MEMORANDUM

DATE: May 4, 2015

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval. Part III covers other matters.

The Committee has scheduled its next meeting for October 29 and 30, 2015, in Chicago, Illinois.

More information about the Committee's activities can be found in the Committee's study agenda and in the Reporter's forthcoming draft of the minutes of the April meeting.

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal

Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has

power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether

the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history, briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief

length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus

filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies

resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the

time available to respond. Extensions of time may be warranted to prevent prejudice." The Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

III. Information Items

The Committee continues work on two matters that may result in proposed amendments for consideration at the January 2016 meeting of the Standing Committee. One involves Rule 41, concerning issuance of the mandate; the other relates to Rule 25, which governs electronic filing and service and proof of electronic service. The Committee is also working on a project concerning appellate disclosure statements and Rule 26.1, and is coordinating with the Civil Rules Committee on a project about appeal bonds and Civil Rule 62. Also on the study agenda are a question concerning amicus filings by consent of the parties and a proposal to amend the Appellate Rules to address appeals by class action objectors.

The Committee is considering amendments to Rule 41 that would address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
>
> * * *
>
> (b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> * * *
>
> (d) STAYING THE MANDATE.
>
> * * *
>
> (2) *Pending Petition for Certiorari.*
>
> * * *
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the filing of a Supreme Court order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required. As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion. This past spring, Judge Richard C. Tallman wrote to the Committee to propose that Rule 41 be amended to "permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances."

At its fall 2015 meeting, the Committee will consider proposed amendments to Rule 41 that would (1) restore the requirement that stays of the mandate require an order; (2) make clear that stays of the mandate (other than pending a petition for certiorari) require extraordinary circumstances; and (3) streamline the rule by eliminating Rule 41(d)(1).

At the fall meeting, the Committee will give further consideration to amendments to Appellate Rule 25 to address electronic filing and service and proof of electronic service. Like the proposals currently under development by the Civil and Bankruptcy Rules Committees, the Appellate Rule 25 proposal would presumptively require electronic filing (subject to exceptions for good cause and by local rule) and would presumptively authorize electronic service through the court's transmission facilities (subject, again, to exceptions for good cause and by local rule). Pro se litigants would be treated differently, however, in order to take account of concerns about electronic filing and service by and on unrepresented parties (including inmates). The amendments would also provide that the notice of electronic filing generated by CM/ECF constitutes proof of service on any litigant served electronically through the court's transmission facilities.

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures. The Committee is evaluating whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations and, if so, whether the disclosures should be required by national rule. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee will keep other Advisory Committees apprised of work in this area.

During the past several years, the Civil and Appellate Rules Committees and their joint subcommittee have discussed the possibility of adopting a rule amendment to address the practice of "manufactured finality." A principal topic of discussion has been the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about whether one technique—described as "conditional dismissals with prejudice"—suffices to achieve finality. The Civil Rules Committee, however, has opted to take no action on this matter. Recognizing that any rule amendment addressing the conflict in authority likely should be placed in the Civil Rules rather than the Appellate Rules, the Appellate Rules Committee acceded to the Civil Rules Committee's proposal to take no action. The reporters will monitor the caselaw in this area and alert the committees of significant developments.

The Civil-Appellate Subcommittee also has discussed the treatment of appeal bonds in Civil Rule 62. An Appellate Rules Committee member has suggested that it would be useful to clarify a number of aspects of practice under that rule. The subcommittee has begun drafting a possible rule amendment, focusing particularly on current Rules 62(a), (b), and (d). Although discussion in the Civil Rules Committee suggested that members of that Committee do not see problems with the current rule, attorney members of the Appellate Rules Committee have noted that problems with the rule are likely to be felt most keenly by appellate lawyers.

Other topics on the Committee's agenda may receive attention in the next year. One item concerns a proposal that Appellate Rule 42 be amended to bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. The Appellate Rules Committee is hopeful that the work of the Civil Rules Committee's Rule 23 Subcommittee will assist with deliberations in this area. Another item concerns amicus filings during initial consideration of a case on the merits. Current Rule 29(a) provides that the United States or a State may file without consent of the parties or leave of court. It then states: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Some circuits have local provisions that prevent the filing of amicus briefs that would cause a recusal. The Committee will consider whether a revision to the Rule 29(a) provision on party consent would be desirable.

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TAB 4B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate ~~confined in an institution~~ files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

* New material is underlined in red; matter to be omitted is lined through.

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence

that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit" – rather than simply "permits" – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Changes Made After Publication and Comment

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail. The Committee's subsequent inquiries revealed that a number of other States similarly record the date of inmates' legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(C) **Inmate F~~f~~iling.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely~~

~~filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or
- evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

* * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other

evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit" – rather than simply "permits" – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Changes Made After Publication and Comment

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail. The Committee's subsequent inquiries revealed that a number of other States similarly record the date of inmates' legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to

proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Changes Made After Publication and Comment

The Committee added the word "timing" to the "Note to inmate filers" in order to clarify the reference to Rule 4(c)(1).

