The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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Daniel A. Durst, Chief Counsel
Supreme Court of Pennsylvania
Rules Committees
Pennsylvania Judicial Center
PO Box 62635
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Re: Comments on Proposed Adoption of Pa.R.J.A. 1990 and Amendment of Corresponding *In Forma Pauperis* ("IFP") Statewide Procedures

Dear Mr. Durst:

We are writing today in response to the April 2022 request from the Rules Committees for comments on their proposed adoption of Pa.R.J.A. 1990 and amendments to other rules governing the procedures and forms to seek and determine eligibility for IFP status. The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (the "Commission") commends the Committees for their responsiveness to stakeholders' suggestions that indigent individuals have access to the Pennsylvania courts in a speedier and more comprehensive manner. Many of the amendments that the Commission suggested to the Committees in its first round of comments were meaningfully addressed. We believe that the remaining suggestions contained in this letter will make the process even more accessible to indigent individuals and their counsel.

As you know, the Commission was established in 2005 to implement the recommendations proposed in the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System. Pursuant to that Report's findings, the Commission has focused on promoting the equal application of the law for all Pennsylvanians, including those who lack the financial resources to have meaningful access to the courts. It is in furtherance of that mission that the Commission offers the following comments.

Proposed Substantive Modifications

1. Require that litigants are provided sufficient notice of the option to proceed IFP.

As the Comment to proposed Pa.R.J.A. 1990 points out, Rule 1990 is intended to "establish criteria and procedures for . . . seeking a waiver of fees and costs for indigent parties that would otherwise operate to *limit access* to the courts" (emphasis added). In other words, the proposed

rule is centered on equitable access to court procedures, regardless of one's financial status. Unfortunately, however, many individuals across the Commonwealth who need to file a lawsuit, appeal, or other court action are turned away when they are unable to pay the accompanying fees and costs, unaware of the fact that these cumbersome charges may be waived. In short, absent a meaningful effort to inform indigent individuals of the availability of the IFP designation, even the most liberally construed court rules governing that designation will not achieve their full potential.

Fortunately, increasing awareness of IFP procedures can be accomplished with the insertion of simple requirements into the text of Pa.R.J.A. 1990 and related rules. The rules could mandate, for instance, that the clerk or other designated court official explain to a party that they may petition to proceed IFP at the same time that the filing office first informs that party of the existence of the fees and costs associated with their legal action. Public notice could also be strengthened by requiring that the text of the rules and information about the IFP application – or accessible summaries thereof – be prominently displayed in all court filing offices. Either, both, or substantially similar iterations of these amendments would obviate the unfamiliarity that many indigent individuals have with the IFP designation, increasing the very access to the courts on which that designation is centered.

2. Establish a workable standard for the term "substantial financial hardship" in proposed Pa.R.J.A. 1990(b)(2).

Providing sufficient notice of the availability of IFP status *also* involves detailing user-friendly standards within the specific provisions that determine that status. In its present form, Pa.R.J.A. 1990 provides an off-ramp for indigent individuals who do not automatically qualify for IFP status pursuant to the criteria established by subsection (b)(1), allowing them to apply if they would otherwise suffer "substantial financial hardship" absent a waiver of the associated fees and costs. However, neither the text of the proposed rule itself nor the Comment to the rule expound on what "substantial financial hardship" means.

In their comments addressing this concern, the Committees state that whether an individual would incur "substantial financial hardship" without IFP status is "fact-specific" and that a "standard may be incapable of precise definition." However, making an IFP determination based on an articulable standard and reviewing facts specific to that determination are not mutually exclusive undertakings. The Committees also posit that including "basic life needs" as a standard is 'as ambiguous as the ['substantial financial hardship'] phrase it was intended to explain." Although "basic human needs" seems to be a phrase on which a uniform consensus can readily be reached, the Committees' comment also fails to address the fact that a phrase such as "basic human needs or obligations" may be accompanied by an explanatory clause illustrative of examples of these basic needs. At present, the considerations in Pa.R.J.A. 1990(b)(2)(i)-(v) generally contemplate only what a party *has* – their gross income and other available financial resources, for example. These considerations should not be improperly conflated with a party's *basic needs*, which a fleshed-out standard for "substantial financial hardship" would more capably address.

Accordingly, we recommend that the text of subsection (b)(2) or the Comment to Pa.R.J.A. 1990 be amended to define "substantial financial hardship" to mean that there is "a substantial risk that, without the fee waiver, the litigant is or will be unable to fully meet their basic human needs or obligations including, but not limited to: nutrition, housing, utilities, health, transportation, care of depends, or other areas of essential need."

