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Adding Supreme Court Justices: Can They Really Do That?

By Karl S. Myers

Amicus Curiae - a friend of the Court - is an ancient concept that traces its origins to Imperial The election-year confirmation of Justice Amy Coney Barrett, in the wake of the Senate's inaction on the 2016 nomination of Judge Merrick Garland, has triggered widespread speculation that the next Congress and President, if Democratic, may seek to add justices to the U.S. Supreme Court. One end of the political spectrum views that prospect as improper "court packing," while the other end considers it a reasonable response to hypocrisy. Whatever one's perspective, we could witness an effort to add seats to the court.

They can't do that . . . can they?

Sure they can. The number of Supreme Court justices is not set by the Constitution. So a change in the court's complement does not require a constitutional amendment. The Constitution says, in Article III, Section 1, only that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It then says that jurists "shall hold their Offices during good Behaviour" and be paid a non-diminishing salary for their work. But our governing charter does not specify how many justices are to sit on the high court.

Since the Constitution does not specify the number of justices, that leaves the issue to legislation passed by Congress. Put otherwise, adding and subtracting judicial seats is a power in the legislative quiver. It is one "check" the legislative branch has on the judiciary in our system of separated powers. Congress "commands the purse," as Alexander Hamilton put it in Federalist 78, and thus it pays for every judge's salary. Since the legislature pays the tab, it makes sense that it also gets to decide how many judges we have. So while adding jurists is sometimes described as an attack on our separation of powers, our design of government contemplates that Congress may add or subtract judges on our federal courts.

And, from time to time, the legislature has done so. Congress' first enactment specifying the number of justices was the Judiciary Act of 1789. It specified "a chief justice and five associate justices, any four of whom shall be a quorum." This complement of 6 justices corresponded with the number of seats assigned to the justices on the 3 regional circuit courts, which functioned as trial courts. Those courts sat in panels of 3 judges: 2 Supreme Court justices and 1 local district judge. This setup meant regular state-to-state travel for the justices, a tiring practice known as "circuit riding" that Congress did not finally end until 1911.

Congress first changed the Supreme Court's complement in 1801, when President John Adams signed the Judiciary Act of 1801 just before leaving office. That enactment reduced the size of the court from 6 to 5 members upon its next vacancy, reorganized the

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circuit courts, and added a slew of judicial seats - which Adams immediately tried to fill. Some saw that act as an attempt by Adams and the outgoing Federalist majority in Congress to pack the courts with Federalist judges. This “midnight judges” episode led the next Congress (now with a Democratic-Republican majority) to enact, and new President Thomas Jefferson to sign, the Judiciary Act of 1802. That legislation reverted the court back to 6 members to match the updated 6 circuit courts the enactment specified.

As the 19th century unfolded, Congress engaged in a pattern of adding justices as it added judicial circuits during the nation’s westward expansion. The legislature added a 7th justice by the Seventh Circuit Act of 1807. It added 8th and 9th justices by the Eighth and Ninth Circuits Act of 1837. And Congress added a 10th justice by the Tenth Circuit Act of 1863.

After the Civil War, two forces caused Congress to shrink the court. First, the Republican-controlled Congress wanted to prevent President Andrew Johnson from appointing any Southerners to the court. Second, Chief Justice Salmon Chase, working behind the scenes, was trying to convince Congress to raise the justices’ pay, and suggested trading a raise for a reduction in the court’s size. These factors led the legislature to pass the Judicial Circuits Act of 1866, which cut the court’s complement from 10 to 7 as vacancies occurred. This change was short-lived, however. A few years later, Congress passed the Judiciary Act of 1869. That enactment specified a 9-justice court to match the 9 judicial circuits laid out in the 1866 enactment. Congress has not changed the number of justices since the 1869 act.

In sum, over time, Congress has enacted statutes adding and subtracting Supreme Court justices. Those legislative acts have specified a Supreme Court consisting of 5, 6, 7, 9, and 10 justices. The legislature’s changes have been for different reasons, some of which were decidedly political - and unrelated to the needs of the judicial system or best interests of the American public.

