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NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Reports of Court Rules Committees

Dear Judge Grant:

Thank you for allowing the New Jersey State Bar Association an opportunity to provide comments on the recently published rules committees reports, and for extending the time to do so to allow for adequate review and debate by our members. I am pleased to submit the organization's recommendations and comments regarding the following reports:

- Committee on Complementary Dispute Resolution
- Committee on the Rules of Evidence
- Committee on Minority Concerns, and
- Municipal Court Practice Committee.

The NJSBA does not have any comments on the reports from the Criminal Practice and Family Practice Committees.

The NJSBA applauds the efforts of all of the Court's committees in researching, discussing and debating potential rule amendments in an effort to improve the administration of justice in our court system. The NJSBA's comments are offered in that spirit, with the goal of working cooperatively with the Court to ensure our rules are clear, establish procedures that are fair to all parties, and, most importantly, advance the interests of and access to justice.

The NJSBA's comments to each Committee's report are outlined below.

Committee on Complementary Dispute Resolution

The NJSBA supports the majority of recommendations contained in this report, including defining the Special Civil Part Complementary Dispute Resolution Program as a settlement program rather than a mediation program to resolve disputes venued in that division, reducing the hours of the

mandatory law clerk mediation and conciliation training from 12 to six hours, and revising the focus of the training from mediation to a CDR settlement negotiation training. The NJSBA believes these changes will help to facilitate settlement of more cases pending in the Special Civil Part.

The NJSBA has concerns about the proposal providing for New Jersey court roster mediators to be paid a fee that amounts to half their market rate for the first two hours of mediation should litigants pursue mediation beyond those first two hours. The NJSBA believes mediation of appropriate cases is helpful, but members expressed a number of concerns with the current system that should be addressed before a change in payment structure is made. Some of these concerns were previously raised with the Court, but are noted here again. The comments emanate from members who provide representation in a variety of practice areas and who participate in the mediation process as both mediators and litigants. In particular, members noted that attorneys know their clients and their cases best and should be able to opt-out of mediation if they believe the process will not be productive in their case. In addition, under the current system, members noted that mediators are often assigned to a matter even though they are not familiar with the substantive area of law in which the case is focused, requiring additional preparation time or resulting in an ineffective mediation session. Similarly, mediators whose practice is not local to the county where the case is venued (or sometimes even out-of-state lawyers), are assigned, increasing travel time, causing scheduling difficulties for future sessions and increasing the costs beyond the initial free two hours. Members also expressed frequently receiving invoices for unexpected accumulated mediator fees, even in cases where they thought the mediation had ended after the first hour so as not to accumulate additional fees. Some members reported that mediators start the session already having accumulated several hours of preparation time for which they seek to be paid. Finally, there were concerns that charging for the first two hours if the mediation continued would actually incentivize litigants to stop the mediation early, even if progress was being made.

In light of these concerns, the NJSBA recommends that the Court examine the current structure and administration of the mandatory mediation program and consider making some adjustments to:

- allow parties to opt-out under appropriate circumstances;
- clarify the payment provisions, making it clear that there are two free hours provided under the program – one hour for preparation time and one hour of facetime;
- specify that additional time should not be expended and cannot be charged for unless the litigants expressly agree;
- require the hourly rate that the parties will be responsible for in the event that the session goes over the first two hours be made clear during the scheduling phone call and confirmation letter;
- ensure the mediator is local to the venue and understands the local practice, so as to maximize the most effective use of everyone's time; and
- prohibit mediators from charging for travel time or becoming familiar with an area of law in which they do not regularly practice.

Overall, the NJSBA recognizes the benefit that productive mediation can bring to moving a case forward. In light of the concerns expressed above, however, the current system appears to frequently frustrate litigants, rather than positively impact them. For these reasons, the NJSBA urges that the proposed change to the payment of mediators be put on hold and the current system be re-evaluated.