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.*]

Changes Made After Publication and Comment

The Committee added the word "timing" to the "Note to inmate filers" in order to clarify the reference to Rule 4(c)(1).

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example,*
United States District Court for the District of Minnesota]

A.B., Plaintiff

v.

C.D., Defendant

Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order*

to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).]

Changes Made After Publication and Comment

The Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect the fact that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system. The Committee added a "Note to inmate filers" pointing out the legal-mail-system requirement in Rules 4(c)(1) and 25(a)(2)(C). The Committee also made style changes.

Summary of Public Comments

AP-2014-0002-0007: Edward Baskauskas. Objects to "the implicit assumption that a signed declaration can prove the occurrence of an event happening after signing (such as the mailing of the declaration and accompanying document). How can a document deposited in the mail be accompanied by a declaration that says I deposited [the document] . . . in the institutions internal mail system (the language of proposed new Form 7), when no one can truthfully make or sign such a statement until after the document has actually been deposited in the mail and is beyond the signers control?"

Suggests "changing the language of proposed new Form 7 to read I am today depositing instead of I deposited. ... Changing to the present tense would be consistent with the Forms later statement that postage is being affixed .... Alternatively, if the past-tense deposited language is retained in proposed new Form 7, the amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) might be modified to specify that a paper to be filed by an inmate may be accompanied by an unsigned copy of the declaration or statement, and that the signed original of the declaration or notarized statement must be filed separately within a reasonable time." In addition, "the amendments should explicitly permit separate filing of the declaration or notarized statement as a matter of course, rather than leaving the matter to judicial discretion or interpretation."

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposals.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0030: Joshua R. Heller. Opposes the proposed amendments. By "eliminat[ing] the requirement that an inmate use an institution's legal mail system that establishes the date of filing when one is available," the proposed amendments will "significantly harm[] the inmate filing systems that many states, including

Florida, have created to establish the date documents are provided to prison officials in federal cases." Inmates have a motive to lie about the filing date.

The State of Florida's procedures for inmate legal mail "permit[] — without the enormous expense of establishing outgoing mail logs for every prisoner in the custody of the State of Florida's Department of Corrections – a date certain that a document is placed by an inmate into the hands of a corrections official for mailing."

The proposed amendments would only affect appellate filings. "Neither inmates nor those who litigate against them benefit from having two sets of inmate-filing rules: one for trial court filings and one for appeals."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee endorses the amendments (1) to include a sample declaration of timely filing (Form 7); and (2) to eliminate the distinction between an institution's legal mail system and its general mail system. The Committee does not endorse the proposed amendments to the extent they require inmates to include an affidavit or declaration of timely mailing at the time of mailing itself." Such a requirement "could cause unwitting defaults by pro se prisoner litigants."

Also, in Form 7, "[a]n inmate should not be required to declare that she 'deposited' materials (past tense) as part of a declaration that she is supposed to include in the same envelope as the very materials being deposited." Use of the

past tense "may cause further confusion for pro se inmates as to whether the declaration needs to be included in the same mailing as the document being filed."

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. Supports the proposal. "In new paragraphs 4(c)(1)(B) and 25(a)(2)(C)(ii), the Court of Appeals should have discretion not only to accept separate and subsequent proof of timely mailing ... but also to excuse 'for good cause' any failure by the inmate to 'prepay' the postage"; it is hard to take account of variations in institutions' policies for providing postage to inmates. "In the Note proposed to be added to Form 1 (as well as to Form 5), we would add, after the reference to Rule 4(c)(1), a brief explanatory parenthetical, such as '(allowing timely filing by mail).' In Form 7, we would change 'Insert name of court' to say 'Insert name of trial-level court.'"

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. Supports the proposal, but expresses concern about "potential problems that might arise with inadequate postage, where an inmate relied upon an institution for advising on the proper postage or some other issue arose that prevented the inmate from including proper postage." Proposes the following revision to proposed Rule 4(c)(1)(B) (along with a corresponding revision to proposed Rule 25(a)(2)(C)(ii)): "(B) the court of appeals exercises its discretion to excuse a failure to prepay postage

or to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i)."

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure~~,~~ ~~—~~and does so within the time allowed by those rules~~—~~the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion."

Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Changes Made After Publication and Comment

The Committee made no changes after publication and comment.

Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL does not oppose the proposed amendment ...."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. Supports the proposal, "which will create uniformity and clarity (and ... will not change the practice in the Second Circuit)."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. "The PBA opposes the proposed amendments to Rule 4(a)(4), governing the timeliness of a notice of appeal when a post-judgment motion is filed, because, without providing greater clarification, it simply substitutes a new trap for the unwary in place of the current trap for the unwary." Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules." The memo notes the desirability of clarifying Rule 4(a)(4) "in light of the consequences of filing a late appeal" but expresses doubt that the proposed language is clear enough. The memo also states it is "anomalous that while a post-judgment motion tolls the time for an appeal and a district court has discretion to extend the time for filing a post-judgment motion, such an implicit extension of time does not toll the time for appeal, notwithstanding the district court's power to enlarge the time for appeal for cause under Rule 4(a)."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate

Courts. Supports the proposal. "Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority" with respect to the circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 can count as "timely" under Rule 4(a)(4).