Given this history, why is it that so many of us think the requirement of a 9-member Supreme Court is carved in stone?

Surely it has something to do with the fact that the number has not changed for 150 years. Nobody alive has known a different number of justices. It may also relate to President Franklin Roosevelt’s attempt to expand the court in 1937. After his landslide re-election the year before, FDR announced a bold plan to expand the court to as many as 15 justices - an increase in the court’s complement of up to 66%. Most saw this as an effort to “pack” the court with New Deal supporters. It went over like a lead balloon in Congress, which refused to move the measure. Roosevelt had overplayed his hand. The issue ultimately was rendered moot when the court started upholding New Deal enactments and justices retired. But ever since FDR’s gambit, we have taught our children that FDR’s “court packing” plan was perhaps his biggest mistake.

It thus appears that a combination of stasis and historical folly have baked a 9-member court into the current American consciousness. But nothing stops Congress from passing, and the President from signing into law, an enactment adding or subtracting justices at any time. This has happened in recent years at the state court level - and for political reasons, rather than to serve systemic or public ends. For instance, in 2016, Arizona’s legislature expanded its high court from 5 to 7 justices. The same year, the Georgia legislature increased its supreme court from 7 to 9 jurists. And in 2011, Montana’s legislature considered a proposal to reduce the size of its supreme court from 7 to 5 members. So while there has been no recent change in the complement of our nation’s highest court, the same is not true on the state level.

None of this is meant to suggest that a future Congress and President should - or should not - change the number of justices. Political considerations are outside the scope of this article. But if the legislative and executive branches decide to add seats to the court, it is certainly possible that a future Congress and President could add yet more seats. Adding justices to the Supreme Court might become a regular occurrence. A 9-member court may become a distant memory. What repeated expansion of the Supreme Court for political reasons might mean for public confidence in the judiciary is anyone’s guess. But the simple reality is that our plan of government allows the elected branches to do it.

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Getting Amicus Briefs Read

By Mark E. Chopko

Amicus briefs are a staple of appellate practice, especially in the U.S. Supreme Court and in a state's highest court. In a previous article, we addressed some of the strategic reasons why an entity might file an amicus brief to advance its own mission and agenda by bolstering another's case on appeal. Amicus briefs have become so integral to the appellate decision-making process that courts[1] as well as public interest organizations[2] have their own guidelines and practice pointers for the preparation and filing of these briefs, beyond the text of the rules of appellate procedure. Amicus briefs that stake out new ground or a different perspective on a case or legal issue can be invaluable to an appellate court. As Supreme Court Rule 37.1 states: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." The Court's Rule then cautions that "[a]n amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."[3]

When an entity decides that a case or issue pending before an appellate court is important enough, how does an advocate for that prospective amicus approach the contents of such a brief? Appellate rules for amicus briefs allow amicus participants to skip a recitation of the facts of the case and its procedural background. In fact, amicus briefs that restate the record and restate parties' arguments can waste the Court's and the clerks' time. Other sections are required. In the U.S. Supreme Court, required sections are the tables of contents and authorities, a brief statement outlining the interest of the amicus, a summary of the argument, the argument and a conclusion.

Courts are busy at all times and thousands of cases vie for a few coveted argument or merits consideration slots each year. Whether filed at the time of an application for review or after review is granted, an amicus advocate needs to have the brief read – carefully – to maximize the amicus's hoped-for impact on the Court. Here is one way to think about constructing the key elements of an amicus brief, and the order of their crafting, with the goal of getting the finished amicus brief read.

