Testimony

Public Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure and Official Forms Judicial Conference Advisory Committee on Appellate Rules

Mecham Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

April 1, 2015

TAB

TAB 1

Charles A. Bird, Esq.,
American Academy of Appellate Lawyers

Outline of Proposed Testimony
AAAL President Charles A. Bird
February 17, 2015

1. Introduction.

   AAAL thanks the committee for the opportunity to discuss the proposed rule change. My focus will be on what's better than the proposed rule. Our published comments, drafted by our rules committee and adopted by our board, state our views of the proposal as made.

2. Bench versus Bar serves neither.

   2.1 We and our clients communicate with the courts of appeals primarily through our briefs. Restrictions on what we can say go to the heart of both the perception of justice and the realization of justice. Everyone benefits from a brief that fully and competently presents a case.

   2.2 Using one-size-fits all rules to try to change law-practice behavior causes stress, causes misunderstanding, and invites aberrant behavior.

   2.3 The committee's process should be a forum to improve appellate practice, even if the committee can only recommend action by others on some proposals.

3. We recognize bad briefs are an issue. The target should be bad briefs, not all briefs in the range of 12,500 to 14,000 words. Courts of appeals get bad briefs from:

   3.1 Lawyers who can't write.

   3.2 Lawyers who don't understand how to advocate in appellate courts.

      3.2.1 This is a moving target as technology develops.

      3.2.2 Deselecting issues and arguments takes courage that can only come from experience.

3.3 Lawyers whose clients don't understand appellate courts. Lawyers' first concern is clients: getting, keeping, not being sued by. GCs and favored trial lawyers can interfere even with specialist performance.

4. Overall things to do.

4.1 Certify federal appellate specialists; consider competency standards for admission to circuit-level practice.

4.2 Develop circuit bar associations that focus on better advocacy in their appellate courts; teach how to frame and select issues, including critical evaluations of the standard of review, prejudicial error, and appellate remedy.

4.3 Have more oral arguments in counseled cases; every oral argument is a potential teaching experience.

4.4 Write more disclosing memorandum dispositions. The court's issue selection is also a teaching experience.

5. Study fluctuating length limits for appellate briefs.

5.1 For pro se parties, develop a short-form brief (See Ninth Circuit appellant's informal brief).

5.2 For counseled cases, study allowing circuits that actively manage appeals to shorten the 14,000 word limit based on the length of the record and the complexity of the case. FRAP should still provide base word limits for particular kinds of appeals in circuits opting into the active case management process. The actual word limit, to be not less than the FRAP base, would be set by a motions attorney when the briefing schedule is set, after consulting with counsel. This step would be easy to add to early settlement evaluation in circuits that have such programs. The parties would retain the right to seek leave from the court to file longer briefs. Take care with reply briefs, since shotgun appellee's briefs and alternative grounds to affirm can cause major difficulties.

TAB 2

Cynthia Keely Timms, Esq.,
Chair, Appellate Section of the
State Bar of Texas

STATE BAR OF TEXAS
APPELLATE SECTION

TESTIMONY ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF APPELLATE PROCEDURE
BEFORE THE ADVISORY COMMITTEE ON APPELLATE RULES
FEBRUARY 17, 2015

The Appellate Section of the State Bar of Texas (the "Section") represents its attorney members, promotes the role of appellate lawyers in Texas, enhances their skills, and improves appellate practice in Texas. It furthers these goals by offering continuing legal education, disseminating materials on matters of interest to members of the Section, and creating opportunities for the exchange of ideas among members of the Section. The Section currently has around 1960 members.

The Section wishes to comment on the proposed Amendments to Rules 5, 21, 27, 28.1, 32, 35 and 40 with regard to the proposal to reduce the current word limits in briefs. These comments also address the proposal to apply a conversion rate of 250 words per page on documents being converted from page to word limits. The Section opposes both proposals and believes that a conversion rate of at least 280 words per page is more appropriate and better supported.

Testimony on Length Limits in Proposed Amendments to Rules 5, 21, 27, 28.1, 32, 35 and 40.

The Section opposes the proposed changes that would effectively use a conversion rate of 250 words per page to define the number of words permitted in documents being filed in accordance with the listed rules. The Section advocates that the Federal Rules continue to use a word-to-page conversion factor of at least 280 words per page.

When the Advisory Committee on Appellate Rules voted in April to reduce the words in principal briefs from 14,000 words to 12,500 (while proposing similar changes in other documents), it relied on a 1993 analysis that concluded the average words per page in briefs filed at that time was 250 words per page. Based on that study, the Advisory Committee decided "research indicates that the estimate of 280 words per page is too high" and that "250 words per page is closer to the mark." See Judge Steven M. Colloton, Chair Advisory Committee on Appellate Rules, Memorandum, "Report of Advisory Committee on Appellate Rules" (May 8, 2014, revised June 6, 2014) at 4 ("May 8 Committee Report").

To test the Committee's premise, the Section has conducted its own study of briefs filed in the United States Courts of Appeals prior to the 1998 rule change that replaced page limits in briefs with word limits. The results of this study demonstrate that the average words per page in these briefs was 294 words per page—exceeding the 250 words per page the Committee now advocates and even the 280 words per page actually used at the time of the 1998 rule amendments. That study (the "2015 Study") is attached as Appendix A.

Previously, members of the Section had conducted a similar, but more thorough study in 2012, when the Texas Rules of Appellate Procedure were being amended to convert page limits to word limits. That study examined 63 briefs in which the Texas Rules of Appellate Procedure created very short page limits of either 8 or 15 pages. The results of that study were that the documents averaged 291 words per page. If the single highest and single lowest numbers were eliminated, the average was 293 words per page. That study (the "2012 Study") is attached as Appendix B. At the time of the 2012 conversion from page to word limits, the Texas Supreme Court adopted a conversion ratio of 300 words per page.

Both these studies are described in greater detail below. Both studies support word-per-page conversion ratios between 290 and 300 words per page. Neither supports a word-per-page conversion ratio of 250 words per page.