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must include a certificate under Rule 32(g) and not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 5,000 words to 5,200 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must include a certificate under Rule 32(g) and not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 7,500 words to 7,800 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; ~~Page Limits; and~~ Number of Copies.

* * * * *

(2) **~~Page~~ Length Limits.** ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must include a certificate

under Rule 32(g) and not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 32(g) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limits. The Committee revised the proposed word limit for motions and responses from 5,000 words to 5,200 words, and revised the proposed word limit for replies from 2,500 words to 2,600 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) ~~and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 32(g) and:

(i) ~~it~~ contains no more than ~~14,000~~13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 32(g) and:

(i) ~~it~~ contains no more than ~~16,500~~15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 32(g) and contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 28.1(e) is amended to refer to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

Changes Made After Publication and Comment

The Committee revised the proposed word limit for the appellant's principal brief and the appellant's response and reply brief from 12,500 words to 13,000 words, and revised the proposed word limit for the appellee's principal and response brief from 14,700 words to 15,300 words. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) ~~and (C)~~.

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it includes a certificate under Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~13,000 words; or

- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 32(g) and contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of~~

~~counsel do not count toward the limitation.~~

~~(C) Certificate of compliance.~~

~~(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

~~● the number of words in the brief; or~~

~~• the number of lines of monospaced type in the brief.~~

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).~~

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all ~~of~~ the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has re-evaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted.

The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit) – including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Changes Made After Publication and Comment

The Committee revised the proposed word limit for principal briefs from 12,500 words to 13,000 words. The Committee added an amendment to Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. A cross-reference in Rule 32(a)(7)(A) was updated. A reference to Rule 29(b)(4) was added to Rule 32(g)(1), to reflect the Committee's approval of a proposed amendment to Rule 29. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a petition for an en banc hearing or rehearing produced using a computer must include a certificate under Rule 32(g) and not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.~~Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must include a certificate under Rule 32(g) and not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those

page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(2)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

Changes Made After Publication and Comment

The Committee revised the proposed amendments to Form 6 to reflect the deletion of the proposed line limits for documents other than briefs. The Committee also made style changes to the Form.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart shows the length limits stated in the Federal Rules of Appellate Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you are using a word limit or a line limit (other than the word limit in Rule 28(j)), you must include the certificate required by Rule 32(g).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	· Petition for permission to appeal · Answer in opposition · Cross-petition	5,200	20	Not applicable
Extraordinary writs	21(d)	· Petition for writ of mandamus or prohibition or other extraordinary writ · Answer	7,800	30	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Motions	27(d)(2)	· Motion · Response to a motion	5,200	20	Not applicable
	27(d)(2)	· Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	· Principal brief	13,000	30	1,300
	32(a)(7)	· Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	· Appellant's principal brief · Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	· Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	· Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	· Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	· Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	· Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	· Petition for hearing en banc · Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

Changes Made After Publication and Comment

The Committee added the Appendix after the public comment period, as an aid to understanding the various length limits that will now be stated in the Appellate Rules.

Summary of Public Comments and Hearing Testimony

AP-2014-0002-0003: Judge Jon O. Newman. Suggests "that 'monospaced face' be defined in Rule 1(b). The definition might be '"Monospaced face" means that the combined width of every letter or other character and the space immediately to the right of the letter or character is the same for all letters and other characters.' ... I realize that the term is now in the current FRAP 32(a)(7)(B)(i), which I had not previously realized, but now that it will be used in several places, it should be defined."

AP-2014-0002-0004: Richard A. Ferraro. Notes that the word "brief" would be changed to "document" (in Form 6), and asks whether this should be a global change throughout the Appellate Rules.

AP-2014-0002-0005: Robert Markle. "I support the Committee's proposed revision to Rule 32(a)(7)(B) reducing the word limit for principal briefs. In the typical case, nothing justifies even approaching, much less reaching or exceeding, 14,000 words. Indeed, I would

support reducing the limit to 10,000 words, but 12,500 is a good start."

AP-2014-0002-0006: Judge Frank H. Easterbrook. Supports "[t]he replacement of page limits with word limits in all Rules of Appellate Procedure."

Discusses the origin of the current type-volume limits for briefs. "When the 14,000 word limit was being devised, I was a member of the Standing Committee and the liaison to the Appellate Rules Committee. I drafted Rule 32, which was based on a rule that the Seventh Circuit had issued a few years earlier. The 14,000 word limit came from Seventh Circuit Local Rule 32, not from any new calculation and Seventh Circuit Rule 32 came from a detailed count of words in briefs filed in the Supreme Court, not from a word-count or line-count of briefs filed in the court of appeals."

Opposes shortening the length limits for briefs. "[T]he Supreme Court ... chose 15,000 as the replacement for 50 pages. Many cases in courts of appeals are every bit as complex as those in the Supreme Court. Issues may be simpler on average, but cases have more issues on average, and lawyers often must devote substantial space to discussing evidence, which is not so important after a grant of certiorari. Changing to a system in which the old 50-page-printed-brief rule converts to 15,000 words in the Supreme Court, and 12,500 words in the court of appeals, would create an unjustified difference."