- **Table of contents:** I have always believed that the first cut made by clerks between the briefs that get studied and those that get skimmed starts with the table of contents. Especially in a case that has multiple amicus brief filings, an effective table of contents provides a complete overview of the arguments made in the brief. That means the headings in the table are complete sentences arranged to capture the position of the amicus about the case and its proper resolution, rather than a set of out-of-context fragments or phrases. If the table of contents is not complete, informative and inviting, the clerks and the Court might still review the brief, but the submission might not immediately get the kind of attention that an effective outline provided by an engaging table of contents would invite.[4]

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- **Interest of amicus:** Advocates often have different views about the importance of the Statement of Interest, and therefore the attention it might command in drafting. Some make it a rote restatement of the agency's mission. I have always regarded it as a "press release" to explain to the court (as well as to the media) why this particular case matters so much that the entity decided it needed to participate. Viewed in this light, an advocate is writing not just for the clerks, but for the general public. It may often be the case that a press story gets written based only on the statement of interest by a busy journalist on a deadline. It must tie together succinctly the amicus's mission and the particulars of the case.

- **Argument:** Mercifully short, substantive, insightful and decisive – these are the adjectives that one hopes a clerk or judge would use after reading an amicus brief. Argument should not be bogged down in the case's procedure or record except as those facets are integral to the amicus's own argument about the law or policy impacted in the case. In those instances, lifting up one or two key places or transactions in the record makes all the difference for an important distinction in the law the amicus hopes the Court will adopt. The argument must address the law as the amicus hopes it will evolve or hopes to preserve, or the policy and social implications of adopting (or resisting) the amicus' position. To paraphrase Rule 37.1 of the Supreme Court, an effective argument would mark a new path through the thicket of the case to guide a court to a proper resolution. In short, it helps the Court decide the case the way that the amicus wants it decided to advance its mission or position.

- **Summary of Argument:** Aside from the Table of Contents, I believe that the Summary of Argument is probably the most-read section of an amicus brief by the Court and clerks. Obviously, it precedes the Argument section. But as a practice, I write it last. I intend it to tell the reader a story – from the perspective of the amicus – about how the case should be resolved and why. In short, it is not written in a formal legal style, as it invites the reader to examine the facets and details of the story to follow in the Argument.

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Getting Amicus Briefs Read

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- **Conclusions:** Every appellate brief ends with a request or "prayer" for relief – a request that a lower court opinion be affirmed or reversed. That a conclusion is a required portion of an amicus brief means that the Court views it as a last opportunity to make a final statement of why this case (and this specific brief) are important. The advocate should use it effectively to sum up in a sentence or two.

Amicus briefs that offer a court a new way to look at a problem, the law and the implications of a case will boost that court's ultimate reasoning and decision-making. Those briefs that do so compellingly are truly friends of the court.

[1] Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States (October 2019), found at https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf.

[2] League of California Cities, Amicus Guide: Summary of Rules of Court and Procedural Considerations Relating to Amicus Participation (2017), found at https://www.cacities.org/amicusguide.

[3] Rules of the Supreme Court, https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf.

[4] Former Supreme Court law clerks have stated that they are responsible for picking the wheat from the chaff. One clerk noted that "[a]fter six months I could read amicus briefs in sixty seconds; I could make judgments as to their usefulness and dispose of them. Others were read more seriously." K.J. Lynch, Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J. L. & POLITICS 33, 43 (2004).

Preventing Deficiency Notices from the New Jersey Appellate Division

By Robert "RJ" Norcia

It's 11:55 p.m., and you just put the final finishing touches on your brief to the Superior Court of New Jersey, Appellate Division, which is due before the clock strikes midnight. For the last few weeks, you pored over the relevant law, crafted your arguments as persuasively as possible and gained confidence that the Appellate Division would ultimately rule in your favor. You make your way to New Jersey's eCourts webpage, upload your brief and several appendix volumes at 11:59 p.m., and exhale.

The next day you receive an e-mail from the Clerk's Office that your submission "has been marked deficient" and that you have 15 days to correct the deficiencies identified in the attached letter. The deficiency letter identifies a litany of citation, formatting, and procedural deficiencies under New Jersey's Appellate Court Rules. Now you have to reopen documents you thought were finished, make additional – sometimes substantive – modifications, re-upload everything and hope you did it right this time.

