

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORDER AMENDING RULES 3, 9, §  
25, 29, 30, AND 43 OF THE §  
RULES OF THE SUPREME §  
COURT OF DELAWARE §

Before **STRINE**, Chief Justice, **HOLLAND**, **VALIHURA**, **VAUGHN**, and **SEITZ**, Justices, constituting the Court *en banc*.

**ORDER**

This 20<sup>th</sup> day of May 2015, it appears to the Court that it is desirable to amend Supreme Court Rules 3, 9, 25, 29, 30, and 43. These amendments are effective June 1, 2015.

(1) Supreme Court Rule 3(b)(2) shall be amended to strike and revise the following language:

All parties consent to the termination of the case. A party is deemed to have consented to the termination of the case when the party fails to respond timely to (a) ~~another party's motion to dismiss,~~ (b) this Court's notice to show cause why the appeal should not be dismissed, or (c) a direction of this Court requiring the party to take action by a fixed date.

(2) Supreme Court Rule 9(aa) shall be amended to strike the following language:

*Sanctions for failure to pay the record preparation and transmittal fee.* Every appellant is required to pay the record preparation and transmittal fee within the time limit imposed by the trial court unless the trial court waives its fee or otherwise extends the deadline for payment. If an appellant shall fail to comply with the provisions of this rule, ~~any other party may move to dismiss the appeal,~~ or the Court

may dismiss the appeal *sua sponte* pursuant to Rule 29(b). Failure to pay the trial court's record preparation and transmittal fee also may be the basis for disciplinary action against the appellant's attorney.

(3) Supreme Court Rule 9(f) shall be amended to strike the following language:

*Sanctions for failure to order or pay for transcript.* The time periods provided for the designation, ordering of, and payment for the transcript or portions thereof are mandatory unless extended by Order of this Court for good cause shown. Absent good cause shown, failure to so designate shall not be a basis for enlargement of time for the filing of briefs and appendices under Rule 15. If a party or counsel shall fail to comply with the provisions of this rule, including the timely filing of designations or directions, or the prompt payment for the transcript, as provided herein, ~~any other party may move to dismiss the appeal,~~ or the Court may dismiss the appeal *sua sponte*, pursuant to Rule 29(b). Such failure may also be the basis for disciplinary action against the attorney or other relief in the discretion of the Court.

(4) Current Supreme Court Rule 25 is stricken in its entirety and the following new Rule 25 is adopted:

Rule 25. Expedited procedure.

(a) *Motions to affirm in certain criminal cases.* Motions to affirm may be filed in appeals of criminal matters other than direct appeals of convictions after trial and first motions for postconviction relief under Superior Court Criminal Rule 61 when there was a conviction after trial. The following procedures shall apply to motions to affirm. Within 10 days after service of appellant's opening brief, appellee may, in lieu of a brief, serve and file a motion to affirm the judgment or order of the trial court. The motion shall not exceed four pages in length. The filing of the motion tolls the time for filing of appellee's brief. If there is more than one appellee in an appeal, the filing of a motion to affirm by one appellee tolls the time for the filing of all the appellees' briefs. The sole ground for such motion shall be that it is manifest on the face of appellant's brief that the appeal is without

merit because:

(i) Law settled. The issue on appeal is clearly controlled by settled Delaware law;

(ii) Factual issue. The issue on appeal is factual and clearly there is sufficient evidence to support the jury verdict or findings of fact below; or

(iii) Exercise of discretion. The issue on appeal is one of judicial discretion and clearly there was no abuse of discretion. The motion to affirm shall state the ground or grounds on which it is based together with citation of authorities and record references to evidence relied upon. There shall be no briefing, argument or response to the motion, unless requested by the Court. If the motion to affirm shall be granted by unanimous action of a panel of the Court an order or opinion will be entered and a mandate will issue thereon; if the motion shall not be unanimously granted, it shall be denied. If the motion shall be denied, the appellee's brief will be due within 20 days after such denial, and the appeal will proceed through briefing, scheduling and disposition as provided by these Rules. The motion to affirm shall be substantially in the form set forth in Official Form G. A motion to affirm shall not be accompanied by a proposed form of order.

(b) *Motions to affirm denials of petitions for extraordinary writs in civil cases.* Motions to affirm may only be filed in civil appeals from orders denying petitions for extraordinary writs. The procedures and standards for motions to affirm in these civil cases are set forth in subparagraph a. In all other cases in which a party seeks expedited resolution of a civil appeal, the party shall follow the procedures set forth in subparagraph e.

(c) *Affirmance sua sponte.* After filing of the appellant's opening brief, a panel of the Court by unanimous action may, *sua sponte*, enter an order or opinion affirming the judgment or order of the trial court for the reason that it is manifest on the face of the appellant's opening brief that the appeal is without merit because:

(i) Law settled. The issue on appeal is clearly controlled by settled Delaware law;

(ii) Factual issue. The issue on appeal is factual and clearly there is sufficient evidence to support the jury verdict or findings of fact below; or

(iii) Exercise of discretion. The issue on appeal is one of judicial discretion and clearly there was no abuse of discretion.

(d) *Oral argument without briefs.* In any case where the parties so

stipulate and the Court approves, or upon the Court's order *sua sponte*, an appeal may be heard by the Court on oral argument without briefs, or with limited briefs or other submission to the Court. Any such stipulation shall be presented to the Court not later than the time when the first brief is otherwise due to be served and filed.

(e) *Expedited scheduling*. Upon motion for good cause shown or upon the Court's order *sua sponte*, the Court may order an expedited schedule of any or all procedures, including a shortened time for the filing of briefs and other papers, in any appeal or other proceeding.

(5) Supreme Court Rule 29(b) shall be shall be amended to strike the following language:

*Involuntary dismissal upon notice of the Court* ~~or motion by a party~~. The Court may order a complaint, petition or appeal dismissed, *sua sponte*, upon notice of the Court, ~~or upon a motion to dismiss by any party~~. Dismissal upon notice  ~~or motion~~ may be ordered for lack of subject matter jurisdiction, for untimely filing of an appeal, for appealing an unappealable interlocutory order, for failure of a party diligently to prosecute the appeal, for failure to comply with any rule, statute, or order of the Court, or for any other reason deemed by the Court to be appropriate. In the event that the Court shall conclude, *sua sponte*, that dismissal upon any of the foregoing grounds appears appropriate, the procedure for such dismissal shall be as follows: The Clerk shall forward to the appellant a notice directing that the appellant show cause why the complaint, petition or appeal should not be dismissed for the reasons stated in the notice. The notice shall direct the complainant, petitioner or appellant to respond within 10 days after receipt of the notice. After consideration of such response, the Court shall enter an order dismissing the complaint, petition or appeal or maintaining jurisdiction of the case. If a response is not filed within the time allowed, the dismissal shall be deemed to be consented to pursuant to Rule 3(b)(2). Upon entry of any order of dismissal, the Court shall specify the terms thereof including provision for payment of costs.

(6) Supreme Court Rule 30(d) is stricken. Supreme Court Rule 30(e) shall be renumbered 30(d) and Supreme Court Rule 30(f) shall be renumbered 30(e).

(7) Supreme Court Rule 43(ii) shall be amended to add and strike the following language:

Answer requested. An answer is requested to be filed within 20 days of the filing of the complaint with the Court. The answer may include any affirmative defense or grounds for ~~motion seeking the~~ dismissal or denial of the complaint, and unless the Court otherwise directs, no further submissions of the parties shall be accepted. If the complaint is directed against a judge who does not desire to appear or participate in the proceeding, the judge may so advise the Clerk by letter. The Clerk shall notify all other parties to the proceeding. The complaint shall not be taken as admitted whether or not such a letter is submitted.

(8) Supreme Court Rule 43(iii) shall be amended shall be amended to add and strike the following language:

Brief schedule. In the event that the Court requires briefing on the matter, it shall so notify the parties and the matter shall be briefed in accordance with the rules applicable to appeals. The opening brief of complainant shall be due within 30 days after service of the answer, unless the answer includes an an ~~motion or~~ affirmative defense or grounds to dismiss or deny the complaint, in which event the opening brief shall be due within 30 days after the Court has determined that the complaint shall not be dismissed. In all other respects, the matter shall be briefed in accordance with the rules applicable to appeals.

(9) The comments to current Supreme Court Rules 25 and 29 are stricken and the following new comment is adopted for both rules:

These Rule changes are intended to clarify and to bring into conformity with actual practice the use of motions to affirm under Rule 25

and for dismissal under Rule 29 in the Supreme Court. The goal of this effort is to improve the efficiency of the appellate process for litigants.

For years, practitioners have debated the utility of the motion to affirm option that exists under Rule 25. Many civil practitioners have concluded, with some reason, that the option is of little benefit, as the incidence of approval of civil motions to affirm has been very small. On the criminal side, meanwhile, patterns have emerged that illustrate that motions to affirm are most useful as to certain types of cases, and of little benefit in other categories.

Starting with the criminal side, this amendment would eliminate the ability of an appellee to bring a motion to affirm as to direct appeals from convictions after trial and first motions for postconviction relief under Superior Court Rule 61 when there was a conviction after trial. Motions to affirm would be permitted as to other criminal appeals. In the categories where motions to affirm would no longer be permitted, the appellee may of course file an earlier answering brief if it wishes quicker disposition and if it believes that the grounds for affirmance are straightforward, can file a terse answering brief.

On the civil side, experience has shown that motions to affirm are rarely, if ever, granted, especially if the appeal has been filed through counsel. As a result, parties filing motions to affirm have often expended time and resources in addition to, rather than instead of, full merits briefing. Although there are many reasons for the low rate of approval of such motions, the low rate of approval is clear.

As a result, the Rules are being amended to eliminate the option to file a motion to affirm in a civil case, other than one from an appeal of a denial of a petition for an extraordinary writ. Experience has shown that the motion to affirm tool has been efficiently and consistently used in this special category and the amended Rule 25 would continue this option as to that special class of civil appeals.

In all other civil appeals, motions to affirm would not be permitted. The elimination of this option does not mean, however, that an appellee cannot expedite consideration of an appeal in order to facilitate its earlier resolution. If there is a genuine need for expedited proceedings, the option of filing a motion for expedition remains. As important, if an appellee files

its answering brief earlier, that speeds the process automatically because the appellant's due date for filing a reply brief is tied to when the answering brief is filed.

In the same spirit, Rule 29 is being amended to eliminate the option to bring a motion to dismiss an appeal. The Court would retain the ability to grant a dismissal motion *sua sponte*, under the same conditions are currently exist. But as with motions to affirm in civil cases, motions to dismiss have rarely been made or granted in the Supreme Court. If an appellee believes an appeal should be dismissed for lack of jurisdiction or some other non-merits reason, that argument can be made in its answering brief. As has been mentioned, if the appellee believes that the appeal should move faster, the appellee can file its answering brief earlier. Conforming rules have been made to other Rules to make them consistent with the revised Rule 29.

In conclusion, the effect of these amendments will be to conform the Rules to what has experience has shown to be the most efficient handling of certain types of appeals, to eliminate any waste of resources or time that may have occurred because of the lack of understanding of the circumstances in which motions to affirm and to dismiss were likely to find favor, and thereby to improve the benefit to cost ratio of the Rules for litigants.

(10) The Clerk of this Court is directed to transmit a certified copy of the Order to the clerk for each trial court in each county.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice