NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex, P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Rules Reports

Dear Judge Grant:

Thank you for the opportunity to review and provide comments on the 2021 Rules Reports. I am pleased to submit the Association's recommendations and comments regarding the following reports:

- Committee on the Rules of Evidence
- Committee on Diversity, Inclusion and Community Engagement,
- Family Practice Committee, and
- Municipal Court Practice Committee.

The NJSBA does not have any comments on the reports from the Complementary Dispute Resolution and Criminal Practice Committees.

The New Jersey State Bar Association applauds the efforts of all of the Court's committees in researching, discussing and debating potential rule amendments in an effort to improve the administration of justice in our court system. The NJSBA recognizes the importance of ensuring our rules are clear, establish procedures that are fair to all parties, and, most importantly, advance the interests of and access to justice.

Report of the Committee on Rules of Evidence

Evidence Rule 803(c)(27): The NJSBA generally supports the proposed rule change to Evidence Rule 803 (c)(27), which seeks to clarify that a prior statement by a child must be found trustworthy by a preponderance of the evidence to be admitted, as opposed to the current standard based on probability. We believe, though, that the Rule's prohibition against the disqualification of a child witness by virtue of *any* of the competency requirements of Rule 601, without delineating any of its subsections, should remain intact and not be limited to just subsection (b) of Rule 601.

The current rule may permit testimony of a child, and therefore admission of the child's prior statement, despite the fact that under Rule 601, (a) the witness is unable to express themselves in an understandable way, (b) the witness does not understand the duty to tell the truth, or (c) as otherwise provided by law. This recognizes that a traumatized child will often express themselves in different ways, such as through art work or acting out with figures, and such expression should not be disqualifying. Admission of the prior statement, together with the child's testimony, in whatever fashion it may be able to be conveyed, provides a full picture for the trier of fact to consider.

The proposed changes, though, would render a child's prior statement inadmissible if there is a finding that the child is incapable of expression that could be understood by the court and jury, or for other reasons provided by rule or statute. This is unfair and fails to take into account the trauma experienced by a child who is the victim of sexual assault. Often times the assailant is a family member or trusted acquaintance. The trauma can cause a child victim to completely shut down, or communicate in non-traditional ways. It can cause a child to suppress memories from the time of a statement until the much later time of a trial. The courtrooms and formal proceedings can intimidate children and cause them to become uncommunicative. This should not disqualify a child from being able to testify in whatever manner they can, and more importantly, it should not prevent prior statements of the child from being admitted. In fact, under these circumstances, a spontaneous out-of-court statement is often the most credible from a child.

For these reasons, we believe the current Evidence Rule's disengagement of *any* Rule 601 analysis in the context of a child's statement relating to a sexual offense is more appropriate than the proposed rule change which would only prohibit disqualification where the child was found to not understand the duty to tell the truth. We encourage retention of the current reference to Rule 601 by itself in Evidence Rule 803(c)(27) and recommend that the reference to subsection "(b)," to the exclusion of subsections (a) and (c), not be adopted.

Collaborative Law Privilege: The NJSBA objects to the Evidence Rule Committee's rejection of the collaborative law privilege, which was submitted to the Committee by the NJSBA to codify in the Evidence Rules the privilege which has been enacted by statute.

The NJSBA's advocacy in favor of a collaborative law privilege to be included in the Evidence Rules follows the model of the mediator privilege. The mediator privilege was adopted after the Uniform Mediation Act was enacted in 2004, which included a privilege granted by statute under N.J.S.A. 2A:23C-4. A corresponding Evidence Rule was adopted in 2007 with an effective date of September 2008.

Similarly, the Collaborative Law Act, N.J.S.A. 2A:23D-1 et seq., was enacted in 2014 to recognize the dispute resolution method known as family collaborative law. In that process, the parties to a family law dispute meet with other relevant professionals, such as financial professionals, mental health professionals or therapists, in an effort to resolve their dispute without the need for litigation. An evidentiary privilege was included in the collaborative law statute to protect participants from the disclosure of any communication during this process, similar to the privilege for mediators under the Uniform Mediation Act. The purpose is to allow participants to engage candidly in the process to facilitate resolution.