Analysis of the 2015 Study

The Federal Rules of Appellate Procedure were amended in 1998 to change the page limits on principal briefs and reply briefs to word limits. The 2015 study had to rely on locating attorneys who had retained hard copies of their briefs for approximately seventeen years. In that time, most law firm had changed their word processing and operating system programs so that most attorneys no longer had access to electronic versions of briefs from the era. Because of the difficulty in locating briefs that were at least seventeen years old, the sampling ended up being fairly limited. Nevertheless, the Section was able to locate 15 briefs that predated the 1998 rule change.

The original object of the study was to gather briefs that were 50 pages in length (or more) because it was thought those briefs would probably reflect the attorneys' attempt to put as many words on the page as possible. That task proved too difficult, given the passage of time and the fact that attorneys apparently used the full 50 pages only if it was absolutely necessary. As a result, around 60% of the briefs were nearly 50 pages or longer. The rest varied between 39.81 pages and 48.85.

The study demonstrates no briefs had as few words per page as 250—the number the 1993 study found was the average. Instead, the fewest number of words per page was 263. The maximum number of words per page was 336. If the words per page are averaged over the 15 briefs, the average equals 294 words per page. That number exceeds the 280 words per page adopted in the 1998 amendments to the Federal Rules of Appellate Procedure, and it far exceeds the 250 words per page being suggested in the current proposed amendments.

Analysis of the 2012 Study

The 2012 study was compiled by Marcy Greer, currently at the law firm of Alexander Dubose Jefferson & Townsend. Ms. Greer was at Fulbright & Jaworski when the study was conducted. In 2012, the Texas Supreme Court was considering adopting word limits to replace the page limits that had previously been in place. The Texas Supreme Court was considering a word-per-page conversion of 300 words per page. Thus, briefs previously subject to a 50 page limit would be limited to 15,000 words.

The object of the 2012 study was to examine the number of words per page allowed in the shorter briefs filed with the Texas Supreme Court. The Texas Rules of Appellate Procedure create a multi-stage process for obtaining Texas Supreme Court review, somewhat akin to the petition for certiorari process in the United States Supreme Court. The initial filing in the Texas Supreme Court is a petition for review. The petition for review and response were limited to 15 pages. The reply brief was limited to 8 pages. Mandamus proceedings to the Texas Supreme Court were similarly limited in their first sets of filings. Only if the Texas Supreme Court calls for further briefing would the parties be allowed to file their full briefs. Those full briefs were 50 pages for the petitioner's and respondent's briefs and 25 pages for the reply brief using 13-point font.

The 2012 study included 63 briefs and showed the average words per page was 291. If the single highest and lowest numbers were excluded (385 words/pg. and 90 words/pg.) the average was 293 words per page. Twenty-eight of the 63 briefs had 300 words or more per page, while only 4 of the 63 briefs had 250 words or fewer per page.

As with the 2015 study, the 2012 study supports a word-to-page ratio of 300 words per page. It certainly supports a ratio of at least 280 words per page. It does not support a ratio of 250 words per page.

Conversion of Pages to Word Count – Rules 5, 21, 27, 35, 40

The Section does not oppose the proposed amendments to these rules insofar as they propose to convert the current page limitations to word limitations. However, as with the current rules for briefs—Rules 28.1 and 32—the conversion factor should be based on at least 280 words per page. Although the Section has not conducted a comprehensive study on these types of motions, I recently assisted in filing a response to a motion to stay injunction in the Fifth Circuit in Cause No. 14-41384, Retractable Technologies, Inc. et al. v. Becton Dickinson and Company. That response was a full 20 pages long (in 14-point font) and was 5,808 words total. That calculates out to 290 words per page. Although this is a single example, it serves to show that a conversion of at least 280 words per page remains appropriate for the amendments to be made to Rules 5, 21, 27, 35, and 40.

Overall Comments Regarding Proposed Amendments on Length Limits

The Section joins the sentiments of the other organizations filing comments that the current word limits should not be reduced. Cases now tend to be complicated and can involve very high damages awards. In March 2014, the National Law Journal compiled a list of the top 100 verdicts in 2013. See National Law Journal, *Top 100 Verdicts of 2013* (March 24, 2014), http://www.nationallawjournal.com/id=1202647966490/Top-100-Verdicts-of-2013?slreturn=20150026124728. That National Law Journal report reveals that the top 100 verdicts of 2013 ranged from $20 million to more than $1.2 billion. Nearly a quarter of the cases on that list (23) were in federal district courts throughout the nation. Many were intellectual property cases; some were antitrust; others ranged from breach of contract to employment issues.

This is just an example of the types of cases that are being appealed now. Attorneys should not be forced to go through the difficult procedure that exists in some courts to file longer briefs. For example, Fifth Circuit Local Rule 32.4 provides:

> 32.4 Motions for Extra-Length Briefs. A motion to file a brief in excess of the page length or word-volume limitations must be filed at least 10 days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.

Attorneys should not have to go through a process like this when there is nothing wrong with the current limitations. As shown in these comments, the 1993 analysis does not accurately reflect the word count per page in many of the briefs being filed under the pre-1998 Rules of Appellate Procedure.

Conclusion

The Section recommends retaining at least the current word count for briefs in Rules 28.1 and 32 and further recommends that pages be converted to word counts for Rules 5, 21, 27, 35, and 40 assuming at least a 280 word per page conversion ratio.

