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By Email

The Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments – Oral Argument Rule
Hughes Justice Complex; PO Box 037
Trenton, NJ 08625-00370

RE: **Rule 2:11-1(b)(3) "Amendment"**
Many More Costs than Benefits under Economic Analysis

Dear Judge Grant:

The proposed Rule 2:11-1(b)(3) change limiting argument to only one attorney is puzzling. Since no reason for the change is listed, we are left to guessing. Space is a legitimate issue in some multiparty cases but, worst case, some attorneys have to sit with the spectators until it is their turn. Confusion is ridiculous given that our judges are some of the most intelligent and well-educated people on Earth.

This leads to a conclusion, possibly wrong, that it's just plain annoying for judges to have to deal with two or more attorneys. This also makes no sense since our appellate judges are very polite and even-handed regarding seating and argument. Since no reason is given, it's hard to see any benefits. However, it is simple to predict the costs. Three "Point Headings" of costs or issues come to mind:

1) How are inexperienced lawyers[1] supposed to learn the art of oral argument?; and

2) Is it necessary to impose these costs on the relevant parties:

   A) For lawyers, the absolute terror of having to argue an issue about which they are not very familiar? (Think First Year Moot Court); and

   B) For clients (and judges), the opportunity costs of non-expert argument?; and

3) Do the judges realize how many "new" motions this will create?

[1] I intentionally do not say "young."

If the "second chair"[2] is seen as annoying, maybe that's because they whisper suggestions to the first chair and tap him or her on the foot if s/he is going off point. But isn't that what second chairs are for? Certainty, a lawyer, who may or may not argue, depending on "how it's going," has much more extra utility than a paralegal. They track the argument while handing the first chair relevant cases, statutes or rules. Is this minor, helpful and educational activity annoying? I think not and other commenters agree. (Please refer to Mr. Greenbaum's Letter to Judge Grant. He is far more knowledgeable than I, with the education of "less experienced attorneys" and, similarly, Judge Goldman's Email citing the "real life" utility of argument by multiple counsel.)

Maybe the judges are looking out for the interests of clients. Frequently, it may be that the money spent on the second attorney is not worth the benefits – and that is the main general criticism of our profession -- basically that we are always finding new ways to rip-off our clients. It may be that attorneys do spend much more than $1000 in time foreclosing a 1% chance of losing (or having to pay) an extra $100,000.

But Lawyers rarely have a good estimate of probabilities and costs of outcomes – so we just do the best we can on all issues, as we were taught in law school. Now, this is critical, nor do we have the chance for repetitive trials or events like those in finance, construction and insurance, in which a loss, even a large one, can be defrayed by very similar or nearly identical future "winning" events or trials.

In a word, lawyers face more risk from bad outcomes – there is rarely a chance "to make up" for a loss, especially for a given client. Risk runs up costs in any undertaking. While a lawyer may "make up" for losses in his or her career, that doesn't help the losing clients who should have won. Having options, such as team argument, reduces risk, improves argument, and should be available without "cost" or hassle.

If the above "protect the client" mentality is the economic reasoning, it is from the socialist, "parental" branch of that science. In a capitalist system, we allow lawyers and clients to decide whether they need a "second chair." No one questions the rationality and probable efficiency of the Current Rule that having more than two attorneys requires permission. In those rare three (or more) attorney cases, they can explain why – but a two attorney team should not have to explain. If clients are willing to spend big money on more than one attorney, let them – they know their cases better than any judge ever will. That's our system. (Please refer to Mr. Greenberg's email for more on economic freedom and for his learned experience that the Current Rule is harmless.)

Even Law School Moot Court Contests point to the utility of dual attorneys. When judging them, the changing of counsel has not bothered me at all. Better, it's a great time to get a drink, refocus your thoughts about the next issue, etc. Why are almost all moot court contests done in teams of two for argument? There are resource issues, but I thought it was for synergy and because multiple counsel are practically compulsory in "big cases," or perhaps any argument involving moneyed corporations, large law firms or aspirational entities such as the ACLU.

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[2] I use this term for the lawyers who don't start argument whether allowed to argue later or not.

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The third point is a practical one: the courts will be swamped by motions for two attorneys due to habit and risk hedging. This may be fair if the courts granted all or nearly all the requests. Judges may just want to impose an extra cost to force lawyers to seriously consider whether a second chair is necessary. However, the cost of a second chair is already more than enough to cause close examination of the need for two attorneys (or more) by both lawyers and, certainly, clients.

More importantly, since motions should be filed at least 30 days or more[3] before an argument date to be "safe," there will be many "protective motions" to give lawyers and clients "options" since a "last minute" motion is out of the question. (Click here to see Emergent Guidelines.) The rational maneuver is to file an "early" motion for dual counsel – perhaps even before the case has an argument date or the lawyer actually knows whether s/he wants or needs dual argument.

Since lawyers, judges and the entire Court System rarely have a predictable time schedule, attorneys will have no choice but to file these early "protective motions" to hedge their risk of not being allowed to have a two attorney team if they do nothing. Think of the variables for an argument date months in the future. Their associate may or may not be on another case that day. Their partner may or may not be recovered from a medical procedure. A law professor hasn't yet agreed to argue, and on and on. So they hedge. And the two courts get, literally, tons of second chair motions.

Even if our appellate courts turn down a large percentage of these motions, it will take years for attorneys to adjust to that information. Or they may never adjust – certainly, there are no shortage of *certiorari* petitions in every court of last appeal despite usual "odds" of 1%-2%.

In short, none of the reasons one can think of for changing this long-standing (and seemingly harmless) Two Attorney Rule makes any sense. The Bar needs more information before we can analyze this large departure from tradition, capitalist principles, and maybe even logic, so we can weigh in with intelligent responses.

Your Honor, thank you for this opportunity for commentary.

Respectfully yours,

Thomas B. Duffy

cc: Posted online on AOC website

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2) If the hyperlinks to the other attorneys' comments don't work, they are at: https://njcourts.gov/courts/supreme/reports.html. Click on the blue "Comments Received" button on the right, which is currently the first entry on the list. All the other AOC materials relating to the proposed Rule charge are also on that same webpage.

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[3] There is no "time table" for appeals motions. See https://www.judiciary.state.nj.us/attorneys/assets/rules/r2-8.pdf.
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