Attys Resist Proposal To Shrink Appellate Brief Limits

By **Michael Macagnone**

Law360, Washington (April 01, 2015, 4:21 PM ET) -- Several appellate attorney organizations on Monday blasted a judicial rule-making body's proposals to shorten appellate brief lengths, saying the plans would hurt advocacy efforts in a swath of complex areas including Native American law, antitrust disputes and challenges to federal agency activities.

The proposal from the Judicial Conference's Advisory Committee on Rules of Appellate Procedure would lower the word limit from 14,000 to 12,500 on opening briefs. Charles A. Bird, partner at McKenna Long & Aldridge LLP and president of the American Academy of Appellate Lawyers, said the proposed rule change alone would do nothing to improve the quality of briefs judges receive.

"I think you have seen many comments here that a rule shortening a brief will get you the same bad brief, just 1,500 words shorter," he said.

Bird recommended the courts engage in more training and proactive efforts with attorneys to help address expectations and issues to raise in their briefs. He and the other panelists said the efforts to make appellate briefs better should not focus on their length alone, for a boring, repetitive or ineffective brief can as easily be 7,000 words as 14,000.

"We would like this to be a cooperative process with the bench and the bar rather than bench versus bar over brief lengths," Bird said.

David H. Tennant, partner at Nixon Peabody LLP and chair of the programming committee at the Council of Appellate Lawyers, said even where many cases might not require a lengthy brief on their own, "it takes two to tango" and he's frequently had to beef up a brief to address the muddled argument of his opponent.

"I've been there as the law clerk having to do all of the running to make up for what is not in the papers," he said. "It is our obligation as lawyers in private practice for fee-paying clients to understand that in most cases less is more, but there are times that we can provide a great service to the court by doing the fixing up of whatever was defective in the other party's brief."

Tennant said a variety of practice areas, including one of his specialties, Native American law, could be adversely affected by the change. He said that area requires lengthy delving into treaties, litigation history and other issues that can eat up pages.

He also made a broader point that a growing number of cases get decided on their briefs alone, with little or no oral argument. Shortening the brief length has the effect of getting less of a hearing in court, he said.

"In a world where there is declining oral argument, with all feeling really scrimped, where you might get five, six minutes at the podium, briefing is becoming more and more the only way a litigant feels they have their day in court," he said.

James Pew, a staff attorney at Earthjustice, said the proposed changes present obstacles to many agency rule-making challenges. Pew said the nuances involved — many times petitioners challenge only portions of a rule — along with the number of litigants and the lack of a traditional trial court record, make it difficult for those briefs to fit under the proposed limit.

"The effect it has, in my experience, is to have petitioners drop valid claims or take the risk of trying to brief those claims in such a summary, brief format that they risk either losing or making bad law or both," Pew said.

The D.C. Circuit already places shorter limits on multiparty review cases and an onerous standard on securing extensions, Pew said. He said lower brief limits only open the door to further restrictions on length.

The chair of the Judicial Conference committee, U.S. Circuit Judge Steven Colloton, said the committee would meet later this month to discuss the proposal and decide whether to forward it to the Standing Committee on Appellate Procedure.

After that, the proposal would head to the full Judicial Conference, the Supreme Court and finally to Congress, where either chamber could raise objections, according to the U.S. Courts website.

The proposed changes also include elimination of the "three-day rule," which allows extra days for responses to appellate motions to accommodate mail service of paperwork, as well as changes on inmate appeals, tolling of motions and amicus briefs.