03-AP-487 ✓ RECEIVED 2/24/04

John Rabiej
02/24/2004 09:53 AM

To: Judy Krivit/DCA/AO/USCOURTS@USCOURTS, James Ishida/DCA/AO/USCOURTS@USCOURTS
cc:
Subject: Addendum to my testimony on pending FRAP Rules

Judy:

Please add this to the record.

03-AP-008 Addendum

John

---- Forwarded by John Rabiej/DCA/AO/USCOURTS on 02/24/2004 09:55 AM ----

"Brian Wolfman" <BWOLFMAN@citizen.org>
02/23/2004 06:15 PM

To: <John_Rabiej@ao.uscourts.gov>
cc:
Subject: Addendum to my testimony on pending FRAP Rules

As I mentioned in our conversation this afternoon, a colleague of mine, Paul Levy, recently submitted comments on proposed Third Circuit rules that I would like to bring to the Appellate Advisory Committee's attention, in conjunction with my testimony on April 13. I would appreciate it if you would circulate the attached as an addendum to the written testimony that I have already submitted.

Thank you.

Brian

Brian Wolfman
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2003 Third Circuit Rules Comments.

January 15, 2004

Marcia Waldron, Clerk
United States Court of Appeals
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Dear Ms. Waldron:

I am writing on behalf of Public Citizen Litigation Group to comment on the recent proposed amendments to Third Circuit Rules 31.1 and 32.1. As explained below, we believe that some of the changes should be rejected because they violate the Federal Rules of Appellate Procedure and because they are unwise.

Public Citizen Litigation Group is a public interest law firm located in Washington, D.C. Its lawyers have handled hundreds of appeals, practicing in every federal circuit as well as in the Supreme Court of the United States and appellate courts in many states. We have provided comments on several past proposed amendments to the Federal Rules of Appellate Procedure. Most members of the Group belong to the Bar of the Third Circuit as well as other circuits, and we have argued dozens of cases there.

We have two principal objections to the proposed rule changes. First, we object to the requirement that every brief must contain line numbering. This is rule is directly contrary to Rule 32(e) of the Federal Rules of Appellate Procedure, which forbids a court of appeals from rejecting a document that complies with the formatting requirements of Rule 32. The Advisory Committee included that rule in the 1998 amendments because the proliferation of local variations on brief formatting made it increasingly difficult for smaller firms like ours to engage in a national practice without having to deal with idiosyncratic rules in every locality concerning the required form for appellate briefs. We continue to support Rule 32(e), and would object to any local rule that might renew the trend toward balkanization of filing formats.

We also doubt that this change is necessary, because when a citation is given to a particular page of another brief, it is not difficult to look at a single page and decide what parts of the page are referenced. As we understand the rule, the intention is to have line numbers that do not begin again at one on every page, so that the final line in a 14000 word brief would likely be over 1000, thus filling much of the left hand margin and making the page look cluttered. Moreover, if lawyers drafting a brief made even a minor change in an early part of the brief that added a single line, they would have to reread the entire brief to locate and correct the line references. However, the crucial point is that local variations of this sort are not permitted.

We also disagree with the proposal to make the timeliness of briefs depend on the date of electronic filing. Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure provides that a brief or appendix is timely filed if it is sent to the Clerk by first-class mail, or by an expeditious commercial delivery service, by the date that it is due. Under the proposal, however, the brief is timely filed only if it is filed electronically by the deadline **and** the hard copies are received within three days of that deadline. By eliminating the rule that sending by first-class mail guarantees timelineness, parties whose firms have their offices outside the metropolitan area where the Clerk's Office is located will effectively be compelled to use the substantially more expensive overnight delivery services, which in turn increases the expense of filing when the brief is lengthy. Because the proposed local rule would make untimely a brief that is otherwise timely under the Federal Rules of Appellate Procedure, it would violate Rule 47, which allows local rules only to the extent consistent with the FRAP. Moreover, there is no reason to require actual receipt by the Clerk's office any sooner; after all, it is the rare appeal in which the clerk's office or the judges are waiting anxiously for the arrival of a brief so that it can be read and digested in preparation for oral argument or decision. Nor, indeed, is the Joint Appendix required to arrive within the same time period. If the Court wishes to allow briefs to be deemed timely upon receipt of the electronic filing, that is sensible; however, the option to send hard copies by regular mail should not be effectively eliminated.

We have also have a modest suggestion with respect to the requirement that briefs be filed electronically in PDF format. Although we applaud the adoption of a software format whose reader is freely available, we note that the software for creating PDF files is not only not free, but can be quite expensive. Moreover, the file size of PDF documents is much larger than documents in standard word-processing formats; for example, a brief that uses the full 14000 words, combined with tables and all of the required certificates, can easily exceed one megabyte in PDF, but would be less than 200 kilobytes in word-processing format. The time required for email transmission of such a large attachment can be substantial for parties whose only connection to the Internet is by dial-up. Although the procedures for electronic filing are not yet provided on the Court's web site, your office indicated that electronic submission would be by email. Accordingly, we suggest the inclusion of an escape clause that allows parties to submit briefs in other formats if they state that it would impose a hardship to submit in PDF format. When a litigant takes advantage of this exception, the Clerk's Office can use its own software to convert such briefs to PDF format.

We ask that you circulate copies of these comments to the Court.

Sincerely yours,

Paul Alan Levy