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March 29, 2022

The Hon. Glenn A. Grant, J.A.D
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037
Via email Comments.Mailbox@njcourts.gov

Re: Comments on Report of Supreme Court Committee on Civil Practice

Dear Judge Grant:

Thank you for allowing the Office of the Public Defender's Appellate Section (OPD Appellate) the opportunity to submit comments on the Report of the Supreme Court Civil Practice Committee.

OPD Appellate represents indigent juveniles and adults in criminal and delinquency appeals from all 21 counties in New Jersey. Each year, our office handles more than a thousand appeals, including representation of clients in the Appellate Division and Supreme Court. As the office that handles the overwhelming majority of criminal and juvenile appeals in New Jersey, we write to express concerns about the application of two of the Committee's recommendations to criminal appellate practice.

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

Under this proposal, within 14 days of receiving any transcripts, the appellant must serve upon the respondent a designation of the parts of the record the appellant intends to include in the appendix, as well as a statement of the issues the appellant intends to present for review. According to the Committee Report, these proposed changes were based on the Federal Rules of Appellate Procedure concerning joint appendices and are intended to encourage the parties to agree on the

contents of the appendix. However, at least when it comes to indigent criminal appeals (which comprise the bulk of criminal appeals in New Jersey), there are (1) fundamental structural differences between the state and federal agencies marshalling these appeals and (2) important differences in the types of issues raised on appeal in state and federal cases, that would make the proposed amendments unworkable in New Jersey. In addition, the proposed rule change appears to rely on the assumption that the same attorneys will be representing the parties on appeal, and thus they will already know the issues they intend to raise and the documents needed to do so well before they obtain the transcripts. This is not so in indigent criminal and juvenile practice.

First, in contrast to a typical federal criminal appeal, where the same Federal Public Defender's Office and United States Attorney's Office handle the case both at trial and on appeal (therefore allowing for more expedient cooperation and compilation of the appellate record), OPD Appellate is separate and distinct from the OPD's 21 regional trial offices and generally has no involvement with the case at the trial level. Once an indigent criminal defendant indicates that they wish to appeal their case, OPD Appellate files the Notice of Appeal. Because of the sheer volume of cases, our office then attempts to construct as much of the record as possible before assigning the case to an OPD staff or pool appellate attorney. This time-consuming intake process includes ordering the transcripts that preliminarily appear relevant to the appeal and usually requires multiple requests of the attorneys and court below to gather other relevant documents and exhibits, often delaying the eventual assignment to an appellate attorney. Thus, in a typical case, the proposed time-period of "14 days after receipt of any transcripts" will have long passed before a case is even assigned to an attorney responsible for substantive review of the appeal, thereby making compliance with the proposed rule impossible. No matter what administrative changes OPD Appellate implemented in an effort to comply with the proposed amendments, it would be impossible for a newly assigned attorney to review all of the transcripts, briefing, orders, evidence, and documents filed below, determine which issues to raise, discuss them with the client, and identify the precise set of documents needed for the appendix, all within a two-week period.

Additionally, unlike a federal appeal that would go to the same U.S. Attorney's Office that handled the case at trial, all state criminal appeals go to the Attorney General's office, which does not decide until after the defendant's brief is filed and reviewed whether to assign the case to a Deputy Attorney General or to an assistant county prosecutor. While this long-standing and mutually endorsed structure for shepherding appeals is necessary given the volume of cases each office handles on an annual basis, it would also make it impossible for the assigned OPD attorney to comply with the proposed rule to seek agreement with respondent's counsel on the contents of the appendix; respondent's counsel is unknown at the time the appellant's brief is filed, and the respondent's counsel initially assigned to the appeal for administrative purposes has no knowledge about the substance of the case or possession of the trial file. Attempting to comply with the proposal, although futile, would be onerous on our attorneys and the Attorney General's, delay filings, and ultimately create unnecessarily overinclusive appendices.

A second distinction between federal and state criminal appellate practice that militates against adopting the proposed amendment involves the types of issues typically raised on appeal in both jurisdictions. Since many more criminal cases go to trial in state court than in federal court, the issues ripe for appeal in state cases are far more expansive and diverse than in federal court, and thus, implicate more parts of the trial record. The overwhelming majority of federal direct criminal appeals only involve sentencing issues, where the relevant parts of the record are straightforward. By contrast, state direct criminal appeals often involve intricate constitutional issues concerning the trial itself. Issues such as suppression of statements or physical evidence, the admissibility of exhibits, the admission or exclusion of expert testimony, propriety of jury instructions, and matters concerning the jury selection process are only some examples of the types of issues raised in state criminal appeals and which implicate far more parts of a record than a typical federal appeal. This fundamentally makes it much more difficult, especially within "14 days after receipt of any transcripts," to identify the potential issues to present for review as well as the parts of the record relevant for inclusion in an appendix. This problem is only compounded when the aforementioned structure of the appellate process is taken into consideration.

Finally, OPD Appellate is concerned that the proposal would leave attorneys no choice but to provide general notice that all motions and rulings are being challenged. In criminal practice, there are many rulings that are not ultimately appealed, just as appellants often raise issues that were not preserved before the trial court. Attorneys cannot determine what viable appellate issues a case presents, and which ones to raise, until they have read the entire file including transcripts and supporting documentation and researched the issues. Frequently, further research, drafting, and consultation is required before the precise appellate issues are finalized. Thus, this proposal is of no practical assistance to the respondent or the court, and will result in overinclusive appendices containing many documents irrelevant to the issues ultimately briefed on appeal.

