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Subject: [External]2022 Civil Practice Committee Report Comments

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I am writing with regard to the 2022 Report of the Supreme Court Civil Practice Committee. In particular, I am focusing on the proposed amendments to the Rules in Part 2, which govern actions in the appellate courts.

By way of background, I will note that I have now been practicing in the New Jersey courts for over 35 years, with a particular focus on appellate matters. This appellate practice has included both civil and criminal matters. Ever since law school, I have had also had a particular interest in the Rules of Civil Practice, and have a strong familiarity with the provisions of the New Jersey Rules, which extends to the Part 2 Rules. Based on these experiences, I feel particularly qualified to offer the following observations.

While there are many aspects of the proposals that I think would improve the Rules, there unfortunately are many that are problematic, often very much so.

First, I will briefly note the proposals I agree with. As the overall comment on the Part 2 amendment indicates (page 6), many of these Rules have become quite cumbersome and difficult to understand. Because I am known to be quite familiar with these Rules, I often receive calls from attorneys asking me questions about appellate practice, where the answer is clear and obvious if you can actually follow the Rule, but where the language of the Rule is so dense that it can be very hard to figure to work through all the verbiage. The reorganization of the Rules, breaking out solid blocks of text into subsections and sub-subsections, should help greatly in that regard. For instance, the current version of the R. 2:2-3 (pages 20-25) is very dense, and so extremely difficult for many to parse, and the proposed reorganization should reduce those problems.

That said, there are some elements of the proposed rewrites that make substantive changes to the Rules, at least some of which are as I said problematic, and it is these that I will focus on in this submission.

Before addressing the specifics, I will offer the following general comment. In many if not most cases, the Committee commentary regarding the proposal is at best cursory, not addressing in any detail what changes are being made to the Rule, much less the rationale for the changes. Perhaps there are good reasons for some of the substantive changes, but it's impossible to know what these are in the absence of explanatory commentary. This will create issues if/when questions arise as to how the new amendments should be construed.

The first proposed amendment I want to discuss is the rewrite of R. 2:5-1 (pages 30-43). As rewritten, this Rule would make a major change in the practice regarding the filing of appeals. Currently (and as long as I've been an attorney), appeals are started by filing the Notice of Appeal in the Appellate Division. R. 2:5-1 (a) & (d). If the appeal is from a court, then a copy is filed

with the court from which the appeal is being taken. R. 2:5-1 (a). But the proposal would change that by directing that "An appeal from the final judgment of a court is taken by filing with the court from which the appeal is taken" the Notice of Appeal, along with the Transcript Request Form, and CIS. As written, this would mean that appeals would be started by filing not in the App Div but the trial court. Indeed, there is nothing in the rewrite that would even require a copy of the Notice of Appeal and other pleadings to be filed with the Appellate Division (or for that matter the fee to actually be paid to the App Div). Moreover, nothing in the rewrite addresses how to file an appeal in an administrative matter. Service is addressed, but not filing.

Interestingly, the proposed rewrite of R. 2:5-6, dealing with applications for leave to appeal, would maintain the language providing that the Notice of Motion is filed in the App Div, with a copy to the court below.

While attorneys experienced in appellate practice will no doubt realize that appeals should be started through the App Div eCourts application, non-experienced attorneys – and even more problematically pro se parties – would read the proposed rewrite and follow its directions and file only in the trial court. This will no doubt create much confusion, and generate more work for the App Div Clerk's Office. In this regard, I will note that the notion of starting an appeal by filing in the court from which is the appeal is being taken, rather than the appellate court to which it is being taken is a reasonable position – indeed, it is the practice established in the federal courts by FRAP R. 3. So someone not familiar with past practice in NJ would not think such a provision odd. But in the absence of anything in the commentary explaining why such a change should be made here in NJ, I would respectfully submit that there is no reason why it should be made.

Lastly, I do recognize that the reason this is not discussed in the rewrite of R. 2:5-1 is because the drafters felt it is sufficiently covered in proposed new R. 2:5-7. However, as drafted that is not necessarily clear. That is especially true given that the new Rule clearly applies to all documents filed through the eCourts App Div application, not just the initial pleadings. If this is the reason filing of the initial pleadings is not addressed in R. 2:5-1, then the failure to have a cross-reference in the rewritten version of R. 2:5-1 to the new Rule will only serve to create the kind of confusion that the drafters claim they are trying to eliminate in the current text of the Part 2 Rules.

Since there is nothing in the commentary about this change, it is hard to tell whether these problems are the intended result of the rewrite, or whether it was a mistake in drafting. Regardless, it should not be adopted as written.

