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VIA E-MAIL: Comments.Mailbox@njcourts.gov

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Administrative Director Glenn A. Grant
Administrative Office of the Courts
Attn: Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

RE: 2020-2022 Report of the Civil Practice Committee
Comments on Proposed Rule Amendments

Dear Judge Grant:

In accordance with the Supreme Court's invitation of written comments, I offer the following:

1. C.6. Proposed Amendments to *Rule* 2:2-3 – Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

While I am not advocating a change in the general rule that appeals will only lie from final judgments, I am concerned that the proposed definition of "final judgment" as "judgments that finally resolve all issues as to all parties" can be read in a way which is probably not intended. I am aware that this formulation is not completely novel (although I am more familiar with the phrasing "disposing of all issues"), but its incorporation into a rule might instill more rigidity in its application.

My concern here is not with the general requirement of a final judgment for a right to appeal but with how to determine if a judgment is actually final and the (perhaps more than) suggestion in some cases that a dismissal without prejudice can never be final. See *Grow Co., Inc. v. Chokshi*, 403 N.J. Super. 443, 460 (App. Div. 2008). (I believe this concern for "without prejudice" dismissals grows out of the condemned practice of using it "to foist jurisdiction" upon the Appellate Division. *CPC Int'l, Inc. v. Hartford Acc. & Indem. Co.*, 316 N.J. Super. 351, 366 (App. Div. 1998).

Let me illustrate my concern with some examples:

a. In a multi-defendant case, it is possible that the plaintiff will not be able to secure service of process on all defendants and the matter will eventually be dismissed without prejudice as to those defendants. When the matter is resolved as to the defendants who were served and a party appeals, the clerk's office may assert that the dismissal without prejudice of even one unserved defendant means that the judgment is not final as a result of the inflexible view that a "without prejudice" dismissal" is never "final."

b. Similarly, the proposed rule speaks of "resolv[ing] all issues." In some cases, of course, certain issues may not be "resolved" by an actual decision but by a determination that they are moot. Similarly, there is the judicial preference to avoid a decision on constitutional claims if a case may be resolved on another basis.

c. In *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 772 (1989), the Supreme Court teaches that a dismissal for failure to state a claim "barring any other impediment such as a statute of limitations . . . should be without prejudice to a plaintiff's filing of an amended complaint."

As a consequence, not only will a party aggrieved by the judgment not be able to appeal therefrom, but also the party in whose favor judgment was entered will not have the repose available from a final judgment because the time to appeal never actually starts to run.

In summary, while it may be a good rule of thumb, I do not believe that the formulation "finally resolve all issues as to all parties" will be a good definition of those trial court orders that should be subject to an appeal of right, especially if a "without prejudice" dismissal becomes a bright line indicator of non-finality.

2. C.7. Proposed Amendments to *Rule* 2:3-3 - Joint and Several Appeals

I have two concerns about this proposed amendment.

First, the subject matter of proposed *Rule* 2:3-3(b) is distinct from the subject matter of the current rule, proposed to be re-codified as *Rule* 2:3-3(a), and the caption of the *Rule* will not adequately describe it if the addition is made. The rule will thus be difficult to find by reviewing a table of contents.

Second, I believe that the obligation proposed to be imposed is, or should be, addressed in connection with the case information statement, which makes such an inquiry and must be updated under *Rule* 2:5-1(e)(2) (proposed to be amended as *Rule* 2:5-1(h)(2)).