AP-2014-0002-0008: Louis R. Koerner Jr. Opposes shortening briefing length limits because the length is necessary in complex, important cases. "I would keep the limits at 14,000 and 7,000 words and use those limitations as formulaic for other word limitations. I think, however, that the rule should stress that briefs do not have to come close to the word limitations and that briefs that are short and to the point and free from unnecessary repetition are gratefully received."

AP-2014-0002-0009: Hirbod Rashidi. "I would go a step further. In oral argument typically when the appellant wants to have time to rebut, he/she will have to save some of the time for rebuttal. Why not adopt the same rule for briefing? The total limit for briefing, 12.5K or 14K words, should be the total (I think 12.5k in overwhelming cases is plenty)."

AP-2014-0002-0010: Joshua Lee. "I do capital habeas litigation, and such cases are often very legally complex and come with records tens of thousands of pages long. I find that the existing volume limits frequently prevent me from adequately briefing a capital habeas appeal, and reduction of the existing limits would only aggravate the problem, putting the court in a situation when it must either repeatedly adjudicate overlength motions or else have a case that is not adequately briefed."

AP-2014-0002-0011: John J. White, Jr. Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

Shorter limits will force lawyers to abandon (or to brief inadequately and thus waive) arguments that might have merit. And the time it will take lawyers to pare down their prose will be costly to clients.

AP-2014-0002-0012: Andrew Kennedy. Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Opposes the proposal to shorten brief length limits and the proposal to use a 250-word-per-page conversion rate for the new type/volume limits in Rules 5, 21, 27, 35, and 40.

Asserts that, to the extent that the history of the 1998 amendments is discernible, it supports the view that a 280-word-per-page conversion ratio was employed in 1998 "because it appeared wise and reasonable." Suggests that Committee members who voted in 2014 to reduce the length limit for briefs were acting on the basis of "individual preferences, perhaps supported by unreported anecdotal information."

As a policy matter, argues that shortening the length limits would limit the ability to brief complex issues adequately (and to fulfil counsel's reponsibility in criminal cases) and would generate motions for leave to file longer briefs. Suggests that appeals nowadays tend to be more complex than appeals were in 1998. Argues that better

training for advocates is a preferable way to address verbose briefs.

Opposes the use of the 250-words-per-page conversion ratio for type/volume limits in Rules 5, 21, 27, 35, and 40, based on anecdotal reports that the current page limits permit longer documents than the type/volume limits would. Argues that the downside of shortening the already-short limits for these documents "would likely be even more pronounced." Argues that a 280-word-per-page conversion ratio, rounded up, should be used.

April 2015 testimony, Charles A. Bird, American Academy of Appellate Lawyers. Mr. Bird submitted both written and oral testimony.

Written testimony: The target for improvement "should be bad briefs, not all briefs in the range of 12,500 to 14,000 words." Means of improvement could include a certification for appellate specialists (and perhaps "competency standards for admission to circuit-level practice"), and better education of advocates through circuit bar associations, more oral arguments, and more informative rulings. The Committee could develop a form for pro se briefs, modeled on the Ninth Circuit's informal brief form. The Committee could consider "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," with the shortening to be done "by a motions attorney when the briefing schedule is set."

Oral testimony: The American Academy of Appellate Lawyers' view that complex cases require 14,000 words has been "confirmed in part" by the Sisk & Heise study and "anecdotally validated" by the comments of experienced practitioners. Solicitor General Verrilli's proposal – for rule text and/or a Committee Note stating that more length should be granted when appropriate – would not solve the problem that a 12,500-word limit would create for private practitioners; judges will be more willing to grant extra length to the U.S. Government than to private parties. Currently, the circuits vary widely in their willingness to grant requests for extra length. The D.C. Circuit's rule, like the Fifth Circuit's rule, disfavors requests for extra length. Problems might also arise because, in adjudicating a motion for extra length, a court might pre-judge the issues involved in the appeal.

The American Academy of Appellate Lawyers would be glad to assist in efforts to improve appellate briefs. Courts of appeals could post, on their court websites, short videos outlining how to write a decent brief. Circuit bar associations (in the circuits where they exist) could develop programs that would certify lawyers as competent in federal appellate practice. The courts of appeals could experiment with active case management.

It would be possible to change the structure of appellate briefs in ways that make them shorter. For example, the brief could commence with a short agenda-setting introduction, rather than starting with the basis for jurisdiction. The 2013 amendment, which deleted from

Rule 28(a) the requirement of separate statements of the case and of the facts, was a useful one.

The American Academy of Appellate Lawyers did not attempt to perform its own study of the history of the 1998 amendments. Most of its members were doing appellate work under the pre-1998 rules. The adoption in 1998 of the 14,000-word limit was a great relief because the prior 50-page limit was subject to a lot of manipulation (for example, through use of single-spaced text). There is reason not to trust any statistical information concerning briefs filed during the bad old days of length-limits manipulation. The pre-1998 50-page limit "was an issue in complex cases more so than 14,000 words." Lawyers tended to deal with that issue by using self-help (i.e., manipulating technicalities in order to fit within the page limit) rather than by making motions for extra length.