It is not uncommon for the Appellate Division to mark submissions deficient. Its Clerk's Office serves as the gatekeeper to the Court and has a keen understanding of the Court Rules, and it holds the line on those Rules before letting a submission make its way to the panel of judges. The below checklist is intended to present and explain, in an easy-to-follow format, New Jersey's Appellate Court Rules governing briefs and appendices submitted to the Court, identify common pitfalls that

RJ Norcia served as a Law Clerk to the Hon. George S. Leone, J.A.D. (Ret.), in the Superior Court of New Jersey, Appellate Division, during the 2015-2016 term. He is a member of Stradley's Appellate Practice Group and has authored party and amicus briefs in the Appellate Division and other appellate courts. In addition to his appellate practice, RJ has significant experience appearing in State and Federal trial courts in New Jersey and focuses his practice primarily on healthcare litigation.

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generate a deficiency letter and attempt to assist practitioners and litigants in ensuring that they receive the e-mail notification that their submission has been accepted and filed the first go-round.[1]

I. PREPARING THE BRIEF FOR ELECTRONIC FILING

A. GENERAL APPEARANCE AND FORMATTING THROUGHOUT THE BRIEF

- **Font** – 10-pitch or 12-point type font is permitted. R. 2:6-10. Although this Rule does not mandate a specific font, a comment to the Rule identifies Courier BT as the most common font used when submitting briefs to the Court.

- **Spacing** – No more than 26 double-spaced lines of no more than 65 characters per page. R. 2:6-10.

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- **Page Length** – Initial briefs of appellants and respondents shall not exceed 65 pages. R. 2:6-7. Reply briefs, if any, shall not exceed 20 pages. Id. Briefs of a respondent/cross-appellant shall not exceed 90 pages, and the brief of an appellant/cross-respondent, if answering points raised in support of a cross-appeal, R. 2:6-4(e), shall not exceed 65 pages. R. 2:6-7. Page limitations are exclusive of tables of contents and citations. Id. These limitations may be relaxed by leave of court. Id.

- **Text Recognition** – Both briefs and appendices must be text-searchable using Optical Character Recognition (OCR). If using Microsoft Word, you can easily convert the document to a PDF that will automatically be text-searchable. See section II.F below for a discussion on making the appendix text-searchable.

B. BRIEF COVER PAGE

- **Name of Court** – Centered at the top of the cover page, above the caption: "IN THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION." R. 2:6-6(a)(1).

- **Appellate Division Docket Number** – Follows this format: "A-XXXX-XX."

- **Title of the Action** – Typical case caption used for pleadings; however, include the trial court and appellate court designations for the parties, i.e., "Plaintiff-Appellant" or "Defendant-Respondent." R. 2:6-6(a)(2).

- **Nature of the Proceeding in the Appellate Court** – Provide the name of the court or agency or officer below. R. 2:6-6(a)(3). If a court, the name of the judge or judges who sat below. Id. For example: "On appeal from: Superior Court of New Jersey, Law Division, Ocean County, Docket No. OCN-L-1234-19. Sat below: Honorable John Doe, J.S.C."

- **Title of Brief and Party Affiliation** – Include, in all capitalized letters, the title of the document and the designation of the party for whom it is filed. R. 2:6-6(a). While not required by the Rules, and if space permits, include the name of the party filing the document. For example, if filing a brief on behalf of a Plaintiff-Appellant, the title on the document can read: "BRIEF OF PLAINTIFF-APPELLANT JOHN DOE." Id.

- **Name of Law Firm, Attorney, and Contact Information** – If a party is represented by an attorney, include the name of the law firm, the mailing address, telephone number, fax number (if any) and an indication as to whom the attorney represents (i.e., Attorneys for Plaintiff-Appellant John Doe). Id. Identify all attorneys of record. R. 2:6-6(a)(5). The Rules permit designations of attorneys "Of Counsel" and "On the Brief." Id. Include the e-mail address for each attorney identified on the cover page as well as their New Jersey Bar Identification Number.

C. TABLE OF CONTENTS

- **Include all Items Required by the Rules** – Rule 2:6-2 requires a brief submitted to the Court to contain a table of contents, a table of judgments, a table of citations of cases, a concise procedural history, a concise statement of facts, and the legal arguments divided by point headings. The table of contents should identify the page in the brief where each of these items appear. R. 2:6-2. Each and every point, sub-point, and sub-sub-point heading should be included in the table of contents.

  – **Tip:** As noted above, the table of contents and table of authorities are not applied towards the page count. R. 2:6-7. Number these pages in small roman numerals in the body of the brief and in the table of contents with page "1" beginning at either the optional preliminary statement discussed below or the procedural history.

- **Point Headings** – In the table of contents and the body of the brief, the sections of the legal argument should be divided by distinctively printed or typed point headings. R. 2:6-2(6). At the end of each point heading in both the table of contents and the body of the brief include in parentheses the place in the record where the opinion or ruling is located. Id. For example: "POINT I – THE TRIAL COURT APPLIED THE INCORRECT STANDARD (T20-25)." If the issue was not raised below, indicate as such in the table of contents and the body of the brief with a notation: "(Not Raised Below)." Id.

D. TABLE OF JUDGMENTS, ORDERS AND RULINGS

- **Format** – Organize the table of judgments, orders, and rulings the same as the table of contents and include the citation to the first page of the document as it appears in the appendix. R. 2:6-2(a)(2).

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- **Items that Must be Included** – The table of judgments, orders, and rulings should include citations to the portions of the record (i.e., the appendix) where the trial court's judgment(s), order(s), and ruling(s) under appeal are located. R. 2:6-2(a)(2). Or, if applicable, identify the portions of the record where the administrative agency's final decision(s) is located. Id. The table should also identify where in the record the trial judge's written, or oral opinion is located and the location of any intermediate decisions that are pertinent to the appeal (i.e., planning board resolutions, initial decisions of the administrative law judge, and appeal tribunal decisions). Id.

E. TABLE OF CITATIONS OF CASES, STATUTES, AND RULES

- **Format** – Organize the table of citations of cases, statutes, and rules the same as the table of contents, except that case names shall be in alphabetical order. R. 2:6-2(a)(3). Each page of the brief in which a source of authority appears should be included in the table of citations of cases, statutes, and rules. However, if a case, statute, rule, regulation, or other authority is cited on more than five pages of the brief, the table of citations of cases, statutes, and rules may identify the authority with passim. Citations to the specific page of any given case, other than the first page, is unnecessary in the table of citations; however, pinpoint citations must be included in the body of the brief.

- **Order** – List all cases cited first, followed by any constitutional provisions, statutes, rules, regulations, or secondary sources. Arrange every source of authority in alphabetical order. R. 2:6-2(a)(3).

- **Case Citations** – The Appellate Division does not follow all of the rules contained in the Blue Book. For a helpful guide on how the Appellate Division cites to cases, statutes, and court rules, see The 2017 New Jersey Manual on Style for Judicial Opinions. Any citations to published New Jersey cases should be to the official New Jersey Reporter and not the Atlantic Reporter. R. 2:6-2(a)(6). Published cases from the Law, Chancery, and Appellate Divisions are contained in the N.J. Super. Reporter. If citing to a case published in the N.J. Super. Reporter include in parentheses, before the year of the case, the name of the court (i.e., "Law Div.," "Ch. Div.," or "App. Div."). Decisions from the New Jersey Supreme Court are published in the N.J. Reporter and do not need an identification of the Court in parentheses. R. 2:6-2(a)(6). If citing to a published case outside of New Jersey, cite to the National Reporter System or, if not contained therein, the official report for that State or jurisdiction. Id.

- **Procedural History for Cited Cases** – The aforementioned New Jersey Manual on Style requires any case citation to include the subsequent procedural history of the case, if any. If citing to an Appellate Division case from N.J. Super. and the parties subsequently sought and were denied certification to the New Jersey Supreme Court, the end of the case citation should also include a "certif. denied" notation. For example, *State v. Blome*, 459 N.J. Super. 227 (App. Div.), certif. denied, 228 N.J. 458 (2016).

  - **Tip:** Note in the above case citation that there is no year contained in the parentheses for (App. Div.). If a case was decided by the Appellate Division and the Supreme Court, in the same year, denied or granted certification, or affirmed or reversed the decision of the Appellate Division, omit the year from the first parenthetical and include it at the end of the subsequent procedural history, as in the above example. If a case was decided by the Appellate Division in one year and the Supreme Court decides an issue in the case in a later year, include both years in the citation. For example, *State v. Maure*, 240 N.J. Super. 269 (App. Div. 1990), aff'd o.b., 123 N.J. 457 (1991).

F. APPENDIX TABLE OF CONTENTS

- **When to Include in the Brief** – If an appendix is being attached to the brief itself, include the table of contents for the appendix in the brief's table of contents. R. 2:6-1(c).

G. PRELIMINARY STATEMENT

- **Optional** – The Rules do not require a party to submit a preliminary statement. R. 2:6-2(7). If a party wishes to include a preliminary statement, it must be used to provide a concise overview of the case. Id. It shall not exceed three pages and may not include footnotes or, to the extent practicable, citations. Id.

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H. CONCISE PROCEDURAL HISTORY

- **Keep It Short** – Include a statement of the nature of the proceedings and a reference to the judgment, order, decision, action or rule appealed from or sought to be enforced. R. 2:6-2(a)(4). For any document referenced in the procedural history, include a citation to the relevant page(s) of the appendix where the document may be located. Id. **Refer to the parties by name or as "Plaintiff" or "Defendant" unless it is necessary to refer to the parties as "Appellant" or "Respondent."** Id.

- **Transcripts** – If there are multiple transcripts that were submitted to the Court, then the first time a transcript is cited in the procedural history a footnote should be included listing all of the transcripts that have been presented to the panel and assigning them a numerical identifier in chronological order. For example:

  - "1T = Transcript of Jan. 5, 2020, Oral Argument on Motion to Dismiss";

  - "2T = Transcript March 10, 2020, Oral Argument on Motion for Reconsideration" R. 2:6-8.

- **Citing Transcripts** – If there are multiple transcripts, be sure to cite them in the brief using the numerical identifiers designated in the footnote contained in the procedural history. For example, if citing to page 20, lines 10-25 of the transcript of the Jan. 5, 2020 Oral Argument on Motion to Dismiss in the above example, it should appear as: "1T20:10-25." R. 2:6-8.

I. CONCISE STATEMENT OF FACTS

- **Tell a Story** – The Rules require statements of facts to be in the form of a narrative chronological summary. R. 2:6-2(a)(5). It should not be a summary of all the evidence adduced at a deposition or at trial. Id.

- **Cite, Cite, Cite** – If practical, each and every sentence contained in the statement of facts should include a citation of the appendix page(s) supporting the statement. For example: "On October 1, 2020, the defendant ran a red light and was cited for careless driving. (Ja1-2)." R. 2:6-2(a)(5). If citing to a brief of the plaintiff, use the prefix "Pb" followed by the page number. R. 2:6-8. If citing to a brief of the defendant, use the prefix "Db" followed by the page number. Id. If citing to a reply brief of the plaintiff, use the prefix "Prb," followed by the page number. Id.

J. LEGAL ARGUMENT

- **Point Headings** – As noted above, any point, sub-point, or sub-sub-point headings should be used to break up the argument into bite-size "chunks" that will assist the panel in understanding your arguments. R. 2:6-2(a)(6). At the end of each and every point heading, there should be a citation to the record where the issue was raised below. Id. If the issue was not raised below, include at the end of the point heading a notation of "(Not Raised Below)."

- **More Citations** – If a sentence in the legal argument relies on a case, statute, rule, regulation, or item in the record, include an appropriate citation to assist the panel reviewing your arguments.

K. CONCLUSION

- Ask the Court for the Relief You Want – At the end of the brief, include a very short "conclusion," reiterating the party's request for relief.

- Signature Block – The attorney signing the brief does not have to do so in an old-fashion pen and paper. A simple "/s/ John Doe" will suffice. Ensure the signature block at the end of the brief matches what is on the cover, including any designations of attorneys "Of Counsel" or "On the Brief."

II. PREPARING THE APPENDIX FOR E-FILING

A. WORK TOGETHER

- **Joint Appendix** – The Rules encourage litigants to work together in agreeing on the contents of a joint appendix, which shall be bound separately. R. 2:6-1(d).

B. COVER PAGE

- **Formatting** – The Cover page should include the same information as contained in the brief. However, the title of the appendix shall be named appropriately (i.e., "JOINT APPENDIX" or "PLAINTIFF'S APPENDIX"). As discussed in greater detail below, if there are multiple volumes

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of an appendix, the cover page should contain the volume and the pages contained within that volume. R. 2:6-1(c).

C. TABLE OF CONTENTS

- **Formatting** – Follow the same process for a table of contents in the brief. Each separate document contained in an appendix should include the date and title of the document. For example: "January 5, 2020 Order on Motion to Dismiss." R. 2:6-1(c). The first page of each separate document contained in an appendix shall be listed in the table of contents. Id.

- **Use the Proper Prefix** – If a Joint Appendix has been prepared, use the prefix "Ja" followed by consecutive numbering. For example, page 1 of the joint appendix would be numbered "Ja1" and page 2 would be numbered "Ja2." If no joint appendix has been prepared, and the plaintiff has prepared its own appendix, use the prefix "Pa." If the defendant also prepares an appendix, use the prefix "Da."

- **Break it Out** – If a document in an appendix contains, for example, an affidavit with exhibits, each exhibit shall be separately identified in the table of contents and the initial page of each attachment shall also be noted. R. 2:6-1(c). Be sure to identify each document by its exhibit number below. For example: "Exhibit 1 to Doe Affidavit – Sept. 1, 2019, Careless Driving Citation Issued to Defendant Jane Doe."

- **Include it All** – Even if there are multiple volumes of an appendix, each volume should contain the full table of contents with point headings indicating where each volume begins and ends. Id. As noted above, the cover page should indicate the volume of the appendix and the pages contained within that volume. Id.

D. APPENDIX—WHAT'S IN AND WHAT'S OUT

- Required Contents of Appendix – Rule 2:6-1 lists the items that must be included in any appendix, if applicable. These items include, but are not limited to:

  - The complete pretrial order in civil actions;

  - The indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below for criminal, quasi-criminal or juvenile delinquency actions;

  - The judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any;

  - The trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions;

  - The notice or notices of appeal;

  - The transcript delivery certification prescribed by R. 2:5-3(f);

  - Copies of any unpublished opinions cited in the brief pursuant to R. 1:36-3; and

  - Any other parts of the record that are essential to the proper consideration of the issues. If the parties were unable to agree on a joint appendix, then the appellant shall assemble an appendix that it "reasonably assume[s] will be relied upon by the respondent in meeting the issues raised."

- **Prohibited Contents of Appendix** – Unless there is a question regarding whether an argument was raised below, briefs submitted to the trial court shall not be included in the appendix. R. 2:6-1(a)(2). However, if a brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is "germane to the appeal," then only the pertinent information from the brief submitted to the trial court may be included. Id.

- **Motions for Summary Judgment** – If the trial court's decision on a motion for summary judgment is under appeal, the appendix shall include a statement of all items submitted to the court on the motion for summary judgment and all such items shall be included in the appendix, except the briefs unless otherwise permitted. R. 2:6-1(a)(1).

- **Don't Include Documents Twice** – If the same document is annexed to multiple pleadings, it should only be included as an attachment to the first pleading in an appendix, and any subsequent versions of the document shall be omitted and replaced with a slipsheet indicating the appendix

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page where the document can be located. R. 2:6-1(a)(2).

- **Cut Down the Fluff** – If only a portion of a document included in an appendix is pertinent to the appeal, the document may be abridged with asterisks indicating an omission. R. 2:6-1(b).

E. MULTIPLE VOLUMES

- **200 Sheets or Less** – If an appendix is larger than 200 pieces of paper, it must be broken up into multiple volumes, with each volume containing the full table of contents to the appendix. R. 2:6-1(c).

F. TEXT RECOGNITION

- **Running OCR** – The Appellate Division requires all appendices to be text-searchable. Once you have your appendix volumes combined into PDF format, use the "Recognize Text" feature of Adobe to make the document text-searchable. You can test whether your document is text-searchable by pressing "Ctrl+F" on your keyboard and searching for a word that appears in the appendix. If there are no results in response to your search, then you know you have to run the "Recognize Text" function on Adobe.

- **Mind the File Size** – To file an appendix on eCourts, it must be smaller than 25MB. If your appendix is larger than 25MB, it will have to be broken up into smaller volumes.

  Tip: Running the "Recognize Text" feature will increase the size of the PDF file, so be mindful of this when preparing appendix volumes. In addition, if you include documents in an appendix that are part of a larger document, avoid using the "Print to PDF" feature as it will also increase the file sizes. Instead, use the "Extract Pages" feature of Adobe, which should help keep the file size down. You can check the file size of a document by right-clicking it and selecting "Properties."

III. PAPER FILING

If your brief and appendix are "accepted and filed" by the Clerk's Office, your work is not yet complete. You also have to include paper copies of the filed documents to the clerk's office. **Do not send paper copies until your brief and appendix have been "accepted and filed."** See below for the guidelines on submitting paper copies.

- **Paper Type and Size** – Paper shall be of good quality, opaque, unglazed, and approximately 8.5 inches by 11 inches in size. R. 2:6-10. Papers may be printed on both sides, provided legibility is not impaired. Id.

- **Binding** – Papers must be securely fastened, either bound along the left margin or stapled in the upper left-hand corner. R. 2:6-10. If submitting a separate brief and appendix, both the brief and appendix shall be separately bound. R. 2:6-1(c), 2:6-10.

- **Cover Color** – The cover of the appellants' brief and appendix shall be white. R. 2:6-6(b). The cover of the respondents' brief and appendix shall be blue. Id. The cover of a reply brief and appendix, if any, shall be buff. Id. On a cross-appeal, the respondent/cross appellant's brief shall have a blue cover. Id. On a cross-appeal, the appellant/cross respondents' brief shall have a buff cover.

- **Cover Paper Type** – Covers of all briefs and appendices shall "be of a firm material but not glassine." R. 2:6-6(b).

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[1] This checklist is not intended to provide legal advice of any kind and is not, and shall not, serve as a substitute for reading and carefully following New Jersey's Court Rules governing submissions to the Superior Court of New Jersey, Appellate Division.

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Rules Corner

The Penrulescornernsylvania Superior Court recently reminded practitioners that trial court orders are ineffective unless formally issued to the parties by the court's clerk (or the prothonotary, in Pennsylvania lingo). In Carr v. Michuck, 234 A.3d 797 (Pa. Super. 2020), the trial judge entered a verdict for the defendant. But the docket did not show that the clerk formally notified the parties of entry of the verdict under Pennsylvania Rule of Civil Procedure 236. That technical error meant the plaintiff's period to file post-trial motions never started running and that subsequent case events - including the trial court's entry of judgment - were a nullity. The Superior Court set aside the trial court's orders and sent the caseback so the trial court clerk could restart the process by issuing a Rule 236 notice of the verdict to the parties.

Quotable

"Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, and to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."

- Justice Ruth Bader Ginsburg, writing for the majority in United States v. Virginia, 518 U.S. 515 (1996)

Court News

This year marks the 50th anniversary of the Commonwealth Court of Pennsylvania. The court was created by the 1968 Pennsylvania Constitution and officially opened its doors on April 15, 1970, with the investiture of its first 7 judges. The court's jurisdiction is limited to governmental and administrative law disputes. And while the court usually sits as an appellate court, it also has original jurisdiction in some cases and thus sometimes hears disputes as a trial court. This specialized and hybrid jurisdiction makes the court unlike any other in the nation. With the support of its Historical Society and the Pennsylvania Bar Association, the court had planned special events for this year to celebrate its anniversary. But the pandemic had other ideas. So we will just have to wait a bit to toast the Commonwealth Court on reaching this milestone birthday.

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