3. Create a uniform IFP process for fees assessed pursuant to the disposition of criminal cases.

As you know, there is currently no criminal IFP rule, as Pa.R.Crim.P. 124, entitled "In Forma Pauperis," is simply "[Reserved]." We commend the Committees for resolving to address this oversight by establishing an IFP process in criminal proceedings to file a summary appeal, to file a petition for expungement, or to file a Clean Slate limited access petition. Because the proposed rules explicitly seek to expand access to the courts regardless of the nature or type of proceeding involved, we recommend that IFP processes be more uniformly and comprehensively applied to criminal cases.

Specifically, we suggest a generalized criminal IFP rule that covers the fees and costs routinely charged by clerks of courts across the Commonwealth for actions like filing motions, petitions for writs of habeas corpus or writs of certiorari, petitions for post-conviction relief, and petitions for expungement following successful completion of Accelerated Rehabilitative Disposition ("ARD"). In the Re-Publication Report, the Criminal Procedural Rules Committee focuses its comments on the notion that it would be beyond the scope of the proposed rules to "provide for the waiver of any fees, costs, or fines imposed as part of a sentence." It further notes that addressing the costs, fees, or other financial obligations imposed as a result of conviction would be inadvisable due to the pendency of *Commonwealth v. Lopez*, 27 EAP 2021 (argued March 9, 2022). However, the fees assessed pursuant to the actions listed above are separate and distinguishable from those imposed as part of a sentence, and a generalized criminal IFP rule could easily reflect that distinction or otherwise include a specific caveat stating as much. Absent a uniform IFP process applicable to additional criminal cases, financial barriers will continue to needlessly limit access to the courts.

4. Provide an IFP process for proceedings before the Register of Wills.

The proposed rules present an updated IFP process for Orphans' Court proceedings by proposing to cross-reference new Pa.R.J.A. 1990 in existing Pa.R.O.C.P. 1.40. The Rules do *not*, however, provide a similar process to obtain a waiver of the costs imposed by the Register of Wills. In its comments, the Orphans' Court Procedural Rules Committee states that "the Register is a separate . . . county officer and matters filed there are subject to a separate fee schedule." For the purposes of these proposed rules, what matters is not so much that the fees are *separate*, but that they exist at all without an explicitly affixed waiver process for indigent individuals. In its comments, the Committee cites existing provisions that specifically govern the Register of Wills,

thereby acknowledging that procedural rules on the subject already exist. The Committee should therefore adopt and apply an IFP process to those provisions involving the Register, particularly because many of the required fees directly impact an individual's ability to obtain or retain ownership of a home and thus, to ameliorate the financial situation that compelled their application for IFP status in the first place.

5. Lengthen the window to appeal the denial of an IFP application.

Proposed Pa.R.A.P. 1614(a) provides that "[a] petition . . . shall be filed *within ten days* after the entry of the order denying an application for the waiver of fees and costs by a court of record" (emphasis added). In its comments, the Appellate Court Procedural Rules Committee notes that Rule 1614 "is intended to aid self-represented parties navigating the appellate process." That purpose notwithstanding, the Committee creates only a brief, 10-day window within which an individual must appeal, ostensibly due to "the straightforward nature of the subject matter and the desire to streamline the proceedings."

We believe this framework to be an oversight. The Committee correctly acknowledges that the rule is geared toward unrepresented litigants, since any indigent individuals with counsel will automatically receive IFP status via praecipe pursuant to new Pa.R.J.A. 1990. However, it is precisely *because* an unrepresented person must ascertain the appeal process and draft and submit a petition for specialized review on their own that 10 days is an unnecessarily abbreviated window for appeal. That window becomes even briefer when one factors in mail delays that may impact the time within which litigants become aware of the court's IFP denial order. Furthermore, while an unrepresented individual may attempt to obtain counsel through a legal aid office or the equivalent, the intake process alone would likely flood most, if not all, of that 10-day period.

Accordingly, we recommend that Pa.R.A.P. 1614(a) be amended to grant self-represented parties 30 days to appeal the denial of their IFP application. This time frame is more responsive to the needs of litigants proceeding without counsel and also comports with Pa.R.J.A. 1990, which would similarly give parties 30 days to pay the filing fee to commence their legal action if the court denies their IFP application.

Other Proposed Modifications to Clarify Rule Provisions for Applicants

1. Clarify that to have fees and costs waived, an individual need only establish IFP eligibility under *one* of the three criteria provided in Pa.R.J.A. 1990(b).