It is a good idea to change the remaining page limits to word limits. However, a conversion ratio of 250 words per page is too restrictive. Also, Mr. Bird endorses Mr. Samp's view that the proposed length limit for amicus briefs in support of a petition for rehearing is too short.

Responding to a question about a recent article by Carl S. Kaplan in the Journal of Appellate Practice and Process, Mr. Bird stated that, as a former journalist, he has a great appreciation for good editing. Experienced lawyers try to budget their time and to combat the disincentives to "writing short." However, after the recent recession, clients are much less willing to pay for time spent editing a brief. Also, lawyers might sometimes face unexpectedly

quick deadlines in instances when the record is filed earlier than expected. Clients can be very directive about what should go in the brief; clients and trial counsel tend to suggest additions, not deletions.

AP-2014-0002-0014: Mark Langer on behalf of the U.S. Court of Appeals for the D.C. Circuit. "The Judges of the U.S. Court of Appeals for the D.C. Circuit support the proposal to amend FRAP 32 to reduce the length limitations for briefs."

AP-2014-0002-0016: Molly Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice). Opposes the imposition of type/volume limits for petitions for permission to appeal, motions, and petitions for writs of mandamus/prohibition. By referring to the proposal's "more exacting limits" and by asserting a lack of"evidence that lengthy petitions for permission to appeal have presented a problem for the Court," suggests that the type/volume limits would shorten the existing length limits for these documents. And suggests that checking for compliance with type/volume limits would be burdensome.

AP-2014-0002-0017: Judge Laurence H. Silberman. Supports the proposal to shorten the length limits. Under the 14,000 word limit, briefs are "too long to be persuasive." Lawyers include unnecessary fact discussions and brief "marginal issues" (problems which are less likely to afflict briefs filed in the Supreme Court).

AP-2014-0002-0018: Lisa Perrochet, Chair, Rules and Law Subcommittee, Appellate Courts Section, Los Angeles County Bar Association. Supports the use of word limits, but opposes the reduction from 14,000 to 12,500 words. Argues that there is insufficient evidence that the benefits of lowering the word limit outweigh the costs. Motions to file oversized briefs in complex cases require lawyer and court time, and judges may not be well positioned to evaluate such motions before they are familiar with the appeal. Suggests that judges overestimate the benefits of shorter briefs because they are "more pleasant to read." Advocates further research to investigate, for instance, the following questions:

> "[I]s there a disparity now among circuits as to the number of motions filed seeking oversized brief limits and as to the rate at which such motions are granted? If so, would any undue disparity be exacerbated by a lower word limit? What is the briefing practice in jurisdictions where certain types of filings are subject to no limits at all? Is the quality of advocacy materially worse? And do state courts in jurisdictions with lower word counts see demonstrably higher quality briefs, overall? Are judges better able to perform their functions in those states?"

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Opposes the reduction in length limits for parties' briefs. In complex cases, the shorter limit would often cause either

inadequate briefing or a request to exceed the length limit. There is no evidence of problems with the current length limits.

The 1993 D.C. Circuit Advisory Committee study is not a good basis for selecting a conversion ratio of 250 words per page. The study used a small and non-random sample of briefs and excluded those which the study's authors deemed to contain an excessive amount of footnotes and block quotes.

Committee members' survey of some recently filed briefs indicates that the word count per page can vary and that papers compliant with the pre-1998 font size and margin guidelines "can significantly exceed 280 words per page."

Supports the introduction of type-volume limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be based on a conversion ratio of 280 words per page. Current practice features the use of proportional type, and a type-volume limit using a 250-word-per-page conversion ratio would effectively cut the permitted length. Issues addressed in these papers can be important and complex, necessitating the additional length.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. Notes "that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived." Argues that if a court decides to address an issue that is insufficiently briefed due to length limits, that will increase

the court's workload. "Reductions in word count could also trigger more collateral motions and attacks on judgments in the criminal context because of claimed ineffectiveness in appellate counsel."

Reports that the courts of appeals disfavor motions to file over-length briefs. Cites a January 2012 standing order by the Third Circuit which stated "that ... motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent." Argues that the prevalence of such motions under the existing rules shows that a further reduction in limits would be undesirable.

AP-2014-0002-0021: Chief Judge Mary Beck Briscoe. "All of the active judges of our court (except for one who abstains) support the proposed amendment to Fed. R. App. P. 32 to reduce the word limit for briefs. The vast majority of our senior judges have responded and also support this amendment."

Many briefs "are needlessly lengthy." "By excising tangential facts, secondary or tertiary arguments, or issues on which a party is unlikely to prevail, attorneys do both the court and their clients a service by focusing the court's attention on the core facts and dispositive legal issues." When necessary, counsel may seek leave to file an over-length brief.

AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission. Opposes reducing the length limits for parties' briefs and amicus briefs. The appeals in which the EEOC files briefs are often legally and factually complex. A lower length limit would result in motions to file over-length briefs and/or in inadequate briefing.

Supports adopting word limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be set using a conversion ratio of 280 words per page.

