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August 23, 2017

By Email
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver St., 11th floor
New York, N.Y. 10004

Re: Proposed Statewide Rules of the Appellate Division

Dear Mr. McConnell:

We would like to take this opportunity to thank OCA for undertaking this project to bring greater uniformity to appellate practice rules. Practitioners' need to consult and follow disparate procedural rules in the different Departments is inefficient, breeding confusion and adding to the likelihood that counsel may be tripped up by inadvertent errors.

We are generally in support of the particulars of the OCA proposal, and would like to specifically express our support for the proposed uniform rules on motion procedure; on amicus briefs; on the methods for perfecting appeals; on the content and format of records and briefs, particularly the uniform rule that the brief cover state whether oral argument is requested, and also identify the attorney who will argue; and on more uniform time limits for perfecting appeals and more uniform procedures for seeking enlargements of time. Indeed, there are a number of procedural matters where still more uniformity is desirable, so that the proposal's overall goal is not undermined by contrary Departmental rules.

There are a few matters on which we would like to suggest modifications or additions to the proposal. These include:

Motions for poor person relief: The proposal seeks to codify practices that the individual Departments have developed informally. We suggest that the Rules do more to assure that persons genuinely entitled to this relief are able to attain it in the most efficient manner.

In criminal cases, we suggest that proposed UR 3.0(D)(1) and (D)(4) be modified to provide that if the defendant was represented by assigned counsel in the trial court, and the defendant is currently in custody, poor person relief shall be granted on the defendant's request, even if no motion pursuant to C.P.L. § 380.55 was made in the trial court. We would like to delete the language requiring defendants currently in custody to explain why funds previously used to post bail are not available to retain appellate counsel. Such funds are frequently unavailable and it is unnecessary and often unfair to require a prisoner to make this demonstration.

In civil matters, we would suggest an amendment stating that if fees and costs were waived in the trial court pursuant to CPLR 1101(e), relating to cases where the party was represented by a legal aid society or a legal services or other nonprofit organization, etc, fees and costs related to an appeal shall also be waived upon a certification by the society, organization or attorney that the party remains unable to pay the applicable costs, fees and expenses. Waiver of fees in this circumstance should not require an evaluation of the merits of the party's contentions on appeal as described in proposed UR 3.0(D)(2)(a).

Motions for interim relief: We support, in principle, proposed UR 3.0(B)(1) insofar as it requires the seeker of interim relief to give reasonable notice to the adversary. However, we suggest that you consider whether this rule is consistent with CPLR 5704 which permits an appellate court to grant provisional remedies applied for without notice to the adverse party. We believe that CPLR 5704 may be the reason why the existing 2nd Department rule, for example, does not flatly require notice but requires the applicant who has not given notice to explain why notice was not given.

Motions for leave to appeal in criminal cases: We would suggest modifying proposed Rule 6.0(B)(3)(c) to provide that the application for leave to appeal not have to contain "all papers filed in the trial court," but only those papers pertaining to the issue(s) proposed to be raised on appeal. The proposal as written could be unduly burdensome.

Interlocutory appeals in civil cases: When these appeals exclusively address the scope of permissible discovery or other procedural issues, they prolong litigation which many feel is already unduly time-consuming. We suggest that OCA consider establishing a shorter time limit for perfecting such appeals than the time limit applicable to appeals generally.

Constitutional issues: The proposal to require notice to the State, when the constitutionality of a state statute is at issue and the State is not a party, might be

extended to require comparable notice to a municipality, consistent with CPLR 1012(b)(2).

Appeals from criminal sentences: Existing Second Department Rule 670.12(c), which permits expedited appeals from criminal sentences when the legality, propriety or excessiveness of a sentence is the only issue to be raised on appeal, enhances the ability to obtain prompt appellate relief. OCA might consider making this a uniform rule.

Proceedings on original record: OCA might consider modifying proposed Rule 4.0(A)(4)(a) to explicitly include criminal cases as among the appeals that may be prosecuted on the original record.

Initial filing of informational statement: The proposal preserves the existing Departmental discretion on this subject. We suggest that the Departments at least be required to include samples of the required form on the Departmental website, as some Departments already do.

Once again, we applaud OCA's efforts on this demanding subject and we thank you for the opportunity to submit these comments.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Adrienne Koch
Chair, Committee on State Courts of Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation