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Law

A Rules proposal, a marriage proposal and legal gamesmanship

By: Andrew Baida October 20, 2014

A friend who occasionally offers appellate-related topics for me to write about recently suggested an article on proposed changes to the Maryland Rules governing the style and form of briefs and other papers filed in the appellate courts.

This friend is also a judge for whom I have great admiration and respect, but the admiration and respect thing has its limits. As would, I initially thought, the suggested article, both figuratively and literally. I mean, there's only so much a person can say about a proposal to amend the Maryland Rules to limit the word-count of briefs filed in the appellate courts, right? In fact, that's pretty much the entire article.

Or so I thought at first. Until I remembered the news I shared with my friend about my daughter's recently announced engagement. And then I thought, maybe this was why the suggestion to write this article was made. So here we go.

The proposals in question would amend the limitation governing the length of Maryland appellate court briefs by replacing the existing page-limitation with a word-limitation. The principal brief of a party may not currently exceed 35 pages in the Court of Special Appeals and 50 pages in the Court of Appeals; reply briefs may not exceed 15 pages in the intermediate appellate court and 25 pages in the state's highest court.

Under proposed amendments to Maryland Rule 8-503, a party's principal brief would be limited to 9,100 words in the Court of Special Appeals and 13,000 words in the Court of Appeals, and the reply-brief limits would be 3,900 words in the Court of Special Appeals and 6,500 words in the Court of Appeals. These numbers are based on an estimate of 260 words per page.

Similar word limitations are proposed for the portion of a brief pertaining to a motion to dismiss. Word limitations would also apply to briefs filed in cross-appeals and amicus curiae briefs.

Why these proposed changes, you may ask? The motivation lies in the contemplated elimination of Rule 8-112's "kerning" and "horizontal scaling" provisions.

Rule 8-112(c)(2) currently states that the "kerning ordinarily produced by the computer program may not be altered in order to reduce the amount of space between characters or to increase the number of characters on a line." Rule 8-112(c)(1) provides that "horizontal scaling ordinarily produced by the computer program may not be altered in order to decrease the width of the characters or increase the number of characters on a line."

The admonitions in Rule 8-112(c) seem pretty clear: Don't fool with the computer's default settings to circumvent the Maryland Rule's length limitations governing briefs. But you know lawyers. And so does the Maryland Rules Committee.

As stated in the Reporter's Note for the Rules Committee's Oct. 10, 2014 Agenda, "[w]ith word counts replacing page counts, litigants no longer have an incentive to make adjustments to kerning and horizontal scaling in order to include more words on a page. Therefore, 'kerning' and 'horizontal scaling' provisions are proposed for deletion from Rule 8-112."

The Advisory Committee on Appellate Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States was even more blunt in recently describing the mischief underlying page limits for briefs filed in federal appellate courts, stating that "length limits set in terms of pages have been overtaken by advances in technology" and that the "use of page limits rather than type-volume limits invites gamesmanship by attorneys."

In other words, lawyers just can't be trusted, can they? Which leads to my daughter's engagement.

Ordinarily, a wedding would have nothing to do with not trusting lawyers. I suppose it could if one or both of the betrothed were attorneys, but neither my daughter nor her fiancée is a lawyer. My daughter's fiancée is, however, a woman. And their wedding will take place in Pennsylvania. And Pennsylvania, unlike Maryland and 10 other states with laws permitting same-sex marriage, is one of a large majority of states in this country with a law prohibiting this type of union — a law which has been declared unlawful by a federal court on the basis of Justice Kennedy's opinion in United States v. Windsor.

Same-sex couples, and their families, friends, and other supporters, may find comfort in the growing number of post-Windsor cases in which courts have struck down the validity of gay-marriage bans. But there will be no certainty on this issue until it is decided by the Supreme Court, which earlier this month passed up the opportunity to address the question in several cases, including one in which it vacated Justice Kennedy's temporary stay of a Ninth Circuit decision invalidating Idaho's same-sex marriage prohibition.

Maybe the Supreme Court's decision to bypass such an important issue when it has been squarely presented is not gamesmanship. And maybe my friend did not have same-sex marriage in mind when he suggested I write an article about the proposal to impose word limitations on briefs filed with the Maryland appellate courts.

But as the Maryland Rules Committee knows, sneakiness can never be overestimated. I'll just leave it at that.

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