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October 9, 2003

Peter G. McCabe  
Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

**Re: Comments of Public Citizen Litigation Group on Proposed Changes to  
Federal Rules of Appellate Procedure**

**Request to Appear**


Dear Mr. McCabe:

Enclosed are two copies of Public Citizen Litigation Group's comments on the proposed changes to the Federal Rules of Appellate Procedure.

If you hold a hearing on the proposed appellate rules, as currently scheduled for January 24, 2004, I would like to appear on behalf of our Group.

Thank you very much for considering our views.

Sincerely,

  
Brian Wolfman

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**Comments of Public Citizen Litigation Group  
on the Proposed Amendments to the Federal  
Rules of Appellate Procedure**

**October 9, 2003**

Public Citizen Litigation Group (“PCLG”) is filing these comments on the proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”) that were published for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on August 15, 2003.

PCLG is a 10-lawyer public interest law firm located in Washington, D.C. It is a division of Public Citizen, Inc., a non-profit advocacy organization with about 140,000 members nationwide. Since its founding in 1972, PCLG has worked toward improving the administration of justice in the courts. It has submitted proposals to amend the civil and appellate rules and has frequently commented on proposed amendments to those rules.

Collectively, PCLG’s lawyers have litigated hundreds of cases in the federal courts of appeals and have appeared before every federal circuit (in most of them, on many occasions), as well as in the appellate courts of approximately 20 states.

As a result, PCLG's lawyers have considerable experience with the rules and issues that are the subject of the proposed amendments.

In general, we support the proposed amendments. We think the Advisory Committee has taken the right approach regarding citation of "unpublished" opinions — allowing their citation, but leaving it to the courts to determine what kind of precedential effect they should be accorded. We strongly support the amendment to Rule 35 providing that a majority of active judges who are not disqualified may grant en banc review. We also applaud rules, such as the cross appeal package, that are intended to streamline the briefing process and achieve national uniformity where diversity serves no purpose. We have comments about only one of the proposed rules, discussed below.

\* \* \*

**Proposed Rule 27(d)(1)(E) —Typeface and type-style requirements for motions**

PCLG supports the application to motion papers of the current typeface and type-style requirements for briefs. Apparently, many judges prefer the relatively large typefaces required under Rule 32 and, once they got used to them, lawyers have grown to prefer them as well. We also agree with the committee that

“[a]pplying these restrictions . . . is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are permitted.”

However, we believe that this amendment is appropriate only if the current page limits of Rule 27(d)(2) — 20 pages for a motion and response and 10 pages for a reply — are revised. In most circuits in which we practice, the courts do not currently apply Rule 32's typeface restrictions to motions. Rather, they allow motion papers to be in as small as 12-point proportional font, which was the most commonly used font for briefs prior to the adoption of the Rule 32 standards. The D.C. Circuit, where we practice frequently, allows motions to be in 11-point font (as it does for briefs as well). *See* D.C. Cir. R. 32(a)(1). The bottom line is that this proposed amendment would effectively *reduce* substantially the permissible size of motion papers in most circuits. Much motion practice does not require extensive briefing. But some motions, particularly dispositive motions, such as motions to dismiss for lack of appellate jurisdiction or standing, are quite complex and require the full 20 pages even in 12-point type. Motions to stay a district court order, which often require the litigants to preview the merits fairly extensively as well as address a number of other factors, usually push up against the current page

limits as well.

Our preferred solution to this problem is to amend Rule 27(d)(2) to impose word (not page) limits for motion papers, as has been done for briefs. We suggest 5600 words for motions and responses and 2800 words for replies. This is equal to old-style 20 “pages” for motions and responses, and 10 “pages” for replies, assuming that a page of 12-point type averaged about 280 words per page. We arrived at this per-page figure by taking the old FRAP page limit for principal briefs (50 pages) and dividing it into the current word limit (14,000 words).

Our proposal has two key benefits. First, as indicated, it eliminates the effective reduction of the size of motion papers that would be imposed by the proposed amendment. Second, it better serves the committee’s anti-cramming purpose. Reducing type size is not the only way to monkey around with page limits. Zealous counsel’s never-ending efforts to cram can be achieved by employing single-spacing blocked quotes and by adding footnotes, and the committee can rest assured that these methods will gain new adherents once 14-point type is required. Word limits eliminate that nonsense. We recognize that the committee has previously rejected the use of word limits for *all* papers, but, for the reasons stated above, they are particularly appropriate in this instance.

If the committee decides not to impose word limits for motion papers, we urge the committee to increase the page limits so that the effective limit is not reduced. We suggest 24 pages for motions and responses and 12 pages for replies.

**Proposed Rule 28.1(e)(2)(A) — Word/line limits for certain cross appeal briefs**

We have a small concern about the new rule for cross appeals. We believe that the word (or line) limits for the combined appellee's principal brief and response brief and for the combined appellant's response and reply brief should be increased. The former combines two *principal* briefs. We recognize that combining briefs achieves some economy in itself and that the principal submissions in an appeal and a cross appeal are often related. However, in some cases, the two appeals are quite distinct, and limiting this brief to 16,500 words or 1,500 lines of monospaced text (just 2,500 more words, or 200 more lines, than the limit for a principal brief in a cross appeal) seems a bit stingy. Although it is difficult to defend any particular number, we think 18,000 words — or 1650 lines of text in a monospaced face — would better accommodate the needs of the appellee in complex cross appeals.

As to appellant's combined response and reply brief, we acknowledge that

the space needed may not be far greater than that needed for a principal brief (given the overlap between a response and reply in *some* cross appeals), but it should be somewhat greater given the different purpose of the two briefs. We also recognize that *any* answering brief — whether in an ordinary appeal or in a cross appeal — may not require as much space as the opening brief, as there are often points of agreement in even the most hotly contested appeal that the answering brief need not address. But that is often not the case and, as noted, that point applies to all answering briefs. Thus, even if in many cases the space needed for the appellant's combined response and reply will not exceed the space needed for the appellant's principal brief, the *limit* for the former should be greater than that for the latter. We suggest 15,000 words instead of 14,000 or, in monospaced briefs, 1,400 lines instead of 1,300.