Committee on the Rules of Evidence

The NJSBA commends the Committee for undertaking the “restyling” of the Rules of Evidence. We recognize this was a time- and labor-intensive task, but also agree that it is in the best interests of everyone to have clear and precise rules written in plain language that can be easily understood by everyone. We appreciate the Committee’s tremendous efforts on this project.

The NJSBA supports the proposed changes to N.J.R.E. 530, meant to clarify when a waiver of the attorney-client privilege occurs in different settings and circumstances. We suggest, though, that steps be taken to ensure the proposed Rule is not applied in such a way as to result in the elimination of a partial waiver.

While the NJSBA understands that the proposed changes to N.J.R.E. 608 have been adopted without incident in other states, the NJSBA does not believe they should be adopted here. NJSBA members noted a wide array of concerns with the proposal. Universally, members believe it will lead to increased litigation and mini-trials on the character of a witness. They are concerned with overreaching in discovery and the questioning of witnesses on the accuracy of every statement ever made by the witness, especially in connection with social media. Members believe the measure will have a chilling effect on witnesses and will generally be more detrimental to arriving at a fair resolution of a claim than helpful. The NJSBA notes that even the Committee on the Rules of Evidence was closely split on whether to recommend adoption of the proposal. For these reasons, the NJSBA urges the Court to reject these changes.

Committee on Minority Concerns

The NJSBA generally supports all of the recommendations contained in this report.

We agree that increased data collection, including data on sexual orientation and gender outside the traditional binary choices, will provide more information to be used to measure the effectiveness of diversity and inclusion efforts. A review of best practices in data collection and of court-related forms to ensure they provide all appropriate sex and/or gender options will also help to further the Court’s diversity and inclusion efforts. The NJSBA requests that it be permitted to be involved in this process, with a representative on any working group that is formed.

The NJSBA commends the Committee for its recommendations relating to educating judges on immigration issues, developing notices about immigration consequences for family part litigants and reviewing policies that may have an immigration impact. The NJSBA cautions the Court, however, that these recommendations be carefully implemented to ensure that the wide array of

potential immigration concerns be taken into consideration. For example, while juvenile adjudications are not considered convictions for purposes of immigration, a factual basis taken before a judge or an "admission" will be considered a conviction. Additionally, juveniles needing to explore the immigration consequences resulting from a resolution of their state court case face additional expenses which they sometimes cannot bear. Furthermore, sometimes attempting to fulfill the court's due process obligations while preserving the attorney-client privilege with regard to immigration issues can lead to tension in the courtroom and misinformation being conveyed. These issues need to be anticipated and judges need to be properly equipped to address them. The NJSBA and, in particular, the members of its Immigration Law Section, stands ready to assist the Court in ensuring judges are adequately educated and appropriate policies are put in place that are sensitive to the nuances of immigration issues.

Finally, the NJSBA supports the recommendations in this report relating to name changes for minors, which will further protect vulnerable minors who are members of the LGBTQ community seeking a name change with the consent and support of their parents from being forced to face unnecessary publicity about a solely private matter.

Municipal Court Practice Committee

The NJSBA supports the recommendations of the Committee to make technical amendments to the Rules to ensure they comport with current practices. The NJSBA commends the members of the Committee for their efforts to ensure the Rules are up to date.

Again, the New Jersey State Bar Association thanks the Supreme Court for publishing these reports and allowing the bar to submit comments and recommendations. We commend all of the volunteers for their efforts in contributing to the work of the various committees and hope that our comments represent a meaningful contribution to their debate.

Our leaders also look forward to addressing the Court at the public hearing when it is scheduled. The opportunity to participate in all aspects of the rule-making process, which has a significant impact on the practice of law in New Jersey, is appreciated. If you have any questions regarding these recommendations, please do not hesitate to contact me.

Very truly yours.



John E. Keefe Jr., Esq.
President

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cc: Evelyn Padin, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director