Argues that the 250-words-per-page conversion ratio "is too low and appears to be premised on a mistaken assumption that briefs filed under the old 50-page limit for briefs averaged 250 words per page. On reviewing a number of its briefs filed under the old page limit, the EEOC learned that while some briefs are shorter, several contain more than 14,000 words."

AP-2014-0002-0023: Matthew Stiegler, thirdcircuitblog.com. Opposes the reduction in brief length limits. "Brevity is a reflection of good advocacy, not its cause. Under the current limit, the courts are burdened with too many aimless, bloated 14,000-word briefs. Under the proposed limit, they will get aimless, bloated 12,500-word briefs instead. The problem is real, but the solution proposed will miss the mark."

AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center. Agrees that most briefs should be less than 12,500 words. A study

of "approximately two dozen NIJC briefs filed in recent years" showed that "all or nearly all were less than 12,500 words in length." But "some appeals have involved such a plethora of complex issues that we have approached the current word limit." And such appeals might be decided on the basis of an issue that there was barely space to brief.

"Court of Appeals cases have not had issues narrowed through the certiorari process, and cases may present numerous complex or novel issues; and a court may not be equipped in advance of full briefing and oral argument to perceive all of those issues, much less to choose among the issues which it should address." On balance, "the likely time-savings from a reduction in brief size in some small number of cases would likely be outweighed by the costs of adjudicating those additional motions for leave to file over-length briefs." Moreover, a court might deny a request for extra length, only to find that the resulting brief inadequately covers the issues – which then might lead to supplemental briefing.

Proposes an alternative to shortening the length limit: "a rule which would discourage the filing of briefs exceeding 12,500 words, but do so not by changing the word count limitation, but by requiring an additional attestation by counsel filing briefs between 12,500 and 14,000 words. The attestation could require counsel to attest that the length of the brief is required by the legal or factual complexity of the issues in the case, and that after exercising reasonable diligence, the brief could not be made to fit within 12,500 words."

AP-2014-0002-0025: Steven L. Mayer, California Academy of Appellate Lawyers. Brief length limits should not be shortened, "and word-count limits for documents that do not now have them should be set based on the same conversion ratio of 280 words per page."

Adopts by reference "section D of the comments by the American Academy of Appellate Lawyers."

The rationale for the proposals is "unpersuasive." Statutes and doctrines are more complex than they were in 1998. In a complex case it does not aid the court to truncate the brief. And shortening the limits will burden the courts with requests for extra length.

AP-2014-0002-0026: The Appellate Practice Group of Reed Smith LLP. Supports the use of word limits, but opposes the reduction in brief length limits and the use of the 250-words-per-page conversion ratio for other documents' length limits. The current rule "has worked well for 17 years" and the proposed changes "would have numerous negative consequences."

Notes that other commenters have questioned the premise "that use of the 250 word conversion ratio is necessary to correct a historical error." Asserts a lack of evidence that unnecessarily long briefs are burdening the courts in ways that cannot be addressed by other means. Poorly written briefs will remain so whatever their length, and this problem is best addressed through education of the bar.

Meanwhile, skilled lawyers may need the current length. Law, facts, cases, and appeals have become more complex. Cutting the length limits will cause more requests to file over-length briefs and can deprive the courts of information they need to decide a case. As oral arguments become ever rarer, briefs become even more important.

AP-2014-0002-0027: Cynthia K. Timms on behalf of the Appellate Section, State Bar of Texas. Opposes reducing the word limits for briefs. Word limits for documents other than briefs should be set using a conversion ratio of "at least 280 words per page."

The Appellate Section's members located 15 briefs filed in federal courts of appeals under the pre-1998 Appellate Rules; these briefs averaged 294 words per page. "[T]he fewest number of words per page was 263. The maximum number of words per page was 336." The members originally sought "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." Of the 15 briefs that were located, "around 60% of the briefs were nearly 50 pages or longer."

Also recounts a "study in 2012, when the Texas Rules of Appellate Procedure were being amended to convert page limits to word limits." This study focused on "shorter briefs filed with the Texas Supreme Court." The study "included 63 briefs and showed the average words per page was 291" (or 293 if outliers at both ends of the spectrum

were excluded). "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." Ultimately, "the Texas Supreme Court adopted a conversion ratio of 300 words per page."

The two studies described by Ms. Timms' would "support ... conversion ratios between 290 and 300 words per page."

Cases are complex and can involve huge sums of money. Local circuit practices make it difficult to file over-length briefs.

April 2015 testimony, Cynthia K. Timms, Chair, State Bar of Texas Appellate Section. Ms. Timms submitted both written and oral testimony. Her written testimony reiterated the points made in Comment AP-2014-0002-0027.

Oral testimony: Ms. Timms understands the Committee's proposal to stem from the Committee's perception of a flaw in the conversion rate employed when the 14,000-word limit was adopted in 1998. That rationale was articulated in the published materials. If the current proposal stemmed instead from some other impetus, then the Committee should re-think the entire proposal. A properly working process will create buy-in.

It was difficult to find briefs to include in Ms. Timms' study of briefs filed in federal courts of appeals under the pre-1998 Appellate Rules, because lawyers had not saved

all of their briefs from that time. The briefs included in the study were those that people hung onto; Ms. Timms' surmise is that these briefs were filed in complicated, "upper-end" cases. The Texas Supreme Court study looked at documents that were subject to short page limits. The need to fit within the applicable limit may have led lawyers to use techniques such as reducing font size, using shorter words, and/or trimming paragraphs that ended with only one or a few words in their last line. This year, Ms. Timms has filed only one brief that pushed the relevant length limit; so the studies may reflect a sampling difference.

Ms. Timms has always found a way to comply with the length limit – both the pre-1998 50-page limit and the post-1998 14,000-word limit – and she has never requested extra length. (She did, though, recall one instance in which her brief "in its initial form was rejected by the Fifth Circuit." Her client in that instance was "someone who could not drop arguments, ... and loved footnotes." The court "was very nice at working with us to get us to be able to file a[n] acceptable brief, but it was a challenge.") Ms. Timms does not think that she could have lived with a 40-page limit. The nice thing about the 14,000-word limit is that it has cut back dramatically on the number of motions for permission to file an overlength brief. (Ms. Timms made this observation in response to a question about whether, prior to 1998, there were concerns about a 50-page limit being insufficient.)

The 2013 amendment that deleted Appellate Rule 28(a)'s requirement of separate statements of the case and

of the facts has not substantially decreased the length of briefs. "The only savings is the extra heading."

AP-2014-0002-0028: Steven M. Klepper. Opposes reducing the length limits for briefs. Harmless error analysis "requires the error to be viewed in the context of the entirety of the evidence," which may be copious after a lengthy trial. Warns that shortening the length of briefs might increase the number of instances when arguments are raised for the first time in reply briefs.

AP-2014-0002-0032: Michael Skotnicki. Opposes the change in length limits. "I teach persuasive writing techniques as a continuing education instructor and blog about the process of writing appellate briefs.... While appellate judges may dislike long, poorly written briefs, they'll also dislike shorter, poorly written briefs. Meanwhile, the appellate advocate will undoubtedly be hamstrung in making his or her client's case on appeal when the facts, claims, or both, are complex. The correct focus should be on preparing law students to be better writers and for the Courts to emphasize writing quality."

AP-2014-0002-0033: Stanley Neustadter. States that "a dismaying proportion of briefs fail to prune the secondary and marginal issues; fail to crystallize and sharply define the issues chosen; have a fuzzy grasp of the limits of appellate review; and manage to display a gift for compressing the largest number of often bombastic words into the tiniest and least relevant thoughts, repetitiously to boot. Massive, undisciplined briefs divert judicial time from the skilled and focused briefs, those that actually meet

the needs of the bench [and therefore perforce of the client] rather than the ego of the brief writer."

"Not only do I favor the reduced word limit, I wouldn't stop there. I would couple the new word limit with a special rule to govern motions to file oversize briefs, a rule that makes it emphatically clear that such motions are looked upon with great disfavor, a rule that explicitly eliminates as a ground counsel's bald assertion that the record is lengthy and complex. It is one of counsel's key functions to reduce and simplify lengthy and complex lower court proceedings, not to replicate those costly features on appeal."

AP-2014-0002-0034: Jason C. Rylander, Senior Attorney, Defenders of Wildlife. Opposes shortening the length limits for briefs. "Environmental law ... is an increasingly complex field. Such cases often depend on evaluation of voluminous administrative records. They may involve numerous claims, intervenors, and amici curiae. By statute, some actions even originate in the Courts of Appeals, so there may be no prior opportunity for resolution of factual disputes." The defense side in an environmental case may have an aggregate briefing length much longer than that allocated to the plaintiffs (given that the defense side may include "a state agency intervenor and multiple interest group intervenors").

AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL supports the conversion from page limits to type-volume limits for briefs and other documents.

However, CCL opposes the recommendation that those limits be reduced below current practice." Shortening the length limit will not improve the quality of briefs. Cases that result in appeals tend to be complex, and there is reason to think that the law is becoming more complex. "Supreme Court opinions … have become substantially longer," and there is "no reason to believe federal appellate opinions have not followed suit." Briefing is all the more important in light of the fact that there may be no opportunity for oral argument.

Shorter length limits may create inefficiency in amicus practice. "Whereas now it is common for several amici to sign on to one amicus brief, a reduced word limit for amicus briefs would invite amici in complex cases to seek out other amici to make the arguments that won't fit within the new word limits ...." The length reduction "will affect amicus briefs disproportionately," given that the statement of the amicus's interest and the authorship-and-funding disclosure count toward the length limit.

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee endorses these proposed amendments." The proposed word limits "better achieve the intended result of maintaining the length limits in place in 1998." And a circuit would be free to adopt a local rule permitting longer briefs.

The "proposed amendments relating to papers other than briefs on the merits ... provide greater uniformity in

length limits across different types of appellate papers, and greater clarity in calculating a paper's length."

"[T]hese amendments should be adopted or implemented in a manner that applies the changes in length limits only to appeals filed after the Effective Date, because without that specification there will be appeals in which the Appellee's principal brief is subject to the shortened word count even though the Appellant's principal brief was not."