The next proposed rewrite where there is a problem is to R. 2:5-6 (pages 56-61), in particular the proposed addition of subsection (c) (3) and the proposed revision of subsection (d) and the proposed addition of subsection (h). Although the intent of subsection (c) (3) is clearly to deal with motions for reconsideration, that is not altogether clear from the text of the revision. I would submit that the phrase "seeking reconsideration" should be added after "officer" and before "of the order …"). With regard to proposed subsection (d), this appears redundant to portions of proposed subsection (c) (2), and so unnecessary; Either revised subsection (d) or the overlapping language in subsection (c) (2) should be eliminated. With regard to subsection (h), it has been my experience that if the order granting a motion for leave to appeal does not also resolve the issue, then the matter is briefed and heard on oral argument as normal. As I read the new language, it is difficult to tell whether this is the intent or not. I would submit that the Rule should be very clear on this, either explicitly in the Rule or by providing in the Rule that the Order on the Motion for Leave will address these topics if the matter is not summarily resolved.

The next proposed amendment I want to discuss is the addition of R. 2:5-7 (pages 63-69). My first reaction was that this Rule does not belong in the 2:5 Rules, which are titled "How to Appeal" – it does not deal just with the initial submission to the App Div but all submissions, and so would be better elsewhere, perhaps as R. 2:1-2, since it applies throughout the Part 2 Rules. In its proposed location, there is a good chance it will be overlooked by those with less than a strong familiarity with the Rules. Alternatively, the Rules that it impacts, such as R. 2:5-1, 2:5-6, most if not all of the Rules in 2:6 and 2:8 and 2:9, should have cross-references. Indeed, her

More importantly, this Rule imposes more highly technical requirements than any other Rule in the entire book of Rules. Unlike so many other jurisdictions, here in NJ our Rules have always been guided by the principle that they are designed to support simplicity in practice, not create a path with a myriad of technical hoops to jump. And when I first started practicing that was the case in the App Div as much as anywhere, but particularly since the initiation of eCourts App Div, that has been changing. Now the App Div staff see to go out of their way to find reasons to return documents that in the past were accepted. This of course only serves to increase the costs of litigation to the parties, particularly those represented by likewise those proceeding pro se, despite the mandate that the Rules be applied to avoid needless expense. This proposed Rule, in its current form, would only take that to a new extreme level, particularly since these requirements would then be subject to modification through the Rule amendment process, rather than the simpler process used with Administrative Directives and the like.

I will note address all the detailed provisions of this proposed addition, but there is a couple of particular note. The first is the requirement in proposed subsection (d) (3) that the top margin be 1 ½ inches. That is not part of the current administrative requirements, and would result in a significant change in the number of pages contained in a brief (even if the page limits weren't be elsewhere being changed). Out of curiosity, I opened a recent appellate brief that I filed 1 applied this new margin, and the document increased by 1 page for every 15 it currently had. This of course could be the different between a brief that is overlength and one that is not.

Since pleadings, briefs, and other documents that are currently being filed in eCourts App Div (and for in the eCourt applications used for the other parts of the judicial system) can easily fit the eCourts filing time stamp within the current 1 inch top margin (indeed usually in the top 1/4th inch of the 8 ½ sheet of paper), I cannot understand why this change is deemed necessary. If our Rules had word limits (like FRAP), rather than page limits, it would not matter. But as long as our Rules hare page limits, this change should only be done if essential necessary.

Lastly, I will note that this new requirement is not carried over to the Rules governing submissions made by paper rather than through eCourts. This inconsistency makes absolutely no sense whatsoever.

The second observation is that several of the provisions of this Rule appear to be redundant to those in the rewritten R. 2:5-1 and other of the Rules. In particular the subsections addressing service of efiled pleadings and other documents are clearly redundant. While that redundancy might have been appropriate when the text appeared as an administrative directive, it is clearly not so when in the Rules. Such redundancy is contrary to the goals of the revisions and indeed more broadly the Court Rules, and so current redundancies should be eliminated not new ones created.

Lastly, since I am writing about this, I will note that current eCourts App Div application is problematic, in that access can be difficult for those not involved in the case – in other words, members of the public, including other attorneys, who want to exercise their right to public access of court records. More than once, I have tried to access the briefs in a case after reading a newly issued

opinion (for instance, to see whether an issue was adequately briefed when I read a decision that seems contrary to established law), only to find that these are deleted as soon as the final opinion is issued. Even before, access to App Div records can be difficult for these not counsel of record.

The next Rule rewrite I would like to address is the one to R. 2:6-1 (pages 70-78). I see that this was questioned by even some of the members of the Committee. The goal of this rewrite is to encourage an increased use of joint appendices. It has been my experience that even in other contexts where various Court Rules call for such cooperation between counsel (such as the Rules dealing with discovery disputes and pre-trial conference submissions, to name two), these are more often honored in the breach. It is just too difficult to get two, much less more, attorneys to focus at the same time on something they consider as 1) not particularly time sensitive, and 2) unlikely to move a case to amicable resolution as this. May not be right, but that is the reality of the situation. Indeed, even in the cases I have handled in the federal Courts of Appeal, I have never seen a case where a joint appendix was used.

