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APPELLATE

ALERT

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DOING MORE WITH LESS: FORTHCOMING CHANGES TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By Rachel A.H. Horton & David C. Dziengowski

The Declaration of Independence contains 1,337 words. Including its 27 amendments, the U.S. Constitution contains 7,591 words. By contrast, today's practitioners may include up to 14,000 words in a principal brief in the federal courts of appeals. That is about to change.

Amendments to the Federal Rules of Appellate Procedure are set to take effect on December 1, 2016. The proposed amendments that have received the most attention reduce the maximum length of various filings. For example, in cases where no cross appeal has been taken, amended Rule 37 will reduce the word limit for principal briefs from 14,000 to 13,000 words. In the case of a cross-appeal, the limit for an appellee's principal and response brief under amended Rule 28.1 will be reduced from 16,500 words to 15,300 words. The new limits can be found in a new appendix to the Rules. Additional word limit changes apply to Rules 5, 21, 27, 28.1, 29, 32, 35, and 40, which govern, among other things, petitions for permission to appeal, appellate motions, amicus briefs, and rehearing petitions. Amended Rule 32(e) will explicitly allow courts to implement local rules that increase these limits. For example, the Ninth Circuit has adopted changes to its local rules that will maintain the pre-amendment word limits for briefs.

Besides decreasing word limitations, the amended rules also contain one significant decrease in time: the three-day grace period for responding to papers that were filed by electronic means will be removed. This amendment to Rule 26(c) treats electronically filed papers "as delivered on the date of service stated in the proof of service." In other words, documents served and received through a court's electronic case filing system, the most common way that documents are served today, will be treated the same as documents served by personal delivery. A similar change is being made to Rule 6 of the Federal Rules of Civil Procedure, which governs filings in federal trial courts.

Additionally, the proposed amendment to Rule 4(a)(4)(A) resolves a circuit split over the time for filing a notice of appeal when a motion that is untimely under the Federal Rules of Civil Procedure has been filed with the district court. The new version of Rule 4 rejects the Sixth Circuit's rule that the clock for filing a notice of appeal may be reset by filing a late motion that the district court addresses on the merits. The Committee Note explains that such motions—and the notice of appeal that follows—are late regardless of a district court's order that permits an untimely motion, the district court's disposition of the motion on the merits, or opposing counsel's consent or failure to object on timeliness grounds.

One other noteworthy amendment concerns Rule 29, which governs filings by amici. The amended

rule will add a new subsection that specifies the rules for "amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise." The new provisions include word limits for such briefs (2,600), as well as deadlines (which depend on whether the brief supports or opposes the petition for panel or en banc rehearing).

In sum, it is time to dust off the blue pencils and reset the filing clocks. Appellate practitioners must prepare to do more with less.◆

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