State Bar of Texas Appellate Section
Cynthia K. Timms
Chair

Appendix A

Style	Cause No.	Nature of Brief	Page Count[1]	Word Count	Words/ Page	Attorneys of Record	Law Firms
In re Duval County Ranch Co./ Manges v. Atlas	95-40582 95-40584 5th Cir.	Appellee	39.81	11,374	286	Harry M. Reasoner, H. Ronald Welsh, Marie R. Yeats; Evelyn H. Biery	Vinson & Elkins L.L.P.; Fulbright & Jaworski L.L.P.
Arleth v. FMP Operating Co.	92-3313 5th Cir.	Appellee/ Cross-Appellant	44.54	14,980	336	Marie R. Yeats, J. Harrell Feldt; Dermot S. McGlinchey, Craig L. Caesar	Vinson & Elkins L.L.P.; McGlinchey, Stafford, Lang
Crowe v. Smith	96-30851 5th Cir.	Appellant	39.54	13,129	332	Harry M. Reasoner, Marie R. Yeats; Emmett C. Sole; Gary V. Dixon; William E. O'Brian, Jr.	Vinson & Elkins L.L.P.; Stockwell, Sievert, Viccellio, Clements & Shaddock; Ross, Dixon & Masback, L.L.P.
General Accident Ins. Co. v. Enserch Corp.	90-1649 5th Cir.	Appellant	59.19	19,027	321	Harry M. Reasoner, David H. Brown, Marie R. Yeats; Robin P. Hartmann, Werner A. Powers, Noel M. Hensley	Vinson & Elkins; Haynes & Boone
Mitchell Energy Corp. v. Samson Resources Co.	95-40204 5th Cir.	Appellants	49.92	13,999	280	Morris Harrell, Joe E. Staley, Jr., Michael V. Powell; Luther H. Soules, III	Locke Purnell Rain Harrell; Soules & Wallace

[1] This Study assumed 26 lines per page. Decimals indicate the last page is a partial one. The decimal was calculated by dividing the number of lines by 26.

Style	Cause No.	Nature of Brief	Page Count[1]	Word Count	Words/ Page	Attorneys of Record	Law Firms
The Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.	94-10952 5th Cir.	Appellants	49.92	14,003	281	Morris Harrell, Timothy W. Mountz, Cynthia Keely Timms	Locke Purnell Rain Harrell
The Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.	94-10952 5th Cir.	Cross-Appellees/ Response	50	14,535	291	Morris Harrell, Timothy W. Mountz, Cynthia Keely Timms	Locke Purnell Rain Harrell
The Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.	94-10952 5th Cir.	Appellee/ Cross-Appellant	50	15,322	306	Dale A. Cooter, James E. Tompert	Cooter, Mangold, Tompert & Chapman P.C.
Tarrant Distributors, Inc. v. Heublein, Inc.	96-21156 5th Cir.	Appellant	37.08	11,772	317	Alan Wright, LaDawn H. Conway	Haynes and Boone, L.L.P.
Smith v. Smith	96-10999 5th Cir.	Appellant	51.58	13,616	264	Sharon N. Freytag; Todd H. Tinker	Haynes and Boone, L.L.P.; Law Office of Todd H. Tinker, P.C.
Marchman v. NationsBank of Texas, N.A.	95-11209 5th Cir.	Appellee/ Cross-Appellant	41.5	13,169	317	Benjamin H. Davidson II; William C. Madison, Eliza Stewart	Haynes and Boone, L.L.P.; Madison, Harbour & Mroz, P.A.
Weber v. Trinity Meadows Raceway, Inc.	96-10916 5th Cir.	Appellees	49.54	13,505	273	Frederick W. Addison, III; Elizabeth E. Mack; Terry Gardner	Locke Purnell Rain Harrell; Gardner & Aldrich
SportsBand Network Recovery Fund, Inc. v. PGA Tour, Inc.	96-11164 5th Cir.	Appellants	49.42	12,977	263	Frederick W. Addison, III; Elizabeth E. Mack	Locke Purnell Rain Harrell
BancAmerica Commercial Corp. v. Trinity Indus., Inc.	95-3385 10th Cir.	Appellants	49.62	13,452	271	Frederick W. Addison, III; Elizabeth E. Mack	Locke Purnell Rain Harrell

Style	**Cause No.**	**Nature of Brief**	**Page Count[1]**	**Word Count**	**Words/ Page**	**Attorneys of Record**	**Law Firms**
BancAmerica Comm. Corp. v. Trinity Indus., Inc.	95-3385 10th Cir.	Cross Appellee Response and Reply	48.85	13,139	269	Frederick W. Addison, III; Elizabeth E. Mack	Locke Purnell Rain Harrell
AVERAGE					**294**		

