From: Nico Ratkowski <nico@contrerasmetelska.com>
Sent: Wednesday, March 13, 2019 8:11 PM
To: RulesCommittee Secretary
Subject: Suggestion for Change to Rules

Ms. Womeldorf:

I recently encountered a situation in which the 8th Circuit Court of Appeals impermissibly violated the Federal Rules of Appellate Procedure. While I understand that FRAP 2 allows for suspension of the federal rules of appellate procedure, Rule 2 also explicitly states that suspension of FRAP is limited by Rule 26(b). Rule 26(b) starts of by stating "For good cause" before describing different sets of possible actions a court may take with regard to extending time. The way Rule 26(b) is written seems to explicitly, plainly, and clearly disallow a Federal Circuit Judge to grant a briefing extension if good cause has not been established by the moving party. Despite this, in my conversation today with the court clerk for the Eighth Circuit Court of Appeals, I learned that motions for briefing extensions are granted in nearly 100% of cases so long as it is a first request (even if an opposition motion is filed by the non-moving party). This hardly seems like good cause.

Although one would think that a judge should not need to issue a written or oral order establishing that good cause has been established, the case I am referring to presents an interesting scenario in that I am 99% certain the US government (opposing party) did not and could not have established good cause for delay. Because Rule 26(b) cannot be waived, due to Rule 2, it seems highly improper to allow the Circuit Courts to operate in this manner. However, there is no real right to review or oversight. While I can file a Rule 40 petition for rehearing, doing so is only going to annoy the same judges who I need to rule in favor of my client. It's unlikely any cause of action exists to get this reviewed by a district court, and even if I could, the district court would not be able to be neutral because they'd be bound by their Circuit's precedent. Allowing inferior courts to flaunt rules promulgated by the Supreme Court, in this 'one brick at a time' manner is dangerous and unnecessary.

With all of that said, I propose providing a bright line definition (or a multi-factor test) for establishing 'good cause.' I also suggest creating a meaningful mechanism for review of whether good cause has actually been established. Allowing the status quo to continue simply provides litigants' attorneys with incentives to delay their case unnecessarily (even if the litigant would prefer prompt resolution). Moreover, because private attorneys are more sensitive to their clients needs than is the government, it seems like allowing for such broad extensions of time provides disproportionate benefits for the government and harm to private litigants in need of speedy resolution. While I would file a FOIA to seek data to confirm or refute this supposition, I am disallowed from doing so because federal courts are not agencies. I believe, however, if this committee decided it was proper, it could seek empirical research assistance from the Federal Judicial Center to determine the total amount of cases in which the US government is involved and then filter such cases by: (1) the number of requests for briefing extensions granted by the US gov't; (2) the number of requests for briefing extensions granted by private parties engaged in litigation against the US gov't; (3) the number of requests for briefing extensions granted/denied when made by the US gov't; and (4) the number of requests for briefing extensions granted/denied when made by a private party engaged in litigation against the US gov't. Once this data is collected, it could be easily sifted by Circuit and party to see if the current practice of various circuit courts is creating an institutional and systemic advantage for government litigants.

Finally, I also strongly urge this body to create a rule that clearly states a motion for a briefing extension may not, under any circumstances, be granted after time has elapsed for the briefing (the correct way to address this would be to satisfy the exacting equitable tolling standard). This also happened in the case I am referring to. There is no basis in law or in equity capable of supporting such a casual use (or lowering the standard) of equitable tolling in this specific set of circumstances. I know that this sounds petty, but if the small rules don't matter, why bother making them? Why should

anyone rely on them? If the rules can be waived on a whim, even when they are stated to be non-waivable, how can lawyers or litigants be asked to comply? Based on how the 8th Circuit is operating, it seems that litigants should request a briefing extension in 100% of cases just because they can, which hardly seems to serve judicial economy.

I appreciate your thoughtful consideration on this matter and remain available to answer any questions or refine any of the issues addressed above should doing so be helpful to your or the Rules of Practice and Procedure Committee.

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