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PERSPECTIVE

A modest proposal: Amend FRAP to permit reply briefs in support of petitions for permission to appeal

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With the creation of Federal Rule of Civil Procedure 23(f) and enactment of the appeal provisions of the Class Action Fairness Act in recent decades, parties increasingly are seeking early appellate review of critical mid-case rulings. But to obtain review, prospective appellants must petition the relevant Court of Appeals in accordance with Rule 5 of the Federal Rules of Appellate Procedure. FRAP 5, however, has an unusual gap. While it permits the would-be appellee to file a response to a petition seeking permission for an interlocutory appeal, it is silent on whether the petitioner may file a reply brief in support of the petition. This inexplicable omission should be fixed. FRAP 5 should be amended to permit a short reply brief of no more than 2,600 words (the same that FRAP 27 provides for motions).

Because FRAP 5 is currently silent on reply briefs in support of petitions for permission to appeal, experienced federal appellate lawyers routinely file motions for leave to file one along with a proposed reply brief, which are routinely granted by the Courts of Appeals. But this practice is far from ideal for a number of reasons.

Many parties — particularly those represented by attorneys unfamiliar with the unwritten practice — oppose the motion for leave to file a reply and, in so doing, often attempt to respond to the points made in the petitioner's reply brief. This essentially gives the opposing party a sur-reply. Making matters worse, the petitioner could then technically file a reply in support of its motion under FRAP 27, effectively leading to sur-sur-reply on the merits. This only creates unnecessary and usually pointless additional briefing for the Courts of Appeals.

Moreover, there is no established word limit and so practitioners are left to guess as to how long of a brief they can file. Many appellate lawyers restrict their reply briefs to 2,600 words because that is the limit for reply briefs under FRAP 27 and half the length of the word limit for the petition under FRAP 5. But given the absence of any formal word limit, a party can theoretically seek leave to file a lengthier reply brief, which only adds to the workload of the court and largely defeats the central purpose of a reply brief: focusing and narrowing the issues presented.

The current system of informally allowing reply briefs in support of petitions for permission to appeal harms those lawyers and pro se petitioners who are unaware of the established practice.

Amending FRAP 5 to expressly allow for reply briefs and setting a 2,600 word limit for such briefs has multiple advantages over the current informal practice. All petitioners, regardless of their experience with interlocutory appeals, would be placed on the same playing field and would know that they could file a short reply. And allowing for reply briefs as a matter of course will help crystalize the issues for the Courts of Appeals. In fact, reply briefs often are the first briefs that judges and law clerks review when deciding appeals on the merits. There is no reason that reply briefs in the context of a FRAP 5 petition would be any less important. If anything, reply briefs in the context of petitions for permission to appeal may be particularly valuable because the Courts of Appeals typically do not hold oral argument before deciding whether to authorize appellate review.

It is not even clear that recognizing the practice of filing reply briefs would increase the workload of the Courts of Appeals because formalizing the process would eliminate the briefing on the motions for leave. But even assuming there would be an additional burden on the Courts of Appeals, it is warranted given the types of rulings that are the subject of FRAP 5 petitions. For petitions to appeal under 28 U.S.C. Section 1292(b), for example, the district court has already determined that the issues presented are weighty enough to warrant interlocutory appeal. Similarly, Federal Rule of Civil Procedure 23(f) was created because orders granting or denying class certification often warrant immediate appellate review. And in the Class Action Fairness Act, Congress itself sought to ensure that there would be a mechanism for appellate review of district court orders determining whether a putative class action should be remanded to state court. Given the stakes, allowing a modicum of additional briefing on petitions for permission to appeal is worth the modest additional burden such briefing might impose on the Courts of Appeal.

The Rules of the Supreme Court further support amending FRAP 5 to permit reply briefs. A party petitioning the Court for a writ of certiorari has the right to file a reply brief of 3,000 words or less. There is no good reason for a different approach when seeking permissive appellate review in the Courts of Appeals, particularly when there is already an *unwritten* rule permitting reply briefs if leave is formally sought by the petitioner.

It's time to formalize the practice of reply briefs in support of petitions for permission to appeal in the Courts of Appeals. ■

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