The proposed requirements to coordinate on the appendix and preview the issues to be raised will not bring any meaningful benefit to the criminal appellate practice in New Jersey. In addition, in the vast majority of criminal appeals, the state relies upon the appendix filed by the appellant and files either no appendix or perhaps an appendix that just consists of any unpublished cases cited in its brief. Thus, no problem currently exists, at least in terms of criminal appellate practice, that would require such a dramatic change.

We note that the Committee Report indicates the Committee was "closely divided" on this proposal, with concerns raised about timing. For the reasons above, OPD Appellate recommends that this proposal not be adopted. We also respectfully suggest that should this proposal be adopted, language should be added to exclude criminal and juvenile appeals from its requirements.

2. Proposed Amendment to Rule 2:6-7 – Length of Briefs

The proposed amendment to Rule 2:6-7 reduces the page limits on briefs, requires the use of Times New Roman font, size 14, and requires that motions seeking leave to file overlength briefs be filed at least 20 days in advance. OPD Appellate takes no position on the font and type size themselves

but opposes the reduction of brief length and the proposal that overlength-brief motions be filed 20 days prior to the brief's due date. Please note that these comments apply equally to the proposed amendment to Rule 2:11-6(a) regarding reconsideration motions.

Although Times New Roman, size 14 allows more words per page than the current standard Courier New, size 12, the proposal's reduction in pages for plenary briefs from 65 to 50 represents a substantial cut to current limits. The same holds true for the other types of briefs that the proposal cuts. By our calculation, a 65-page Courier New, size 12 brief spans about 60 to 62 pages when converted to Times New Roman, size 14.[1] A 50-page Times New Roman, size 14 plenary brief would be around 11,000 to 12,000 words, as opposed to the 14,500+ words that the current rule permits.[2] This proposal not only represents a significant cut, but is also more restrictive than the United States Supreme Court and federal appellate courts (13,000 words) and many other state courts, including jurisdictions that forbid arguments not raised below. See, e.g., Sup. Ct. R. 33(d) (13,000 words); F.R.A.P. 32(a)(7)(B)(1) (13,000 words); Cal. R. 8.360(b)(1) (25,550 words); Md. R. 8-503(d)(1) (13,000 words); 210 Pa. R.A.P. 2135 (a)(1) (14,000 words).

Although the Committee Report cites to an earlier reduction in presumptive page limits in civil cases in trial courts, it appears its impetus was that parties were "filing extensive motion briefs with arguments not relevant to the issues at hand." 2012 Report of the Supreme Court Civil Practice Committee at 161 (Jan. 24, 2012).[3] There is no indication that this is an issue in appellate practice generally, or in criminal appellate practice more specifically.

In fact, the opposite is true. Most appellate criminal briefs raise multiple legal issues of a constitutional magnitude, a substantial number of them novel. Many of our cases have complicated procedural histories and voluminous records, and contain in-depth analysis of several complex legal issues, frequently requiring substantial revision to keep to the current 65-page limit. In order to provide constitutionally effective assistance of counsel to their clients, advocates for indigent individuals must have the ability to fully discuss all of the issues raised on appeal. This may include, when appropriate, detailed explanations of the relevant laws and their applicability to the case at bar, in-depth analyses of legislative histories, or a thorough tracking of jurisprudence in a particular area. OPD Appellate respectfully urges that an advocate's ability to fully present their indigent client's arguments not be curtailed by truncating their allotted space in which to do so.

Should the proposal be enacted, in many cases it would be necessary to move for leave to file a brief exceeding the new page limits to ensure that our clients' constitutional rights are protected. Amending the rule will thus lead to far more motions to relax the page limitations, delaying the filing of the briefs and leading to unnecessary work for counsel in drafting and filing, and the court in reviewing and deciding these motions.

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[1] We took two 65-page briefs in Courier New, size 12 that were written by different attorneys in our office, and converted them to Times New Roman, size 14. Exclusive of cover page, tables, and signature block, these briefs contained 14,537 and 14,705 words, respectively. After conversion, one brief was 62 ¼ pages in Times New Roman, size 14, and the other was 60 ¼ pages. Similarly, a 20-page reply brief in Courier New, size 12 (2883 words) became a 19⅓-page brief once converted. These calculations were consistent with online calculators.

[2] Once converted to Times New Roman, size 14 and then reduced to 50 pages, the briefs consisted of 11,152 and 12,001 words.

[3] Available at https://www.njcourts.gov/courts/assets/supreme/reports/2012/civil2012.pdf.

In addition, OPD Appellate is opposed to amending the rule to require a party seeking a relaxation of the page limit to file a motion "no later than 20 days before the expiration of the time for filing the brief." Current practice, when seeking to relax the page limits, is to file a motion with the proposed brief along with a certification that explains the basis for the request. Of course, by this time the proposed brief has already undergone review and revision to make best efforts to bring it within the page limits. This practice results in the court only needing to decide motions that are necessary, and with all of the information necessary to decide them.

On the other hand, requiring parties to file a motion at least 20 days before the brief is due — well before the brief is near final form — will result in protective filings in many, if not all cases. Again, this would mean much more work for the court and the parties. It would also result in delays in the filing of briefs and processing of appeals, since parties will need to wait until the motion is decided in order to file. And if the motion is denied, an extension will be needed so counsel can at that time undergo the substantial revisions necessary to conform the brief to the page limits.

In sum, the proposed changes to Rules 2:6-1, 2:6-7, and 2:11-6(a) would require substantial changes to the practice and entire organizational structure of criminal appeals in New Jersey, and ultimately result in a far less efficient and far less fair administration of justice. Thus, for the reasons outlined above, OPD Appellate respectfully urges the Court to reject these proposals. If you have any questions regarding this commentary, please do not hesitate to contact me.

Respectfully Submitted,

ALISON PERRONE
Deputy Public Defender
Appellate Section