasons, I urge that the proposed amendment not be adopted.

Thank you for the opportunity to offer my views.

Respectfully,

Bruce D. Greenberg

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