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Hon. Glenn A. Grant
Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 37
Trenton, NJ 08625-0037

Re: Civil Arbitration – Comments to October 6, 2022 Notice to the Bar

Dear Judge Grant:

Please accept this letter as the undersigned's comments to the proposal to require parties to civil arbitration to submit their Arbitration Statements to the Arbitrator in advance of the scheduled Arbitration hearing for remote Arbitrations.

Initially it should be noted, that the current Rule of allowing Arbitration Statements to be submitted to the Arbitrator at the time of the Arbitration was originally adopted when the hearing were in the Courthouse, and should not be amended for those hearings. That practice has worked very effectively and should not be altered. That same Rule has proven however to be problematic when the Arbitration is remote.

At one point in time, the Rule did require that Arbitration Statements be submitted to the Court prior to the Arbitration Hearing even when the Arbitration was in the Courthouse. That proved to be extremely inefficient. First, staff personnel were required to receive and then put the Arbitration statements in the appropriate place for the Arbitrator or otherwise file them. Secondly, there was no real monitoring due to reduced staffing as to whether or not statements had been submitted in a timely manner. Third, Arbitrators were and still are rarely designated in advance of an Arbitration, and the Arbitrator was seeing the previously submitted Arbitration Statement immediately prior to the Arbitration anyway. As a result, the Rule was amended to allow same day submittal to the Arbitrator. The entire practice of early submittal of Statements for in Court

Arbitration was therefore proven to be nothing more than added and unnecessary work for the staff and become fully obviated when the Rule was changed to allow the submittal of those Statements at the time of the Arbitration Hearing. The Rule also provides that the Statements be exchanged ten (10) days before the Hearing.

With regard to remote Arbitrations, Arbitrators throughout the State are currently subjected to receiving Arbitration Statements at the time of Arbitration because the Rule was never changed and this requires the downloading of lengthy expert reports or other materials at the time of Arbitration often without separation of materials. The greatest advantage of virtual Arbitrations has been the ability of an Arbitrator to review the materials well in advance of the Arbitration in order to have the issues refined. This shortens the Arbitration Hearing and in my view creates a more equitable result because the Arbitrator has had an opportunity to review all of the core case documents.

With this preface, please accept the following as my comments to the specific issues raised in the October 6, 2022 Notice to the Bar, a copy of which is enclosed.

As to (1), the Arbitration Statement should be submitted to the Arbitrator in advance of the scheduled Hearing date for virtual or remote Arbitrations only.

As to (2), those Statements should be submitted five (5) days prior to the Arbitration date by the parties so that the Arbitrator has more than sufficient time to review them.

As to (3), the requirement for advance submittal should only apply to virtual or remote Arbitrations. As stated above, we tried advance submittal of Arbitration Statements to the Court in the past and it proved to be unwieldy and caused unnecessary staffing burdens and still resulted in the statements being seen on the day of the Hearing by the Arbitrator.

As to (4), this is the most difficult issue with regard to a change in the Rule. One possibility is for the Arbitrator not to be required to consider any of the materials that were submitted past the deadline. A possible Rule could give the Arbitrator the right to do so but not require him or her to do so. A second possibility is simply for the Arbitrator to be required to report the dilatory submittal of the Arbitration Statements to the Arbitration Administrator with a determination as to sanctions to be made by the Presiding Judge of the Vicinage.

A third possibility, which is more draconian, is to take the following approach depending on whether the Plaintiff or Defendant is deficient. If the Defendant is deficient, the Arbitration Hearing can then be treated as a Default Judgment Hearing with the Defendant not being able to submit any evidence but only being able to cross examine. If the Plaintiff is the deficient party, the remedy can also be that no materials such as doctors' reports be allowed to be presented in Arbitration. Similar to the first possibility, this will result in less than a fair hearing on the merits.

Of the three possibilities, the last one is the least favored because it will fully deprive a party of his or her rights and will automatically result in *trial de novos* being filed which defeats the salutary purpose of Arbitration as set forth in statute and in the Court Rules which is to settle cases. It should be pointed out that the important statistic with regard to the impact of Arbitration in the State of New Jersey is not the *trial de novo* rate since that rate provides information as to whether or not cases settle within 30 days of the Hearing. The vital statistic is the percentage of cases that go through the Arbitration system that are ultimately settled or disposed of without the necessity of a verdict. The Arbitration Award is often the most influential event in a case and one in which a full hearing is necessary to obtain a fair result. For that reason, the consequences of a failure to submit the Arbitration Statements by an established deadline will have an impact on that settlement/disposition percentage.

In the final analysis, I do not think that the Rule itself should provide for consequences for failure to submit the Arbitration Statement within five (5) days of the remote Arbitration. I would point out that Rule 4:21A-(a) currently requires that the Arbitration Statements be exchanged ten (10) days prior to the Arbitration Hearing. In practice, this Rule is not always complied with. Arbitration Statements in many instances are simply provided to the adverse party at the time of the Arbitration Hearing when the Arbitration Hearing is in person. There are no consequences or penalties in the Rule for failure to comply with that current ten (10) day period for exchange of Statements and it is a recommendation herein that there not be any penalties provided in a new version of the Rule. The practical method of resolving the issue is for all of the Arbitrators in a given Vicinage to be advised in their Arbitration Retraining Session or by letter from the local Arbitration Committee or the Presiding or Assignment Judge, that they should email the parties to an Arbitration that is scheduled before them and advise them that they are required to submit Statements in accordance with the new amended Rule five (5) days prior to the Arbitration Hearing. In the final analysis it is the Arbitrators who are best situated to communicate this deadline to the participants

through an email and it will prove to be effective over time. Any additional sanctions will only, as I have indicated, serve to affect the rights of the participants and have a negative impact on both the *trial de novo* rate and the ultimate disposition rate and be counterproductive in general to the administration of civil justice in New Jersey.

Thank you.

Respectfully submitted,



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Enclosure