Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

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With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

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(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and. . .seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

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2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) BAR ASS'N THIRD CIR. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.