Appendix B

Style	Cause No.	Nature of Document	Page Count	Word Count	Words/ Page	Attorneys of Record (Not Necessarily Complete)	Law Firms (Not Necessarily Complete)
Carol Ernst v. Merck & Co., Inc.	10-0006	Response to Petition	15	4,923	328	Katherine Mackillop	Fulbright & Jaworski LLP
Paradigm Geophysical Ltd. v. Geophysical Micro Computer Applications (Int'l) Ltd.	01-1201	Petition for Review	15	4,855	324	Ben Taylor	Fulbright & Jaworski LLP
Paradigm Geophysical Ltd. v. Geophysical Micro Computer Applications (Int'l) Ltd.	01-1201	Reply Petition for Review	2	179	90	Ben Taylor	Fulbright & Jaworski LLP
Paradigm Geophysical Ltd. v. Geophysical Micro Computer Applications (Int'l) Ltd.	01-1201	Motion for Rehearing	7	2,263	323	Ben Taylor	Fulbright & Jaworski LLP
Zachary Constr. Corp. v. Texas A&M Univ.	07-1050	Petition for Review	15	4,567	304	Ben Taylor	Fulbright & Jaworski LLP
Zachary Constr. Corp. v. Texas A&M Univ.	07-1050	Reply Petition for Review	8	2,694	337	Ben Taylor	Fulbright & Jaworski LLP
Zachary Constr. Corp. v. Texas A&M Univ.	07-1050	Motion for Rehearing	15	4,128	275	Ben Taylor	Fulbright & Jaworski LLP
Francisco Boada v. Tenet Hosps. Ltd.	10-0172	Response to Petition	15	4,131	275	Marcy Greer	Fulbright & Jaworski LLP
Farmers Group, Inc. v. Jan Lubin	05-0169	Petition for Review	15	4,722	315	Marcy Greer	Fulbright & Jaworski LLP
Farmers Group, Inc. v. Jan Lubin	05-0169	Reply Petition for Review	8	2,227	278	Marcy Greer	Fulbright & Jaworski LLP
Farmers Group, Inc. v. Sandra Geter	07-0707	Petition for Review	15	4,369	291	Marcy Greer/ Katherine Mackillop	Fulbright & Jaworski LLP
Farmers Group, Inc. v. Sandra Geter	07-0707	Reply Petition for Review	8	2,540	318	Marcy Greer/ Katherine Mackillop	Fulbright & Jaworski LLP
Universal Health Services, Inc. v. Renaissance Women's Group, P.A.	02-0193	Petition for Review	15	4,494	300	Marcy Greer/Doug Alexander	Fulbright & Jaworski LLP/Scott Douglas McConnico
Universal Health Services, Inc. v. Renaissance Women's Group, P.A.	02-0193	Reply Petition for Review	7	2,124	303	Marcy Greer/Doug Alexander	Fulbright & Jaworski LLP/Scott Douglas McConnico
Power Resource Group, Inc. v. Public Utility Commission of Texas	02-0167	Response to Petition	15	4,674	312	Marcy Greer	Fulbright & Jaworski LLP
In re Allied Chemical Corp.	09-0106	Mandamus Petition	15	3,909	261	Rosemarie Kanusky	Fulbright & Jaworski LLP
In re Allied Chemical Corp.	09-0106	Mandamus Reply	8	2,170	271	Rosemarie Kanusky	Fulbright & Jaworski LLP
In re Emeritus Corp.	05-0726	Mandamus Petition	15	3,926	262	Rosemarie Kanusky	Fulbright & Jaworski LLP
In re Emeritus Corp.	05-0726	Mandamus Reply	8	2,048	256	Rosemarie Kanusky	Fulbright & Jaworski LLP
Trammell Crow Central Texas Ltd. v. Maria Gutierrez	07-0091	Petition for Review	18	3,906	217	Rosemarie Kanusky	Fulbright & Jaworski LLP
Trammell Crow Central Texas Ltd. v. Maria Gutierrez	07-0091	Reply Petition for Review	9	1,955	217	Rosemarie Kanusky	Fulbright & Jaworksi LLP
In re Allied Chemical Corp.	09-0264	Mandamus Petition	15	4,008	267	Rosemarie Kanusky	Fulbright & Jaworski LLP
In re Allied Chemical Corp.	09-0264	Mandamus Reply	8	2,200	275	Rosemarie Kanusky	Fulbright & Jaworski LLP
The City of Round Rock Texas and Round Rock Fire Chief Larry Hodge v. Jaime Rodriguez and Round Rock Fire Fighters Ass'n	10-0666	Petition for Review	15	4,823	322	Doug Alexander	Alexander Dubose Townsend
Lou Ann Smith et al. v. Black+Vernooy Architects et al.	11-0731	Petition for Review	15	4,229	282	Doug Alexander	Alexander Dubose Townsend
Edwards Aquifer Auth. v. Burrell Day	08-0964	Motion for Rehearing	15	5,478	365	Pam Baron/Drew Miller	Pam Baron/Kemp Smith
Wagner Oil Co. v. Vaquillas Ranch Co.	09-0399	Petition for Review	15	4,848	323	Pam Baron/Michael McElroy	Pam Baron/McElroy Sullivan & Miller
Wagner Oil Co. v. Vaquillas Ranch Co.	09-0399	Reply Petition for Review	8	2,520	315	Pam Baron/Michael McElroy	Pam Baron/McElroy Sullivan & Miller
Parsons v. Turley	11-0338	Petition for Review	18	4,431	246	Kurt Kuhn	Kurt Kuhn PLLC

