From: Victoria Katz <victoria.katz@aderant.com>
Sent: Thursday, March 31, 2022 11:47 AM
To: Comments Mailbox
Subject: [External]Comment on Proposed Rule Amendments OFC 3-31-22

Good morning,

We are writing to comment on several of the proposed rule amendments contained in the 2022 Report of the Supreme Court Civil Practice Committee, out for comment until March 31, 2022.

Rule 2:5-1

Proposed Rule 2:5-1(d) says:

> Within 30 days of receipt of the notice of appeal, or an order in lieu of notice of appeal as described in paragraph (f)(4) of this rule, the trial judge, agency or officer who entered the order or judgment under review, may file and send to the clerk of the appellate court and the parties an amplification of a prior written or oral statement, opinion or memorandum. If oral, the amplification shall be recorded pursuant to R. 1:2-2. If there is no such oral or written statement, opinion or memorandum, the trial judge, agency or officer shall within 15 days file with the clerk of the appellate court and send to the parties a written opinion stating findings of fact and conclusions of law. [Emphasis added.]

The first sentence in paragraph (d) clearly sets forth a 30-day deadline triggered by the "receipt of the notice of appeal, or an order in lieu of notice of appeal." The last sentence in paragraph (d) sets forth a 15-day deadline, but does not state any triggering event for this calculation. Is the 15-day deadline likewise triggered from the receipt of the notice or order? To avoid any possible confusion, we request that the Court further revise Rule 2:5-1(d) to specifically state the triggering event for the 15-day deadline.

Rule 2:5-6

Proposed Rule 2:5-6(c)(3) says, "If a motion to the trial court or administrative agency or officer of the order from which leave to appeal or cross-appeal is sought is filed and served within 20 days after the date of its service, the time to file and serve the motion for leave to appeal or cross-appeal in the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration." [Emphasis added.]

This Rule is confusing because it is not clear what document the Court refers to when it says "its service." It also is unclear why is a motion for reconsideration in particular mentioned at the end of the paragraph. Is a motion for reconsideration the only type of motion that may be sought that would extend the deadline for filing and service of the motion for leave to appeal or cross-appeal? Is it the service of that motion for reconsideration the Court refers to when it says "its service?"

We respectfully request that the Court revise Rule 2:5-6(c)(3) to clarify the deadlines therein. For example, the Rule might be changed to say, "If a motion *for reconsideration* to the trial court or administrative agency or officer *regarding* the order from which leave to appeal or cross-appeal is sought is filed and served within 20 days after the date of *service of the order*, the time to file and serve the motion for leave to appeal or cross-appeal in the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration."

In addition, of perhaps a more minor concern, proposed Rule 2:5-6(d) is entitled "Motions for Cross-Appeal when Leave to Appeal is Granted." The body of the paragraph then says, "If an appeal from an interlocutory order or decision is allowed, an application for leave to appeal (if the application has not been previously denied) may be made by serving and filing with the appellate court a notice of motion within 10 days after the date of service of the order of the appellate court allowing the appeal." [Emphasis added.]

Should the underlined language above match the title of the section and say an application "for leave to cross-appeal?"

Rule 2:5-7

The Committee is proposing a new Rule 2:5-7 regarding Electronic Filing in the Appellate Division. Section (c)(5) of this new Rule provides in the last sentence that the "time for filing any required or permitted response" to a document electronically filed "shall begin to run on the first business day following such electronic filing, unless otherwise specified by the court." [Emphasis added.] Although we understand this provision conforms to the Court's prior orders on e-filing in the Appellate Division, we find this sentence problematic as used in both the old and new provisions problematic.

As a preliminary matter, we question the inclusion of the entire that last sentence of Rule 2:5-7(c)(5) because there already is a time computation rule in place, Rule 1:3-1, and the two Rules are not consistent. Including a computation of time calculation in Rule 2:5-7(c)(5) that differs from Rule 1:3-1 creates confusion and the potential for problems. Rule 1:3-1 simply says not to include the day of the act when computing time periods, while Rule 2:5-7(c)(5) goes further and says not to include the day of the act and also not to start counting until you come to a business day. The two Rules could lead to very different calculations. If appellant's brief is served via eCourt-Appellate on 12/23/22, the 30-day time period to file a response brief does not begin to run until 12/27/22 (12/24 and 12/25 are weekend days and 12/26/22 is Christmas holiday observed). If the brief is served traditionally on 12/23/22, the 30-day time period to file a response brief begins to run on 12/24/22 pursuant to Rule 1:3-1.