It seems to me that this is a fix in search of a problem. In the vast majority of appeals, it is not difficult to figure out what should be included in the Appendix, given the issues raised by the appealing party and how the opposing parties can be anticipated to respond. I do see an occasional decision where the panel is critical of how the parties have prepared the submissions, but these are in fact relatively rare. There are of course cases where the parties omit portions of the record that they should recognize the other side will want. But in the absence of a mandate that a joint appendix always be prepared and filed, this will continue to occur – sadly, no rule will dissuade those attorneys who choose to act uncooperatively from continuing to do so.

Beyond that, the proposed requirement that appellant submit to other counsel a list of the documents to be included in the appendix within 14 days after receipt of the transcripts, and that opposing counsel then respond with a similar time, is unrealistic in the real world of attorney practice, and will only serve to increase the cost of an appeal to the client. Most likely, the attorney will simply include every document listed in the docket listing provided through eCourts or the like, along with every trial exhibit where the matter went to trial, regardless of whether these will actually be relevant to the issues on appeal. The alternative would be to spend the time necessary to actually think through all the appeal arguments, and what documents will be necessary, and in the real world, where most attorneys in my experience have far too much work on their desk to spend time on something before it's actually necessary, that alternative just won't happen.

Indeed, as it is, I all too often have seen attorneys who are known not be very familiar with appellate practice include in the appendix every motion, including discovery and calendaring motions, notwithstanding the fact that these are totally irrelevant to the issues on appeal. Indeed, in my experience it's been these kind of attorneys who have been most likely to include all their submissions while omitting the responses of the adversary – even the responses relevant to the issues on appeal. So, for instance, I have seen attorneys who included irrelevant motions to compel discovery while omitting the adversary's submissions on the motion for summary judgment that's being appealed.

The bottom line is that it seems to me that the increased focus on joint appendices, and the formalized procedures for designating what will be included in appendices, is a time and energy.

If R. 2:6-1 is being revised, then I would suggest one small change to subsection (b) (11). I would submit that it would be clearer if the Rule expressly required on appeals from summary judgment orders inclusion of the Statement of Material Facts and any Counter-Statements of Material Facts, together with all exhibits referred to any of those Statements, in cases to which R. 4:46-2 is

applicable, with the current language (which is carried over in the rewrite) included for those cases where that Rule is not applicable. I think such language would be much clearer than that of the current Rule, and would reduce the biggest problem I've seen with appeals from Motions for Summary Judgment, namely the occasional omission of the opposing party's Statement and exhibits.

Next is the proposed rewrite of R. 2:6-2 (pages 79-86), in particular the proposed omission of the option of submitting letter briefs. The commentary's rationale is that production of the tables of authorities, etc., required in regular briefs is not as complicated as it used to be, given the functionalities included in modern word processing programs. While the observation about word processing programs is in fact true, the reality in the real world is that far too many attorneys and staffers have little knowledge of or experience with the relevant functionalities. Indeed, I a few years back, long after those functionalities were available, worked for a firm that filed at least two appellate briefs a year, and if I wasn't personally involved in the production, I would see the staffer manually creating the tables, simply out of ignorance. Indeed, it has been my experience, working with younger people who of course are exposed to computers and typing and word processers from earliest grades of elementary school, and have used them throughout their educational careers, that while they know how to do the basics with a word processor, far too often that is the limit of their familiarity with these programs. While that might not be true of the big law firms, who have people more likely to have such familiarity from their training, it's not true of smaller firms. And of course smaller firms are just as likely to be involved in the appeals than larger firms, if not more so.

Point is that it seems to me that the proposal has an unrealistic view of the realities, and so minimizes the role of letter briefs for certain types of offices. I would submit that the Rules should continue to allow for letter briefs as the parties and their counsel see fit.

Even if an argument could be made that letter briefs should not be allowed in initial briefs (and I've used these as the initial brief in appeals I've been involved in only on the rarest of occasions), I must observe that the same is not true of reply briefs. I have on many occasions concluded that a letter brief is all that is necessary in reply, particularly when I feel only a short response to the opposition is necessary. It is not uncommon for these to have only limited citations to legal authorities not already cited in one of the earlier briefs. So an additional Table of Authorities adds little to the court's consideration of the issues. In short, I would submit that reply letter briefs certainly have a role while serving to reduce the cost to litigants.

Next is the proposed revision to R. 2:6-7 (pages 89-90). While I personally would not favor any change in the permitted length of briefs, if the court believes this is appropriate, I would respectfully submit that the proposed language regarding motions for leave to file an overlength brief should be modified in regards its time frame. Once again, this proposal shows a lack of comprehension of the realities of practice. The suggestion that an attorney could know, 20 days before the due date, whether the brief will be overlength in simply unrealistic. If that were true, I would submit that briefs would be frequently filed well before the due date, and in the appeals I've handled I can't say I've ever seen one where that was the case. Indeed, briefs are usually only received on or even after the due date. Simply put, this proposal is totally unrealistic.

Next is the proposed revision to R. 2:6-11 (pages 94-). There is a technical error in proposed subsection (e) (2), specifically the reference to "subparagraph (a)." I'm not sure exactly what was intended, but this is obviously a drafting error.

In closing, I want to express my appreciation to the Court for its attention to this submission.

Respectfully submitted,

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