Parsons v. Turley	11-0338	Reply Petition for Review	11	2,288	208	Kurt Kuhn	Kurt Kuhn PLLC
TracFone Wireless, Inc.v. Commission on State Emergency Communications	11-0473	Petition for Review	15	4,156	277	Reagan Simpson/Chris Ward	Yetter Coleman/Stahl Bernal & Davis
TracFone Wireless, Inc.v. Commission on State Emergency Communications	11-0473	Reply Petition for Review	8	2,538	317	Reagan Simpson/Chris Ward	Yetter Coleman/Stahl Bernal & Davis
City of Houston v. Hotels.com, L.P.	12-0066	Response to Petition	15	5,777	385	David Keltner & Brian Stagner/Kelly Stewart	Kelly Hart/Jones Day
Carolee Oakland v. Travelocity.com Inc.	09-0811	Response to Petition	14	3,957	283	Brian Stanger/Derek Montgomery	Kelly Hart
In re Bank of America, N.A.	12-0178	Mandamus Petition	15	4,624	308	Karen Precella	Haynes and Boone, LLP
In re Bank of America, N.A.	12-0178	Mandamus Reply	8	2,425	303	Karen Precella	Haynes and Boone, LLP
Larry T. Long v. RIM Operating, Inc.	11-0485	Petition for Review	15	4,188	279	Franklin Honea/Skip Watson & Mike Hatchell	Law Offices of Franklin Honea/Locke Lord Bissell & Liddell LLP
Larry T. Long v. RIM Operating, Inc.	11-0485	Reply Petition for Review	8	2,330	291	Franklin Honea/Skip Watson & Mike Hatchell	Law Offices of Franklin Honea/Locke Lord Bissell & Liddell LLP
Homer Merriman v. XTO Energy Inc.	11-0494	Response to Petition	15	4,185	279	Skip Watson & Mike Hatchell	Locke Lord Bissell & Liddell LLP
Homer Merriman v. XTO Energy Inc.	11-0494	Response to Motion for Rehearing	12	3,354	280	Skip Watson & Mike Hatchell	Locke Lord Bissell & Liddell LLP
Vinson Materials, Ltd. v. XTO Energy Inc.	11-0035	Response to Petition	15	4,445	296	David Skeels/Skip Watson & Mike Hatchell	Friedman, Suder & Cooke/Locke Lord Bissell & Liddell LLP
Cameron International Corporation v. Vetco Gray Inc.	09-0397	Petition for Review	12	3,527	294	Russell Post & David Gunn	Beck, Redden & Sechrest, L.L.P.
Cameron International Corporation v. Vetco Gray Inc.	09-0397	Reply Petition for Review	8	2,418	302	Russell Post & David Gunn	Beck, Redden & Sechrest, L.L.P.
Dynegy, Inc. v. Terry W. Yates	11-0541	Petition for Review	15	4,889	326	Russell Post/Bruce Oakley	Beck, Redden & Sechrest, L.L.P./Hogan Lovells L.L.P.
Dynegy, Inc. v. Terry W. Yates	11-0541	Response on Conditional Cross-Petition	15	4,743	316	Russell Post/Bruce Oakley	Beck, Redden & Sechrest, L.L.P./Hogan Lovells L.L.P.
Dynegy, Inc. v. Terry W. Yates	11-0541	Reply Petition for Review	8	2,575	322	Russell Post/Bruce Oakley	Beck, Redden & Sechrest, L.L.P./Hogan Lovells L.L.P.
James B. Harris v. Gordon R. Cooper, II	11-0060	Response to Petition	11	3173	288	Russell Post & Erin Huber	Beck, Redden & Sechrest, L.L.P.
In re Laura Russell and Brenda Volk	10-0485	Mandamus Petition	10	2,865	287	Russell Post & Douglas Pritchett	Beck, Redden & Sechrest, L.L.P.
In re Laura Russell and Brenda Volk	10-0485	Mandamus Reply	5	1,508	302	Russell Post & Douglas Pritchett	Beck, Redden & Sechrest, L.L.P.
Regal Finance Company, Ltd. v. TexStar Motors, Inc.	08-0148	Petition for Review	15	4,687	312	David Beck, Russell Post & David Gunn	Beck, Redden & Sechrest, L.L.P.
In re Stephanie Lee	11-073	Mandamus	12	3,166	264	Scott Rothenberg	Law Offices of Scott Rothenberg
Spir Star AG v. Louis Kimich	07-0340	Response to Petition	15	4,244	283	Scott Rothenberg	Law Offices of Scott Rothenberg
U-Haul International, Inc. v. Talmadge Waldrip	10-0781	Petition for Review	15	4,630	309	David Keltner/Thomas Leatherbury & Lisa Hobbs	Kelly Hart/Vinson & Elkins LLP

U-Haul International, Inc. v. Talmadge Waldrip	10-0781	Petition for Review	8	2,745	343	David Keltner/Thomas Leatherbury & Lisa Hobbs	Kelly Hart/Vinson & Elkins LLP
In re Petrohawk Energy Corporation	10-0528	Mandamus Petition	15	4,746	316	J. Robert Beatty/Marie Yeates & Gwen Samora & Lisa Hobbs	Locke Lord Bissell & Liddell LLP/Vinson & Elkins LLP
In re Petrohawk Energy Corporation	10-0528	Mandamus Reply	8	2,743	343	J. Robert Beatty/Marie Yeates & Gwen Samora & Lisa Hobbs	Locke Lord Bissell & Liddell LLP/Vinson & Elkins LLP
Thomas Petroleum, Inc. v. Gregory Morris	11-0548	Response to Petition	12	2,780	232	Rhonda Wills/Richard Hogan & Jennifer Hogan	Wills Law Firm/Hogan & Hogan
In re QualitySafety Systems Company	10-0984	Mandamus Petition	15	4,340	289	Jack Little/Richard Hogan & Jennifer Hogan	Weinstein Tippets & Little/Hogan & Hogan
In re Valero Energy Corporation	11-0138	Mandamus Petition	15	4,400	293	Steven Rech/Richard Hogan & Jennifer Hogan	Schwartz, Junell, Greenberg & Oathout LLP/Hogan & Hogan
Enterprise Products Partners LP v. Catherine Mitchell	11-0366	Response to Petition	15	4,296	286	Nick Nichols/Richard Hogan & Jennifer Hogan	Abraham, Watkins, Nichols, Sorrells, Agosto & Friend/Hogan & Hogan
Conex International Corporation v, Fluor Enterprises, Inc.	09-0199	Petition for Review	15	4,439	296	Randal Cashiola/Richard Hogan & Jennifer Hogan	Chambers, Templeton, Cashiola & Thomas/Hogan & Hogan
Microtherm, Inc. v. Dana Corporation	10-0126	Conditional Petition for Review	15	4,253	284	Thomas Phillips/Richard Hogan & Jennifer Hogan	Baker Botts LLP/Hogan & Hogan
Sanguine Gas Exploration LLC v. Expro Americas, LLC	11-0974	Petition for Review	15	4,275	285	James Tompkins/Jennifer Hogan & Richard Hogan	Galloway, Johnson, Tompkins, Burr & Smith/Hogan & Hogan

AVERAGE: 291 words per page

TAB 3

David H. Tennant, Esq., Co-chair of the
Appellate Rules Committee of the
American Bar Association's
Council of Appellate Lawyers

THE COUNCIL OF APPELLATE LAWYERS
AMERICAN BAR ASSOCIATION
JUDICIAL DIVISION
APPELLATE JUDGES CONFERENCE

Testimony on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules February 17, 2015

Statement of Interest

The Council of Appellate Lawyers ("The Council") is part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide Bench-Bar organization devoted to appellate practice. We appreciate the opportunity to address the Advisory Committee on Appellate Rules concerning the most recent proposed amendments to the Federal Rules of Appellate Procedure. The views we express today are solely those of The Council and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

Our testimony is focused on the proposed length limits in Appellate Rule 32 and the related proposed changes to Appellate Rules 5, 21, 27, 28.1, 35, and 40. We have no objection to the amendments proposed to other rules.