As drafted, Pa.R.J.A. 1990 ostensibly sets forth three avenues through which indigent individuals may successfully obtain IFP status: (1) by qualifying for automatic IFP eligibility based on a determination that they are "without financial resources;" (2) by demonstrating that they would suffer a "substantial financial hardship" if they are required to pay the associated fees and costs; or (3) by proceeding via counsel's praecipe. However, the proposed rule does not explicitly state that one need only establish eligibility under one of these pathways to obtain IFP status. To

compound this potential confusion, proposed Pa.R.J.A. 1990(b)(1) and (b)(2) both reference the completion and submission of an application to determine one's eligibility for IFP status under those respective pathways. Thus, an individual may erroneously believe that they must complete separate applications, even though the information that corresponds to the criteria in subsections (b)(1) and (b)(2) are merely contained in different sections within the same application. Subsections (b)(1) and (b)(2) also differ in the directness with which they instruct the court to grant a party IFP status once the respective criteria have been met. Whereas subsection (b)(1) explicitly states that the court "shall" grant a waiver to a party who is "without financial resources," there is no analogue in subsection (b)(2). In other words, it does not similarly direct a court to grant the party's IFP application upon concluding that the party would otherwise suffer a "substantial financial hardship."

Accordingly, we recommend that the Committee add a brief introductory sentence to Pa.R.J.A. 1990(b) establishing that a party need only demonstrate IFP eligibility under one of the three subsequently detailed pathways. We also suggest that the language in subsections (b)(1) and (b)(2) be amended to more clearly indicate that there is only *one* application for the party to initially complete and that a finding by the court that the party has met the subsections' respective criteria in *both* instances means they shall be granted IFP status.

2. Amend Pa.R.J.A. 1990(b)(3) to clarify that, consistent with current practice, counsel's praecipe to proceed IFP does not require action by a judge.

As you know, Pa.R.C.P. 240(d)(1) currently states that the "prothonotary shall allow the party to proceed in forma pauperis upon the filing of a praecipe . . . by the attorney." By granting the prothonotary this authority, the current rule sets forth an *administrative* process, one that does not require judicial approval. This framework is sensible: the prothonotary can capably process counsel's praecipe, thereby avoiding situations in which a party would have to wait a longer period of time in some instances to have their IFP praecipe reviewed and approved by a judge. Accordingly, to avoid these delays and prevent the unnecessary clogging of judicial machinery, we recommend that proposed Pa.R.J.A. 1990(b)(3) be amended to explicitly state that the party "shall receive a waiver from the court filing office upon *praecipe* of counsel . . . ."

3. Clarify that an IFP petition may be filed by a party *after* the commencement of an action.

At present, proposed Pa.R.J.A. 1990(c)(1) provides that the IFP application or praecipe "shall be filed at the same time as the legal action, not before." This language is largely consistent with existing Pa.R.C.P. 240(c), which states that the petition "may not be filed prior to the commencement of an action or proceeding or the taking of an appeal." Like Rule 240, however, Proposed Rule 1990 may unintentionally (and inaccurately) suggest to parties – particularly those who are self-represented – that they may not file an IFP petition *after* an action has commenced. Explicitly informing parties of their ability to subsequently file for IFP status is important: people's financial well-being frequently fluctuates over time, and if a party in a protracted case can no longer afford the associated fees and costs, the text of the rule should more explicitly address such

situations. Therefore, we recommend that proposed Pa.R.J.A. 1990(c)(1) be amended to read: "The application or *praecipe* shall be filed at the same time or after commencement of the legal action, not before."

4. Clarify three minor points in the streamlined application form related to the description of public benefits, the completion of the form's various sections, and the proper valuation of a party's assets.

We commend the Committees for their efforts to simplify the IFP application form in light of the fact that many applicants will be completing it without the aid of counsel. With that said, we suggest several minor modifications to the form to further improve its accessibility to court users. First, the form represents "Supplemental Security Income (SSI)" as "(Not Social Security)." This is misleading and will potentially confuse applicants. SSI is a form of Social Security benefits, and the application for SSI is also an application for Social Security benefits. We believe that the Committees intended to distinguish SSI from Social Security Disability Insurance ("SSDI"), which is a much more meaningful distinction: SSDI qualification is tied to how long an individual was employed, whereas SSI is needs-based and unrelated to one's employment history. Accordingly, if the Committee intends to differentiate the various forms of Social Security benefits, it should do so in a manner consistent with these distinctions.