Admittedly, as noted in the Evidence Rules Report, the collaborative law privilege can be waived, but that is also the case with the mediator privilege under N.J.S.A. 2A:23D-14 and 15. The NJSBA does not believe that should be a reason to exclude the privilege from the Evidence Rules.

Notwithstanding the recommendation of the Evidence Rules Committee, the NJSBA urges inclusion of the collaborative law privilege in the Evidence Rules to be consistent with the statutory provisions related to collaborative law, and to treat the collaborative law privilege in the same manner as other statutory privileges, notably, the mediation privilege.

Report of the Committee on Diversity, Inclusion and Community Engagement

The NJSBA supports the recommendations in this report and strongly encourages the Court's adoption. We offer specific comments on the following recommendations:

Recommendation 2021:05:This would provide a means for attorneys to self-report diversity and other demographic data as part of the attorney registration process.

The NJSBA strongly supported a substantially similar recommendation in the *Supreme Court Committee on Minority Concerns 2013-2015 Report* (the "Committee on Minority Concerns Report"), and further recommended that the voluntarily submitted information include gender identity and expression, as well as the other information noted report. The NJSBA reiterates its previous commentary that such data would provide foundational information that is critical to understanding areas of underrepresentation within the profession and formulating creative solutions to address them.

Recommendation 2021:08:This would expand professional development opportunities for law clerks across various dimensions of access to the courts and procedural fairness, including basic LGBTQ+-inclusive courtroom practices and quality services. Such training will serve the public, attorneys and litigants well, as law clerks are primary points of court contact and, in many instances, serve as court ambassadors. In addition, law clerks will bring their training and experience into the sectors they later serve as practicing attorneys, shaping and influencing our profession and communities throughout their careers.

Recommendation 2021:10: This would establish a working group to support and expand current internal efforts to enhance the administration of justice, procedural fairness and public confidence in the FD Docket. The NJSBA previously supported a recommendation to establish an FD Commission to exclusively study and review the unique issues associated with the non-dissolution docket of the family court, and we renew our support of that worthwhile undertaking now. As noted in the Report, litigants in FD matters are often self-represented and among the most socially vulnerable. While cases in the FD Docket often involve complicated custody, parentage and parenting-time disputes, matters are often decided through summary proceedings that are vastly different from the experience of similarly situated litigants in the FM docket. To fine-tune the effectiveness of the FD docket, the NJSBA had suggested certain revisions like requiring parties to serve all filed documents on the other party, permitting a plenary hearing for appropriate matters, including additional or clarifying language in certain standard FD forms, routinely allowing resolution by consent

order, and standardizing the handling of emergent applications. The NJSBA would welcome the opportunity to assist the Judiciary in exploring ways to implement these and other meaningful reforms for the benefit of those accessing the FD Docket.

Recommendation 2021:11: This would classify name change court filings as non-public records under Rule 1:38. The NJSBA strongly supports this recommendation as a measure to protect transgender and non-binary individuals who are seeking a name change from harassment, intimidation, discrimination and violence. Currently, litigants desiring to keep their name change proceeding private due to personal safety concerns must file a motion to seal the record at the outset of the proceeding. In addition to being procedurally complex, filing a motion to seal imposes additional costs on litigants and has the practical effect of increasing the amount of time before the litigant can obtain a name change judgment and, accordingly, updated identification documents. Furthermore, because the standard for sealing requires an evaluation of the particularized and individual risk to the petitioner's safety, outcomes for these motions are inconsistent. The standard could be interpreted not to be met when a transgender or non-binary applicant seeks to seal the record due to very real risks of physical harm and discrimination yet cannot document an imminent and direct personal threat at the time of filing their name change petition. All of these concerns are compounded for unrepresented litigants and represented litigants of limited economic means. For these reasons, the NJSBA believes this recommendation proposes a practical, efficient, and broadly applicable solution that would resolve the disparate negative impact on vulnerable name change applicants within the LGBTQ+ community.

Recommendation 2021:12: This would make name change judgments effective immediately upon entry. As the Judiciary has eliminated the publication requirements for name changes, the 30-day waiting period reflected in Rule 4:72-4 serves no purpose. Eliminating this requirement would increase access to justice for all individuals obtaining name change judgments by removing an unnecessary delay in obtaining updated identification documents necessary for virtually all aspects of participation in society. This is especially critical for transgender and non-binary individuals, whose need to obtain identification documents that align with their name, gender and lived experience is urgent and acute.

In addition, the NJSBA recommends that Rule 4:72-4 be amended to remove the gendered language contained in its current form, which has the effect of unintentionally excluding non-binary individuals. *See, e.g.,* Rule 4:72-4 ("At the hearing, plaintiff must present adequate proof of *his or her* current name.") (emphasis added).

Family Practice Committee

The NJSBA has no specific comments on the recommendations contained in the Family Practice Committee's Report or Supplemental Report, except to recommend consideration of two additional clarifications to Rule 5:6-9 to ensure fairness and consistency: (1) confirming that child support obligations cease upon the termination of parental rights, and (2) that child support obligations for children placed outside of the home by DCP&P be terminated or continued in the same manner and for the same reasons as child support obligations for children not outside the home.

Municipal Court Practice Committee

The NJSBA is generally supportive of the proposed rule changes, but urges the Judiciary to ensure the following issues, previously raised by the NJSBA, are taken into consideration when implementing any initiatives or changes to pleas by mail and electronic resolution of municipal disputes. Those issues include: ensuring that defendants are advised of their right to counsel, that they are fully apprised of the offense to which they pleading and the ramifications of their plea, and that neither prosecutors nor court staff are permitted to reach out to defendants before they are arraigned and/or have waived their right to counsel, except for scheduling purposes.

The NJSBA also suggests additional changes to two specific rule proposals:

Rule 7:6-3(c)(1)(D):The NJSBA suggests that defendants who are represented by an attorney should be permitted to submit an electronic verification of the information sought with their plea in lieu of a signed certification. This would streamline the submission process and ensure that all defendants are subject to the same requirements, whether they are represented or not. To accomplish this, the NJSBA recommends the underlined language below be added to the rule:

> (c) Plea of Guilty by Mail or in the Electronic System—Acknowledgements, Waiver and Certification.
> . . .
>
> (1) In those cases where a defendant may enter a plea of guilty to a traffic offense or parking offense by mail or in the electronic system, such plea shall include:
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> . . .
>
> (D) In those cases where an attorney submits a plea of guilty on behalf of the defendant through the electronic system certification signed by <u>or electronic verification of</u> defendant that recites the terms of the plea; specifies that the defendant has reviewed such terms; establishes a factual basis for the plea; and establishes that the plea of guilty is being entered voluntarily with understanding of the nature of the charge and the consequences of the plea.

Rule 7:6-3(d)(3): The rule should be modified to (1) require that attorneys representing any of the parties in the matter receive a copy of the Court's decision, in addition to their clients, and (2) require that notice of the Court's decision be provided in three different ways, including ordinary mail, to overcome any unknown or unanticipated technological limitations and provide the best opportunity to ensure that notice of the Court's decision is actually received.

To accomplish this, the NJSBA recommends the following language changes:

> (d) Scheduling and Judgment
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> The Court shall send a copy of its decision to the defendant, [and] complaining witness, and attorneys who have entered an appearance by ordinary mail, email, if available, and [or] electronic system, if used.

Again, the New Jersey State Bar Association thanks the Supreme Court for publishing these reports and allowing the bar to submit comments and recommendations. We commend all of the volunteers for their efforts in contributing to the work of the various committees and hope that our comments represent a meaningful contribution to their debate.

Our leaders also look forward to addressing the Court at the public hearing when it is scheduled. The opportunity to participate in all aspects of the rule-making process, which has a significant impact on the practice of law in New Jersey, is appreciated. If you have any questions regarding these recommendations, please do not hesitate to contact me.

Very truly yours.

Kimberly A. Yonta, Esq.
President

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cc: Domenick Carmagnola, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director