Testimony on Length Limits

The Council respectfully opposes the proposed amendments to Rule 32 that would reduce a principal brief from 14,000 words to 12,500 and a reply brief from 7,000 to 6,250 words. The proposed change is not supported by any currently stated need. The Advisory Committee has not identified any problems with the present length of appellate briefs. Indeed, many state appellate courts permit the same or longer briefs, either with express type-volume limits that track the federal rules,[1] generous word or

[1] *See, e.g.,* California Court of Appeal, Cal. Rules of Court Rule 8.204(c) (14,000 words for computer-produced brief, 50 pages for typewritten brief); New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 600.10(d)(1) (First Department) (70 pages or 14,000 words for principal brief and 35 pages or 7,000 words for reply brief); 670.10.3(a)(3) (Second Department) (14,000 words for principal brief, 7,000 words for reply brief); Pa. R.A.P. Rule 2135 (14,000 words for principal brief and 7,000 words for reply brief).

page limits,[2] or even briefs with no restriction by page or word count.[3] Federal circuit courts, and the counsel who regularly handle federal appeals, have fifteen years of experience with the current federal type-volume rule. We are unaware of any problems in the length of appellate briefs being submitted today in federal circuit courts (or state courts applying those same standards).

While everyone can appreciate better focused and less repetitive briefs, the word count rule is not an effective enforcement mechanism to achieve those ends.[4] An inexperienced or unskilled brief writer will commit the same mistakes in 12,500 words as in 14,000. As one prominent appellate lawyer commented, "we'll just see slightly shorter bad briefs."[5] At the same time:

> [L]awyers and litigants in cases that really do warrant more extensive briefing will be frustrated, having spent extra time and money to explain why they need permission to file oversize. The benefit's not worth the burden on this one.[6]

Ironically, the proposed rule change will penalize knowledgeable lawyers who need adequate space to brief appeals that present complex facts or issues as well as appeals following lengthy trials and appeals involving multiple parties. (See submission of American Academy of Appellate Lawyers, dated November 11, 2014 at 2-6.)

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2 *See, e.g.,* California Supreme Court, Cal. Rules of Court Rule 8.520(c) (14,000 words for computer-produced principal brief and 8,400 words for reply brief, 50 pages for typewritten principal brief and 30 pages for reply brief; 2,800 words for supplemental brief presenting new matter if computer-produced and 10 pages if typewritten); New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 800.8(a) (Third Department) (70 pages for appellant's brief, 35 pages for respondent's brief, and 25 pages for reply); 100.4(f)(3) (Fourth Department) (70 pages for principal brief and 35 pages for reply brief); Tex. R. App. P. 9.4(i)(2)(B)-(C) (15,000 words for principal brief and 7,500 words for reply brief if computer-generated, 50 pages and 25 pages if not). *See, e.g.,* New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 800.8(a) (Third Department) (70 pages for appellant's brief; 35 pages for respondent's brief and 25 pages for reply); 100.4(f)(3) (Fourth Department) (70 pages for principal brief and 35 pages for reply).

3 *See., e.g.,* New York Court of Appeals, 22 N.Y.C.R.R. § 500.1 (providing for 14-point type but no limit on brief length).

4 Some repetition is bound to occur in federal appellate briefs due to the requirements of statement of issues, case summary, summary of argument, and argument, and the frequent practice of including a request for argument as well as an "introduction" that previews or distills the argument.

5 Lisa Perrochet, Horvitz & Levy, Encino, California (comments on ABA Appellate Forum Linked-in page). Ms. Perrochet, as Chair of the Rules and Law Subcommittee of the Los Angeles County Bar Association's Appellate Courts Section, submitted a comment to this Committee on January 26, 2015, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0018.

6 L. Perrochet, ABA Appellate Forum Linked-in page.

The justifications offered in support of the rule change are not persuasive. The history underlying the adoption of the type-volume standard in Rule 32 in 1998 shows that the 14,000 word count limit was accurately derived from word-processed and professionally printed documents that carry 280 (or more) words per page—in contrast to monospaced, typewritten briefs that carry 250 words per page. Moreover, any proposed changes to Rule 32 should be based on current considerations rather than on some concept of a historical "correction." No such present need has been demonstrated.

A. The History of the 1998 Amendments to Rule 32 Shows That the 14,000 Word Count Limit Was Adopted Based on an Accurate Understanding of the Number of Words Per Page on A Word-processed or Professionally-printed Brief Using Proportionally Spaced Fonts.

The record shows that Rule 32's 14,000 word count limit was based on modern word-processing and printing capabilities that produce at least 280 words per page using proportionally spaced fonts. The relevant history is laid out in a memo entitled a "short history of the 1998 amendment to Rule 32" prepared by the Advisory Committee.[7] Among the key steps mentioned in that memo, the Advisory Committee received presentations from Microsoft and printing experts in 1994 that detailed the variability in word count per page, specifically noting that a typewritten 50-page brief with a monospaced font would have 12,500 words, whereas a 50-page brief produced on a computer, with a proportionally spaced font, "can greatly exceed 14,000 words."[8] In 1995, the Advisory Committee received information that a professionally printed 50-page brief, as filed in the Supreme Court of the United States, contained on average 280 words per page.[9] Judge Easterbrook, who served as liaison to the Appellate Rules Committee, has confirmed that Rule 32's type-volume limitation was an informed, reasoned decision that considered 280-words-per-page to be the proper standard in keeping with professionally printed briefs in the Supreme Court.[10]

The Advisory Committee's "short history" shows that the 12,500 word count yield for a 50-page brief was specifically tied to monospaced typewritten documents that were already outmoded in 1998. There thus was no "conversion error" in assigning 280 words per page for briefs with proportionally-spaced, word-processed text, or briefs printed professionally. The current proposal to reduce the word count limit from 14,000 to

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7 Catherine T. Struve, Memorandum, "a short history of the 1998 Amendment to Rule 32" (October 3. 2014), reproduced in the agenda materials for the Advisory Committee's October 20, 2014 meeting at 73-79 (Item No. 12-AP-E (length limits)).

8 *Id.* at 2.

9 *Id.* at 3.

10 Hon. Frank H. Easterbrook, Comment posted September 11, 2014, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0006.

12,500 words is on the wrong side of history and technology by three decades or more—the amount of time since briefs were routinely prepared on typewriters.[11]

B. Modern Appellate Practice Requires a Word Count Limit That Fits the Times.

No matter what historical surveys might show, they do not speak to current needs. Identifying a purported mathematical error that occurred fifteen years ago does not provide a sound basis to change current policy and practice. Indeed, given the passage of time and absence of problems in the intervening decade and a half, reliance interests would seem to predominate over more formalistic interests in correcting the supposed historical conversion error. A retrospective, academic correction cannot account for current briefing needs. Oral argument is becoming rarer and shorter in federal appellate courts, and the briefs are now often the only opportunity for lawyers to advocate on behalf of their clients. At the same time, as litigation grows more complex, many appeals also are becoming increasingly complicated, involving complex facts, extensive records, multiple parties with attendant multiplication of issues and sometimes multiple briefs, participation of *amici curiae* raising additional points that must be addressed, and difficult legal issues, including matters of first impression requiring surveys of the law and public policy considerations. Appeals from trials often strain word count limits given the lengthy record and the tendency of the losing side to raise a host of issues in the conduct of the trial. Requiring advocates to seek additional briefing space to deal with these complications—space that may not always be forthcoming from court personnel, individual judges or motions panels unfamiliar with the merits of the case—would add a needless layer of motion practice to many appeals with attendant time, expense, and uncertainty. Instead of a clear 14,000 word count rule that has been demonstrated to be workable in the vast majority of cases over the past fifteen years, the proposed amendment seeks to impose a materially reduced word

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[11] The Minutes of the Spring 2014 Meeting of the Advisory Committee on Appellate Rules (April 28 and 29, 2014) state that:

> While deliberating over the formulae to use when converting existing pages limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments – namely that one page was equivalent to 280 words – appears to have been mistaken. Based on earlier research by Mr. [Doug] Letter on behalf of the D.C. Circuit's rules committee, a better estimate appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

Catherine T. Struve, Reporter, Item No. 12-AP-E (length limits) Spring Meeting Minutes April 28 and 29, 2014) at 5-6; *id.* at 7 ("Mr. Letter noted that his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake"). This brief discussion, which is the Advisory Committee's only 2014 analysis of the 1998 word count limit, does not square with the "short history" noted above. The Advisory Committee adopted the 14,000 word count limit in 1998 based on the documented difference between monospaced and proportionally spaced fonts and the different yields between typewritten briefs (12,500) and word-processed or professionally printed briefs (14,000). There was no mistake.

count without study or discernment of the expected negative consequences, or weighing those against the proposed benefits of reducing the word count.

The current 14,000 word count limit in Rule 32 fits the needs of experienced appellate practitioners and should be maintained. The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count.

To the extent that circuit judges are finding briefs lengthened by lack of focus or unnecessary repetition, courts might find it desirable to encourage additional training for appellate lawyers or the creation of briefing materials for the benefit of counsel stating specifically the preferred way to advocate before them. The Advisory Committee might also consider eliminating the requirement of a summary of argument or otherwise altering the structure of briefs to try to improve their quality and lessen the occurrence of repetition. Another step that would aid readability of appellate briefs would be to adopt modern typography principles as set forth in Matthew Butterick's *Typography for Lawyers* (2010). Briefs would be easier to read—and shorter—if the font size and leading (the space between lines) were reduced. Briefs would also be more reader-friendly if margins were increased. The Council suggests that these and other educational and formatting issues be explored.

Conclusion

In sum, the Council of Appellate Lawyers respectfully requests the Advisory Committee on Appellate Rules to reconsider its position on the length of federal appellate briefs and other documents and to retain the current word count limits under Rule 32 providing for 14,000 word principal briefs and 7,000 word reply briefs.

The Council of Appellate Lawyers

Bradley S. Pauley
Chair

Deena Jo Schneider
David H. Tennant
Co-chairs, Rules Committee

TAB 4

James Pew, Esq.,
Earthjustice

TESTIMONY OF JAMES S. PEW, EARTHJUSTICE, ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTIION

I am an attorney at Earthjustice, a non-profit public interest law firm representing more than 1,000 different clients, including national, regional and local environmental organizations, Native American Tribes, civil rights and environmental justice organizations, farmworkers' organizations, fishermen's organizations, scientists, and health care workers. Earthjustice employs 93 attorneys, and has an average caseload of 300 cases, many of which are in the federal courts of appeals. The majority of my cases are in the D.C. Circuit.

I very much appreciate the opportunity to present testimony on the proposed changes to the Federal Rules of Appellate Procedure. I respectfully urge the Advisory Committee not to adopt the proposed changes to the word limits for appellate briefs and to the rules regarding the computation and extension of time.

I. THE COMMITTEE SHOULD NOT ADOPT THE PROPOSED CHANGES TO THE WORD LIMITS FOR APPELLATE BRIEFS IN RULE 32.

The proposed changes to Rule 32 would shorten the length for opening briefs from 14,000 words to 12,500 words and the length for reply briefs from 7,000 words to 6,250 words. Because brief lengths in appellate court are often shortened to these lengths (and shorter lengths) in multiparty cases already, I have experience with these lower word limits. As explained in detail below, they present a dilemma: drop valid claims or raise them in such an abbreviated form as to risk losing the claim and making bad law. This dilemma is especially pointed in cases involving review of governmental agency action, many of which are heard for the first (and only) time in the federal courts of appeals. *See, e.g.* 42 U.S.C. § 7607(b) (providing that petitions for review of many final actions taken by the Environmental Protection Agency under the Clean Air Act must be brought in the D.C. Circuit). In these cases, a decision not to raise a valid claim – or the failure to adequately brief a valid claim – can have long term adverse impacts not only on a litigant but on the public.

Cases seeking judicial review of agency action often involve complex government regulations that impact not just the parties to the case but many regulated entities and the public at large. The records for judicial review in these cases are often extensive. Parties to these cases may have valid legal objections to numerous different parts of the regulation, each of which needs to be evaluated separately. To fully protect their clients in these cases, attorneys often need to be able to present claims on multiple claims involving complex technical issues to the Court. The proposed reduction in the word limits would affect attorneys' ability to bring important issues before the courts and to successfully challenge unlawful action.

In these multiparty cases, petitioners with different (and often adverse) interests present different and conflicting claims to the court. In environmental cases, for example, courts may be

presented with arguments by regulated entities who claim that a regulation is too stringent and by environmental groups who claim it is insufficiently stringent. *See National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013). In such cases, the D.C. Circuit typically receives two or more petitioner briefs. *See id.* Faced with multiple briefs, the D.C. Circuit usually reduces the number of words that can be raised in any individual brief to between 10,000 and 12,000 words.

These shortened word limits force attorneys to choose between dropping valid claims and raising arguments too briefly. In judicial review cases, courts generally defer to agency statutory interpretations so long as they do not contravene Congress's plainly expressed intent and are reasonable. *See Chevron v. NRDC*, 467 U.S. 837, 842 (9184). Similarly, they defer to agencies' factual determinations so long as they are not arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut.Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, petitioners in judicial arguments must be able to brief issues in their cases – issues that are often both complex and numerous – in sufficient detail to overcome significant deference. Notably, the D.C. Circuit has ruled that arguments raised too briefly are waived. *See e.g., Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999).

Even where the courts consider arguments that have not been fully developed in sufficient length, they may still reject such arguments just because the briefs did not make sufficiently clear that the government's action was unlawful or arbitrary. Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing even valid claims.

The goal of inducing attorneys to present their claims succinctly is certainly worthwhile, but word limits should not act to cap the number of valid issues that parties can raise. In multi-issue cases, however, the effect of the propose rule change will likely be to prevent parties from bringing valid claims. Such a result would not only be unfortunate from a public policy point of view but would undermine the purpose of statutory judicial review provisions by which Congress intended to provide fully for judicial review of agency actions.

Some may believe that if word limits are shortened, parties who truly need additional words can obtain them by submitting a motion to the court. As a practical matter, such motions are hardly ever granted. *See* D.C. Circuit Rule 28(e)(1) ("The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons."). Further, it is neither in the interest of litigants or judicial economy to create a situation in which parties are forced to file more frequent motions to exceed.

Moreover, if the word limits are shortened as proposed, it is likely that courts will continue to shorten them further in multi-party cases. Thus, instead of reducing the word limit from 14,000 words to 11,200 words or 10,000 words – as the D.C. Circuit frequently does in such cases – courts are likely to reduce word limits in the future from 12,000 words to 10,000 words or 8,000 words. It is understandable that courts would reduce word limits in multi-party cases; the amount of material that judges and clerks need to read increases substantially with

each additional brief. However, the rationale for reducing word limits for each brief in these cases will not cease to exist just because the default word limit is reduced from 14,000 to 12,000.

II. THE COMMITTEE SHOULD NOT ADOPT THE PROPOSED CHANGES TO THE 3-DAY RULE.

The proposed changes would eliminate the 3-day rule, which adds 3 days to the period for submitting responses to motions and replies in support of motions. Under the proposed revisions, the period for responding to a motion would decrease from 13 days to 10 days, and the period for submitting a reply in support of a motion would decrease from 10 days to 7 days. The rationale underlying the proposed change is that the 3-day rule is relic from times when motions and responses were more often served by mail and that the additional 3 days are unnecessary when motions and responses are served electronically.

The practical effect of the proposed changes is to reduce the times for submitting responses and replies to a short period that will be, in many instances, inadequate. It will prevent attorneys from fully presenting their reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions. Further, it will force attorneys to seek extensions more often – a result that is not in the interests of judicial economy. And shortening the process of motions briefing by 3 or 6 days will not expedite the resolution of motions or cases to any significant extent.

The adverse impacts of the proposed changes are best understood in the context of dispositive motions (such as motions to dismiss) and motions to stay government regulations pending judicial review. The courts' rulings on such motions have major impacts on the rights and liabilities of the litigants. They can also have major impacts on the public. Granting a motion to stay government regulations that limit emissions of toxic pollution pending judicial review, for example, can result in a loss of life and other serious health impacts while the regulation is stayed. Likewise, granting a motion to stay a regulatory exemption pending judicial review could cause regulated entities to expend resources while the regulation is stayed. Plainly then, there is a strong public interest in allowing litigants time to fully develop their arguments for or against dispositive motions and motions to stay and in having courts be fully informed before making their decisions on such motions.

Under the proposed changes, responses to motions would be due within 10 calendar days. Thus, responses to a motion filed at 11pm on the Friday before a holiday weekend would be due the Monday after next – i.e., just 5 working days later. Where responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – i.e., just 5 working days later. These times are not sufficient to prepare responses or replies, especially where the motions at issue are dispositive motions or motions to stay. Even in the absence of an intervening holiday, the proposed revision would allow just 6 working days to respond to a motion filed on a Friday, and 5 working days for a reply to a response filed on a Friday.

Nor is it the case that these shorter times always applied before the widespread adoption of electronic service. As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus,

intermediate Saturdays, Sundays and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule 27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4). Rather, under previous rules, a response to a motion filed on the Friday before a holiday weekend would have been due 16 calendar days (10 working days later) – even without an additional 3 days for service. Similarly, replies to a response filed the Friday before a holiday weekend would have been due 12 calendar days (7 working days) later without an additional 3 days for service. In short, although the proposed rule change appears intended to restore the actual times that were provided for responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules.