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03-AP-016

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Peter G. McCabe, Esquire
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Building
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I am pleased to submit these comments on several of the proposed amendments to the Federal Rules of Appellate Procedure.

Just a word about my background. I have frequently commented on proposed amendments to the Federal Rules of Civil Procedure and of Appellate Procedure. I am a member of my firm's Supreme Court and Appellate Practice Group. I am admitted to practice before almost all of the federal circuits and actually have briefed and argued cases before most of them (as well as before the Supreme Court and state appellate courts). I chaired the D.C. Circuit's Advisory Committee on Procedures and for many years was a member of the Judicial Conferences of both the D.C. Circuit and the Second Circuit. I also have been elected as a member of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. My comments are the product of this experience.

General Approval

I have reviewed the package of proposed amendments and generally find them non-controversial improvements appropriate for transmission to the Supreme Court. I do have several comments on specific proposals.

Rule 4(a)(6). Reopening the Time to File an Appeal.

One aspect of the amendment in subparagraph (B) would specify that a motion to reopen the time to appeal may be made within seven days after the moving party "observes" written notice of entry of the appealable order. I find that term clumsy and obscure as a verb in a Federal Rule. As the comment explains, the goal is to trigger the duty to act once the moving

party "learns of" the written notice of entry, but only by physically seeing it. I suggest that substituting the verb "obtains" or "acquires" written notice would be a more conventional way of expressing the point. The Advisory Committee Note adequately explains the various ways in which a party may be placed on written notice.

Rule 28.1. Cross-Appeals.

These rules are a particularly welcome attempt to clarify counsel's obligations in increasingly commonplace cross-appeals. The proposals will avoid needless motion practice and conferences with the Clerk's offices and staff counsel, especially if modified in accordance with a few suggestions to address a couple of problems the current draft poses.

Proposed Rule 28.1(a) states that the new rule applies to "a case" in which a cross-appeal is filed. This may create an unintended ambiguity. In most if not all circuits, each appeal, including a cross-appeal, is assigned a separate docket number and thus is technically a distinct appellate "case," even though the separate cases are typically consolidated. In fact, Rule 34(d), which deals with oral arguments involving cross-appeals, recognizes that, at the appellate level, these are separate cases. The new rule should make clear that its provisions apply to all parties to all related cases involving cross-appeals from the same judgment or order. Thus, at the end of proposed Rule 28.1(a), the Committee should consider adding the following sentence:

> "This Rule governs the briefs of all parties where an appeal and one or more cross-appeals are taken from the same order or judgment."

On a more fundamental level, the proposal appears to me deficient in an important respect. It restricts too narrowly the size of the brief the appellee may file in response to the appellant's opening brief and in support of his own cross-appeal.

If there were no cross-appeal, the appellee would have the right to file a response brief containing 14,000 words. The proposal would allow just 2,500 additional words (for a total of 16,500) to address the issues on which the appellee elected to cross-appeal. The mistaken premise of this proposal is that the cross-appeal is likely to pose relatively insignificant issues that can be treated effectively and intelligibly in a summary fashion or by simply adopting much of the appellant's opening brief, including the all-important statement of the facts.

As the proposed rule recognizes, however, the designation of "appellant" and "appellee" when there are cross-appeals is simply the result of the fortuity of timing. The cross-appeal may be just as substantial as the opening appeal. Indeed, in many cases it is not at all unusual for both (or all) sides to have quite substantial issues to raise in their cross-appeals. The proposed rule (in subparagraph (e)(2)A)) implicitly recognizes this fact by allowing the appellant to file a "response and reply brief" that contains as much as 14,000 words (double the normal reply). This gives the appellant a total of 28,000 words, while the appellee (cross-appellant) would be

limited to 23,500 words (16,500 for the "principal and response brief" plus 7,000 words for a reply).

It is unfair to the parties and unhelpful to the court to impose unrealistically low constraints on the combined brief of a cross-appealing "appellee." The Committee should not create a process in which there is an artificial inducement to race to file the first notice of appeal in order to secure the advantage of being the "appellant" and to impose a corresponding disadvantage on the opposing party who also intends to appeal but becomes the "appellee" under the proposed rule.

I am not suggesting that the appellee's combined brief should be twice the size of the standard opening brief. Instead of 2,500 additional words, however, a more realistic maximum for the typical case would add something like 7,500 words, for a total of 21,500 for the appellee's combined principal and response brief.

It also would be helpful to the court to include in the rule a requirement that both the appellee's principal and response brief and the appellant's response and reply brief contain appropriate headings demarcating the portion of the argument that addresses that party's own appeal and the portion that is addressing the other party's appellate points.

Rule 32.1. Citation of Judicial Dispositions.

As the Committee is well-aware, one of the most vexing problems for practitioners has been the widespread practices of various circuits purporting to prohibit counsel from citing decisions a court has issued as "unpublished" or "not to be published." Probably more than any other facet of appellate practice, these policies have drawn well-deserved criticism from the bar and from scholars. When I chaired the D.C. Circuit's Advisory Committee on Procedures, this kind of practice was perennially and uniformly condemned – all to no avail.