Next, the form states on page five of proposed Pa.R.J.A. 1990 that the petitioner may skip the "next section" if they check the box indicating they receive one or more of the enumerated public benefits. In providing this instruction, the Committees were ostensibly acknowledging the avenues for IFP eligibility established in proposed Pa.R.J.A. 1990(b)(1) and (b)(2). If an individual indicates that they receive needs-based public assistance pursuant to subsection (b)(1), they are automatically eligible for IFP status and do not need to fill out additional information on the form aside from the "Verification" section. If they do *not* receive such assistance, they must complete the remaining sections of the application to demonstrate that they either meet certain income and asset requirements or would suffer substantial financial hardship absent a fee waiver. The text of the form should not assume, however, that self-represented parties will readily grasp the Committees' intent and recognize that "skip this next section" actually means to skip the next *three* sections and proceed to the "Verification" portion of the application form. Therefore, for the sake of clarity, we recommend that the phrase "skip this next section" be amended to read "skip the next three sections (**GROSS MONTHLY INCOME, ASSETS, and MONTHLY EXPENSES**)."

To further streamline the application process, we recommend that the Committees amend the "**ASSETS**" section of the application form. Proposed Pa.R.J.A. 1990(b)(1)(ii)(II) provides that parties may establish they are "without financial resources" and thus automatically eligible for IFP status if they have "assets less than $10,000, *excluding the party's home and one vehicle*" (emphasis added). The application form, however, merely prompts a party to list their value of their "cars or other vehicles" or "house." To be consistent with the "without financial resources" category, we recommend that the form's language be amended to exclude one house and one car

from the individual's total value of property. Because the party providing these values will also almost certainly be self-represented, we also suggest that the form provide brief and digestible guidance on the *kind* of valuation – be it in the form of purchase price, an appraisal, equity, or the like – that the party should provide.

5. Craft proposed rules or explain within the existing proposed rules the processes by which a party may appeal the denial of their IFP petition by a magisterial district court or other minor court that is not a court of record.

The rules proposed by the Appellate Court Procedural Rules Committee do not appear to address instances in which parties seek to appeal the denial of their IFP application in a civil or criminal court case before a magisterial district court or other minor court. These courts are not courts of record, to which the procedures contained in the Pennsylvania Rules of Appellate Procedure are limited. The Committee's proposed rules seem to acknowledge this fact; proposed Pa.R.A.P. 554 references only "appellate review of an application to waive fees and costs denied *in a court of record*" (emphasis added). Thus, we recommend that the Committees set forth the procedures for appealing the denial of a petition to proceed IFP in cases involving landlord-tenant issues, summary expungement, and other disputes or actions that proceed outside of courts of record.

6. Amend the Proposed Rules of Appellate Procedure to provide that IFP petitions to pursue an appeal be filed in the trial court first and that the rules governing appeals of IFP denials apply to more than just proposed Pa.R.J.A. 1990.

Proposed Pa.R.A.P. 552(a) and (b) state that if a party does not already have IFP status at the time they file an appeal, any IFP petition must be submitted to the appellate court, which could then "remand [the application] and any supplemental information to a court of record for a hearing and decision." Subsection (a) additionally provides that the IFP petition must be filed "at the same time as the commencement of the action in the appellate court." This proposed framework is puzzling, given that the fee to file an appeal is payable to the trial court's filing office, not the appellate court, and that absent IFP status in the trial court, no appeal could be perfected, nor would there be a docket on which to file the IFP petition in the appellate court. Therefore, rather than unnecessarily complicate the appellate process and risk avoidable delays, we recommend that the Committee preserve existing practice, which permits a party's IFP petition to first be filed in the trial court when an appeal is taken.

The application of the Proposed Rules of Appellate Procedure is also limited to petitions made pursuant to Pa.R.J.A. 1990. Proposed Pa.R.A.P. 551(a), for instance, states that a previously granted waiver of fees and costs "*pursuant to Pa.R.J.A. 1990* . . . shall continue in an appeal of the same case in the appellate court" (emphasis added). Proposed Pa.R.A.P. 552, which permits a party who was not previously granted a waiver of fees and costs to seek such a waiver, contains virtually identical language. However, Pa.R.J.A. 1990 would not be the sole means by which a party may petition to proceed IFP, given that the proposed rules do not presently cover all actions, such as

criminal cases in which a party wishes to file a petition for a writ of habeas corpus or a petition for post-conviction relief. Accordingly, the Proposed Rules of Appellate Procedure should specify that their provisions apply to appeals of petitions made pursuant to both Pa.R.J.A. 1990 *or other appropriate authority*, including the common law and the Pennsylvania Constitution.

We wish to thank you for your continued efforts to improve the rules governing indigent individuals' ability to secure meaningful access to Pennsylvania's courts. If you have any questions regarding our comments, we would be happy to discuss them with you at your convenience.

Respectfully,

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