3. **C.9. Proposed Amendments to Rule 2:5-1 – Notice of Appeal; Order in Lieu Thereof; Case Information Statement**

   a. I note that proposed Rule 2:5-1(a) provides for the filing of the notice of appeal in the court from which the appeal is taken. This is a significant change and neither the change itself nor the reasons for it are even mentioned in the rather brief narrative on page 30 of the report. Without knowing why this significant change is proposed, it is difficult to comment favorably on it. Will the Appellate Division clerk's office still address issues with the filing of the appeal? Is it the intent of this amendment that attorneys will use eCourts Civil, for example, to upload the appeal documents? Will trial court-level e-filing functionality be modified to produce the system-generated documents as eCourts Appellate currently does?

   b. As a minor matter, I note that if recommendation C.10 is adopted eliminating the deposit for costs, the reference thereto in proposed Rule 2:5-1(f)(4) should be eliminated.

   c. Proposed Rule 2:5-1(g)(1) requires that the transcript request be e-mailed to an identified Judiciary e-mail.

      i. If the appeal is filed via eCourts, the system should automatically route a copy of the transcript request to the correct office, that then becomes a matter internal to the Judiciary and does not need to be reflected in a court rule.

      ii. The same sentence provides for service of the request upon other officers for appeals from the Tax Court, municipal courts, or administrative agencies. Are these service requirements in addition to or in lieu of the Appellate Division transcript office?

4. **C.10. Proposed Amendments to *Rule* 2:5-2 – Deposits for Costs; Application for Dismissal for Default**

   I heartily concur with the proposed deletion. I further suggest that upon the effectiveness of the rule amendment the Court, enter an administrative order for the refund of all deposits still held, with the possible exception of those cases where an application for costs is pending.

5. **C. 11. Proposed Amendments to Rule 2:5-3 – Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form**

   Proposed Rule 2:5-6(d)(1) requires the deposit of "either the estimated cost of the transcript as determined by the court reporter, clerk or agency, or the sum of $ 500.00 for each day or fraction thereof of trial or hearing" but does not specify who decides which alternative governs. It also requires that the deposit be made "at the time of making the request." It has been my experience in filing appeals on eCourts Appellate that payment is not made during the computer session when the appeal is filed, but afterwards when the transcript office arranges for a transcriber who will be the one to contact me with the deposit requirement.

6. **C. 13. Proposed Amendments to Rule 2:5-6 – Appeals from Interlocutory Orders, Decisions and Actions and Proposed Amendments to Rule 2:11-2 – Determination of Appeal on Motion for Leave to Appeal**

   a. I note that proposed Rule 2:5-3(b) requires only a notice of motion. I presume that the notice of motion must be accompanied at least by a brief in accordance with proposed Rule 2:5-3(g).

   b. It appears to me that there is a word or words missing at the beginning of proposed Rule 2:5-6(c)(3), which I presume would specify that the motion which will toll the time to apply for leave to appeal is one for reconsideration.

7. **C. 14. Proposed New Rule 2:5-7 – Electronic Filing in the Appellate Division**

   One of the significant advantages of the e-filing of briefs and appendices is that these documents do not actually have to be printed until the clerk's office has reviewed and approved them as to formal compliance with the rules, eliminating the waster of paper and postage when hard copies are rejected. Upon the acceptance of a brief and appendix, the filer then prints three hard copies for submission to the court. The other parties to the appeal will have already been served via e-Courts Appellate. Proposed Rule 2:5-7(e)(1) (which implies that self-represented litigants who do provide the clerk's office with an email address can also be served via eCourts Appellate (which inference should be made explicit)) reminds us that such litigants who do not provide the clerk's office with an e-mail address must be served via the conventional rules. I suggest that the service requirement should only apply to the "final" clerk-approved version of the brief and appendix (three physical copies of which are sent to the court) and the service should take place when the three hard copies are sent to the court.

8. **C. 15. Proposed Amendments to Rule 2:6-1 – Preparation of Appellant's Appendix; Joint Appendix; Contents**

   a. I am not convinced of the need to mandate a joint appendix.

   b. The words "receipt of" are unnecessarily repeated in the first sentence proposed to be added to 2:6-1(a)(2).

   c. Depending upon counsel's familiarity with the case (appellate counsel may not have been trial counsel) 14 days after receipt of transcripts may be insufficient to have determined that parts of the record to be included in appellant's appendix let alone prepare a list of the issues to be presented for review.

   d. At present the appellant is required to include "such parts [of the record] as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised." If acrimony between counsel results in the appellant's omission of material that

should be included, it is easy enough for the respondent to include the material in a responding appendix and if really vexed, apply for costs. Under the proposed rule, the respondent might designate "everything" (even though the rule would prohibit unnecessary designation). The appellant can object, in which case the respondent must pay the "cost" (how is that determined?). I have not had experience with truly large records (I think three volumes is about the most I have had to prepare) and the greater cost is compiling and assembling the appendix, rather than its reproduction.

e. In proposed Rule 2:6-1(c)(2), I believe the intention is to prohibit the inclusion of transcripts of proceedings other than in the tribunal from which the appeal is taken. If that is correct, then the word "not" should be inserted between "are" and "to" in the final phrase.

f. Proposed Rule 2:6-1(f) mandates the inclusion of unpublished opinions in a separate volume.

   i. The report's narrative does not explain why this change is suggested.

   ii. The proponent of an unpublished opinion often includes it in a certification, perhaps with other exhibits. The proposed rule would require that the certification be reproduced in separate volumes.

   iii. If the proponent of an unpublished opinion does not provide a copy (I know it is required, but sometimes they do not), the appellant may not even have a copy.

   iv. If there is only one or just a few unpublished decisions cited, this separate volume may be very small.

g. While not directly pertinent to the proposed rule changes but relevant to the required and prohibited contents of an appendix, I would like to suggest that the statement of material facts required by Rule 4:46-2 should be a captioned document separate from the brief submitted in support of a summary judgment motion. Although motion briefs are not permitted in an appendix, the statement of material facts would have to be included.

9. C. 16. Proposed Amendments to Rule 2:6-2 – Contents of Appellant's Brief

While strictly speaking not part of the proposed rule, I would suggest that Rules 2:6-4 and 2:6-5 be modified to state explicitly that the parenthetical information required in the point heading by Rules 2:6-2(a)(1) and 2:6-2(a)(6) (proposed to be moved to 2:6-2(a)(7)) either <u>is</u> or <u>is not</u> required in responding and reply briefs.

10. C. 18. Proposed Amendments to Rule 2:6-7 – Length of Briefs

a. No doubt many briefs are overly long because of repetition, inadequate editing, or a writing style that is simply overly verbose. I believe that I am usually able to present my arguments in a concise fashion, and, accordingly, I have rarely, if ever, felt the need to come close to the page limits specified in the rule. However, there is always the prospect that I may have to do so and therefore I share the "general aversion to page limits" referenced on page 89.

b. The page limit should not apply to the table of transcripts proposed to be required by Rule 2:6-2(a)(2)(D)

c. The proposed rule does not appear to provide for an application to exceed the page limits for a subsequent brief. While often a reply brief can be significantly shorter than an initial brief, there are occasions when opposition to a tersely presented argument must be wordier than that argument itself. Further, as an appellate court may affirm a judgment on any ground supported by the record, a respondent is permitted to argue for affirmance of the decision below on grounds other than those cited by the lower court. See e.g., *Chimes v. Oritani Motor Hotel, Inc.*, 195 N.J. Super. 435, 443 (App. Div. 1984). Therefore, the respondent's brief may properly address matters outside the appellant's brief to which the appellant must reply.

11. C. 20. Proposed Amendments to *Rule* 2:6-11 – Time for Serving and Filing Briefs; Appendices; Transcript; Other Permissible Submissions

Rule 2:6-11(f) presently requires the appellant or respondent to advise the court by letter of any change in the placement status of the child in Division of Child Protection and Permanency matters. The proposal would renumber certain paragraphs and the substance of paragraph (f) would be redesignated as (d)(3). However, the appeals subject to this requirement would be expanded from those arising from the Division of Child Protection and Permanency to all matters "involving children." The narrative preceding the proposed change (page 94) does not indicate that there is any intention to broaden the scope of matters in which the obligation arises. If the intention is not to broaden that scope, the reference to the Division of Child Protection and Permanency should be retained. If the intention is to broaden the obligation, more clarity as to that intention is needed. The term "involving" is vague. An appeal from a custody or child support determination would certainly "involve" children as would any case in which a minor is a party. Further, the term "children" itself may not be the appropriate word if the concern is for minors. After all, we are all "children" of our parents no matter our age.

12. C. 21. Proposed Amendments to *Rule* 2:7 – Appeals By Indigent Persons

I have two concerns about this proposed amendment.

a. First and most important, there is no explicit requirement that appellant claiming indigency must serve a copy of the petition (or even notice that such a petition has been filed) upon the other parties to the matter. The issue is not whether the other parties should be able to object to the petition (as to which I am agnostic at this time) but that the rule proposal requires that the filing of the petition within the time to take the appeal renders the appeal itself timely. There is no time limit either for the trial court to act on the petition or for the appellant to file a notice of appeal following approval of the petition. The other parties to the matter would not know if the matter will be appealed or not. I suggest that the petition should be filed with the notice of appeal (much like the case information statement and transcript request form) and at least notice of the application be served on all other parties with those papers.

b. Second, I do not understand why in court appeals the petition would first be reviewed by the trial court (with the possibility of review by the Appellate Division), but in administrative agency appeals it would be decided by the Appellate Division in the first instance. If the Appellate Division is going to have the machinery in place to review such a petition for one class of cases, it makes sense to me to have all such petitions reviewed there. How many potential appellants rejected by the trial court would not take advantage of the opportunity to have that action reviewed?

If my first suggestion is found to be meritorious but not the second, the Appellate Division clerk's office could refer petitions to the appropriate trial court upon the filing of the appeal.

13. C. 22. Proposed Amendments to Rule 2:8-1 – Motions

a. Some, but certainly not all, motions in the Appellate Division can be expected to rely on matters that were not part of the record below, for example, a request for extension of time or to supplement the record. I would normally expect to supply such facts via a certification, but the proposed rule does not appear to contemplate such a document. Instead, it requires an appendix, the only specifically required content of which is "the judgment or order and the opinion or statement of findings and conclusions below." I am afraid that I just do not understand the benefit of an appendix to provide required parts of the record over a certification attaching such documents and non-record items that may be pertinent to the specific motion.

b. Briefs on motions are to comply with Rule 2:6-2(a). Consistent with the suggestion I made in item 9, the rule should state explicitly that the parenthetical information required in the point heading by Rules 2:6-2(a)(1) and 2:6-2(a)(6) (proposed to be moved to 2:6-2(a)(7)) either <u>is</u> or preferably <u>is not</u> required in motion briefs.

c. In addition to tables of contents, tables [this word should be plural to be consistent with its earlier use in the sentence and in Rule 2:6-7] of citations and appendix, the twenty-five-

page limit should not apply to the table of transcripts proposed to be required by Rule 2:6-2(a)(2)(D).

d. Proposed Rule 2:8-1(a)(3) requires a motion in order to file an over-length brief or appendix. Will such an application require its own appendix?

e. Proposed Rule 2:8-1(a)(4) permits a certification in lieu of a brief for motions concerning administrative matters relating to an appeal "on good cause shown." How is this showing to be made? I would not expect to file a prior motion (with brief and appendix) to secure permission to file an administrative motion with a certification in lieu of a brief. The other option would be for the certification to set forth good cause, which leaves the possibility that there will be a finding that good cause has not been shown and therefore either the motion will be rejected or denied for procedural reasons. In either event the other parties, assuming that they wanted to oppose the motion, would have to prepare their opposition assuming that good cause would be found. This brings up too many questions for whatever value there is in allowing a certification in lieu of a brief. (Fundamentally, I believe that the purpose of a certification is to introduce facts, not to make legal argument.)

14. C. 26. Proposed Amendments to Rule 2:9-8 – Temporary Relief in Emergent Matters

The proposal reformats the current rule by addressing requests to the Supreme Court in paragraph (a) and to the Appellate Division in paragraph (b). However, paragraph (a) would continue to reference the potential for relief by a single judge of the Appellate Division for matters pending in that court. The same language also appears in paragraph (b). I believe that the duplication is inadvertent, and I suggest that the phrase "or, if the matter is pending in the Appellate Division, by a single judge thereof," be deleted from proposed Rule 2:9-8(a).

15. C. 29. Proposed Amendments to Rule 2:11-6(a) – Reconsideration; Page Limits

Proposed Rule 2:11-6(a)(2) establishes a page limit for motions for reconsideration. I would expect that the intention is to establish that limit for the brief in support of such a motion. (I do note that in some rules there is a reference to a notice of motion while elsewhere that document is just described as a motion.) I would welcome a change in appellate practice to dispense with the requirement of a separate notice of motion and supporting brief and combine the two documents into a single "motion" in the form of a brief (similar to a petition for certification).

16. C. 31. Proposed Amendments to *Rule* 2:13-1(b) – Presiding Justice or Judge

The proposal would change the title of the Presiding Judge for Administration to Chief Judge of the Appellate Division, but the title of the other presiding judge who could be appointed to assist the chief judge would remain Deputy Presiding Judge for Administration. I suggest that this title should be changed to Deputy Chief Judge for the sake of consistency.

17. G. Proposed Amendments to *Rule* 4:42-2 – Judgment Upon Multiple Claims and *Rule* 4:49-2 – Motion to Alter or Amend a Judgment or Order

I agree that there is continuing confusion regarding the standards and timing requirements for reconsideration of interlocutory versus final orders. I suggest that this confusion arises from the fact that a party or attorney unfamiliar with the distinction would likely be drawn to *Rule* 4:49-2, captioned "Motion to Alter or Amend a Judgment or Order," the text of which currently does not suggest a distinction between final and non-final orders, rather than *Rule* 4:42-2, captioned "Judgment on Multiple Claims." While the proposed amendment of the caption of *Rule* 4:42-2 may make the subject matter more apparent, this rule would continue to address two distinct topics. I believe that the confusion would be more effectively dispelled if the subject matter of reconsideration were comprehensively addressed in *Rule* 4:49-2 (say by re-codifying current content as *Rule* 4:49-2(a) and adding *Rule* 4:49-2(b) to address interlocutory orders). I therefore propose that the two Rules be amended as follows:

4:42-2. Judgment Upon Multiple Claims

If an order would be subject to process to enforce a judgment pursuant to R. 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and liabilities asserted in the litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded. In the absence of such direction, any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in accordance with R. 4:49-2(b)~~in the sound discretion of the court in the interest of justice~~. ~~To the extent possible, application for reconsideration shall be made to the trial judge who entered the order~~.

4:49-2. Motion to Alter or Amend a Judgment or Order

(a) Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or ~~final~~ order appealable of right under R. 2:2-3(a) or (b) shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

(b) A motion for rehearing or reconsideration seeking to alter or amend a judgment or order not appealable of right under R. 2:2-3(a) or (b) may be made at any time before the entry of final judgment and shall be determined in the sound discretion of the court in the interest of justice.

My proposed deletion of the direction that the application should be made to the trial judge who entered the order is not intended to encourage what are sometimes termed "lateral appeals," but to recognize that there is no procedure for the moving party to choose to which judge a motion is assigned. The assignment of the motion to the proper judge is an internal matter for the court and not something under the control of a party.

As you can see, in many cases my comments do not reflect policy matters, but clarification and the avoidance of ambiguity. I would be happy to respond to any questions. I thank you and the Court in advance for consideration of my comments.

Respectfully submitted,

Jay B. Bohn