The Advisory Committee is to be commended for proposing to bring some order out of the multi-circuit chaos and, more importantly, for ordaining a much sounder policy on this issue. In light of what the Reporter calls the "passionate" defense of such restrictions by a number of circuit judges, I understand why the Advisory Committee is proposing only a partial solution to the problem, a proposal aptly termed "extremely limited." It is, nevertheless, an important and welcome first step in restoring legitimacy and integrity to this aspect of the judicial process.

It is not necessary to rehearse at length the reasons for overriding the various circuit rules that attempt to prohibit counsel from citing judicial rulings. Those rules, which have only "practical" arguments of judicial convenience to justify them, cannot be reconciled with the common law tradition that underlies the American judicial system: judicial decisions are an important ingredient in ascertaining and developing the law.

While judges may devote different levels of care and attention to different types of

judicial opinions, neither litigants nor other judges should be forced to ignore what they have said in those opinions. It should make no difference whether the judge who wrote the decision wants to blind other judges or other litigants to the written analysis. As with "published" or formally "precedential" decisions, those decisions may be slighted if they are poorly reasoned or unpersuasive – but their existence cannot properly be denied.

As I indicated, I understand the political forces that have led the Advisory Committee to propose only a modest response to these restrictions, outlawing a "no citation" directive but still explicitly allowing courts of appeals to designate their opinions as "non-precedential" or "not precedent." With all due respect, however, I think that the Advisory Committee is legitimizing these policies and thus undermining the rationale for the proposed ban on "no-citation" rules when it refers to dispositions that have been "designated as . . . 'non-precedential,' 'not precedent,' or the like . . . ." As drafted, the proposed rule necessarily implies that such designations have legal force and effect.

The text of the rule would be quite adequate and would avoid this controversial – and in my opinion, unsound – implication, if it simply stops after the word "dispositions" on line 3 of proposed Rule 32.1(a). The rule would then contain a flat, comprehensive, but neutral policy stating that:

> "No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments or other written dispositions."

That simple declaration would lead directly into subsection (b), which requires service of a copy of the cited decision, if it is not otherwise available on a published database. Nothing more needs to be said – or should be said.

Whether or not the Committee deletes the references to "unpublished" and "non-precedential" opinions, I urge the Committee to strike the concluding clause in proposed subsection (a). That clause states that there may not be a ban or restriction on citing such decisions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions."

This is a truly remarkable, and I dare say bizarre, clause. I suppose that the drafters were responding to one of the powerful objections to the no-citation rules: that they create two classes of judicial decisions, those that may be cited and those that may not. But it would be ludicrous for the Committee to endorse as a permissible solution to that conundrum a policy in which a circuit declares that ***no*** prior decisions of any sort could be cited. No circuit has ever done do, of course, and it is unthinkable that any would – or lawfully could.

Therefore, it would be nothing short of foolish for the Committee to submit to the Supreme Court a proposed rule that appears to license the circuits by local rule to ban *all* citations to all prior decisions.

The Advisory Committee Note seems to suggest that this sweeping clause had a much more modest objective. The Note explains that the "unless . . ." clause would prevent circuits from promulgating local rules requiring filing and service of all unpublished opinions cited in a party's brief, unless they also require similar treatment of published opinions (which, of course, no circuit has done or would do). This is an infelicitous approach to a non-existent problem.

As just discussed, the "unless . . ." clause appears in a subsection of a rule that addresses the ability to *cite* decisions, not the circumstances under which a party may have to *serve and file copies* of cited decisions. That subject is addressed in subsection (b). Subsection (b) sets forth a clear, simple and practical rule governing the obligation to provide copies of otherwise inaccessible decisions cited in the party's brief. Nothing more is needed. The "unless . . ." clause in proposed subsection (a) is a mischievous formulation that should be dropped.

Rule 35. En Banc Determination.

The Advisory Committee proposes a reasonable and practical approach to a problem that actually occurs with some regularity: how to calculate whether a majority of the judges of the court of appeals voted for en banc treatment, when there are judges who must recuse themselves from voting. I recently encountered this problem and noted that different circuits have adopted different approaches to what is, at bottom, a question of statutory power.

The Advisory Committee's proposal for a single, national approach is sound. It represents a reasonable interpretation of the governing statute, 28 U.S.C. § 46(c). By analogy to the "*Chevron* doctrine," the Advisory Committee's interpretation of the range of permissible options deserves deference.

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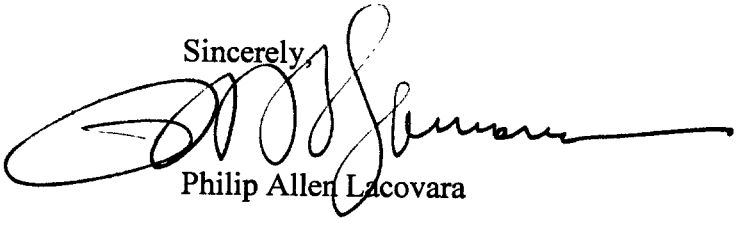
I appreciate the opportunity to submit these comments.

Sincerely,



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