If the Court does retain the last sentence of Rule 2:5-7(c)(5), however, some of the wording in that sentence is ambiguous and themselves may cause confusion. For example, does "response" in this context mean any document with a deadline triggered by the e-filing or e-service via eCourts-Appellate, or only to a document that specifically responds to the initial filing? In other words, when a petition for certification of a final judgment is filed in eCourts-Appellate pursuant to Rule 2:12-3, does the calculation of time stated in Rule 2:5-7(c)(5) apply equally to the to the deadline to file and serve a notice of cross-petition and to the deadline for the petitioner to deposit costs with the Supreme Court pursuant to Rule 2:12-5? One might argue that the deadline to deposit costs is not a "response" to the petition. Somewhat similarly, does the calculation apply when the party submitting documents in eCourts-Appellate is the party that must act following such filing/service, or only when a different party must act? One suggestion to resolve these issues would be to revise the last sentence of Rule 2:5-7(c)(5) to say, "The time for filing any required or permitted document shall begin to run on the first business day following filing and/or service of a document through eCourts-Appellate."

Rule 2:6-1

Proposed Rule 2:6-1(a)(2) says, "In the absence of an agreement, the appellant must, within 14 days after receipt of receipt of any transcripts, serve on all respondents a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review." [Emphasis added.]

It appears that "receipt of" was inadvertently repeated in this sentence and that one repetition needs to be eliminated.

Rule 2:6-7

Proposed Rule 2:6-7 added the following sentence, "Parties may seek a relaxation of these page limitations of the party's first brief upon a showing of good cause by motion filed no later than 20 days before expiration of the time for filing the brief; the movant must certify the motion is made in good faith and not for purposes of delay." [Emphasis added.]

Because the 20-day deadline stated is a backwards-counting deadline, the language "no later than" becomes unclear. Does it mean the motion must be filed more than 20 days before the expiration of the time for filing the brief, or that the motion *cannot* be filed more than 20 days before the expiration of the time for filing the brief? If the former, we request that "no later than" be replaced with "at least." If the latter, we request that "no later than" be replaced with "within."

Rule 2-6-11

Although we have no issues with any of the proposed amendments suggested for Rule 2:6-11, as long as there are changes proposed, we hope the Court will consider a few additional changes to the paragraph to promote clarity and consistency. Proposed, Rule 2:6-11(b) says, "Within 30 days after the service of such brief and appendix, the respondent/cross appellant shall serve and file an answering brief and appendix, if any, which shall also include therein the points and arguments on the cross appeal. Within 30 days thereafter, the appellant/cross respondent shall serve and file a reply brief, which shall also include the points and arguments answering the cross appeal. Within 14 days thereafter,

the respondent/cross appellant may serve and file a reply brief, which shall be limited to the issues raised on the cross appeal." [Emphasis added.]

The use of the term "thereafter" in the 30 and 14-day deadlines above makes those deadlines problematic because the deadlines preceding such use are deadlines to "serve and file" a brief. Thus, it's not clear whether the triggering event is the filing of the preceding brief, the service of the preceding brief, or both. The preciseness of this triggering event is relevant so that one will know whether extra time is required to be added to account for service by mail pursuant to Rule 1:3-3 or to account for filing or service via ecourts-Appellate pursuant to Rule 2:5-7. We request that "thereafter" in these 2 sentences be replaced by a more specific triggering event, such as "after service" of the respective brief, as is used elsewhere in Rule 2:6-11.

Rule 2:7-1

Proposed Rule 2:7-1(c) appears to be missing some language. It currently says, "Representation by Rule 1:13-2 Entities. If an indigent by any person, society or project enumerated in R. 1:13-2, all filing fees and deposits shall be waived by the appropriate clerk or clerks without the necessity of court order."

Should the first phrase actually say "If an indigent *party is represented* by any person, society or project enumerated in R. 1:13-2...?"

Rule 2:8-3

Proposed Rule 2:8-3 says, "The motion may be filed at any time after filing of the notice of appeal; provided, however, that the motion for summary disposition may not be filed, absent leave granted by the court, if 25 days have elapsed from the filing of all respondent's briefs." [Emphasis added.]

Did the Court intend to shorten the existing 25-day deadline? Because it's not clear whether a day "elapses" at the very start or the very end of that day, it is difficult to know whether this change means that the motion for summary disposition is timely if filed on the 25th day after the filing of all respondent's briefs, or if it must be filed on the 24th day to be timely. If the Court wishes to retain the reformatting of this sentence by the Committee, we request that they reformat the sentence but keep the previous "not later than" language. The sentence would thus read, "The motion may be filed at any time after filing of the notice of appeal; provided, however that the motion for summary disposition may not be filed *later than 25 days after* the filing of all respondent's briefs."

Thank you very much for your time and consideration.

Sincerely,

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