AP-2014-0002-0037: Richard L. Stanley. Voices "strong opposition" to the proposed reduction in length limits in Appellate Rules 28.1 and 32(a)(7). Also argues that the proposed new word limits in other Rules "should be based on a conversion ratio of at least 280 words per page, and preferably ... 300 words per page."

Based on his experience litigating patent cases in the Federal Circuit (as well as other types of cases in the federal appellate courts), reports that "the latter stages of the appellate brief writing process under the current rules is already unduly focused on the labor-intensive, delicate, and often painful task of reducing each brief to the required word count in a manner that does not unduly sacrifice its meaning, clarity, or possible success." Shortening the limit "to 12,500 words will not turn 'bad' brief writers into good ones [but] may turn some 'good' briefs into 'not so good' ones." Briefs in complex cases start out longer than the length limit and are edited down until they are just under the length limit. "[J]ust as it is doubtful that any attorney whose initial draft of a brief contains less than the required word count will add text merely for purposes of increasing

its length, it is also doubtful that most attorneys whose briefs satisfy the word count will engage in extensive further editing merely to achieve a shorter brief." Gives a sampling of "word processing techniques and word counting tricks" (such as over-use of abbreviations) and predicts that they will proliferate if length limits are shortened. Attorneys will "excise important procedural details [and] incorporate factual background and even substantive material from citation to the record," and tracking down that referenced information will be more burdensome for judges than reading a longer brief.

Asserts "that the courts of appeal will soon realize a need to adopt a formal rule like that in Supreme Court Rule 37.6 to prohibit counsel for parties from authoring any part of a supporting amicus brief and to prohibit both counsel and parties from making any monetary contributions to such amicus briefs." Also predicts "that the courts of appeal will also realize a need to adopt a formal rule to govern and restrict when multiple or related parties on the same side of an appeal can file separate briefs which address different issues while adopting the positions set forth in the parallel brief(s).... Until then, while the briefs may be shorter, it is quite possible that there will be more of them." And predicts an increase in requests for permission to file overlength briefs and requests "for judicial notice."

AP-2014-0002-0038: Walter K. Pyle. The law has become more complex since 1998 – as illustrated by "Supreme Court caselaw interpreting the Antiterrorism and Effective Death Penalty Act." "Judge Easterbrook, who

should know, says 14,000 [words] was chosen because it was thought to be a good number. It is." Shorter limits will not improve brief quality and will penalize litigants in complex cases. The proposal fails to account for variations in case type and complexity. "In California the word limit for a brief in a civil case is 14,000, and in a criminal appeal it is 25,500. Criminal cases and complex civil cases normally require more words."

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. "NACDL opposes the proposed reduction of type-volume limits and page[] lengths throughout the appellate rules." A conversion ratio of 280 words per page should be used in setting new type-volume limits. The complexity of federal criminal cases has increased, due to the substantive law, the inclusion of multiple counts, and the increasing intricacy of sentencing and habeas issues. Explaining why error was not harmless requires thorough discussion of the record. "[T]he number of precedential opinions required by rules of professional responsibility to be cited is ever-growing." The proposed limits would impair the constitutional effectiveness of NACDL's members (when representing clients) and the efficacy of NACDL's own amicus filings.

"To the listing of excluded portions under Rule 32(f), the Committee should add any required statement of related cases in a brief. For similar reasons, the required statement justifying en banc review under Rule 35(b) should be excluded from the word-count in a rehearing petition."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. "The PBA supports proposed amendments to Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, and Rule 40, governing page and word limits for filings, and Form 6." Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules."

The memo states that "[t]he Committee ... felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement." At the Committee's suggestion, the Committee Chair solicited the views of the judges of the U.S. Court of Appeals for the Third Circuit. "Judge Michael Chagares ... indicated his strong support for the changes. Comments were received from almost half of the court and two judges expressed strong concern in shortening briefs as less words may ultimately reduce the quality of the product. The Chair of the FPC is also a member of the Third Circuit standing panel to review requests for excess pagination. In 2013-2014 motions were received on 65 cases and relief was denied on 13 cases. This is a relatively small percentage of the court caseload and experienced counsel have learned that excess pagination requests are disfavored. The consensus of the court was that the proposed changes will not impact the frequency of requests. The FPC chair believes the Committee should support the proposed amendments based on the assurance of Judge Chagares that the recommendation was made only after all the issues

were carefully and fully considered by the Advisory Committee on Appellate Rules."

AP-2014-0002-0041: The Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference. The Council opposes reducing the length limits for briefs. "[T]he 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." Shorter limits will not improve the quality of poor briefs, but such limits will require good lawyers to expend effort moving for permission (which may not be granted) to file a longer brief and will burden those whose cases are complex, have extensive records, or feature multiple parties. Adequate briefing is all the more important in light of the curtailment of oral argument. "The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count." (The Council appended members' comments – 15 opposing a reduction in the length limit and two supporting such a reduction.) Briefing could be improved through educating lawyers and by altering font, line spacing, and margins. "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."

April 2015 testimony, David H. Tennant, Co-chair, Appellate Rules Committee, Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference. Mr. Tennant submitted both written and oral testimony. His written testimony reiterated the points made in Comment AP-2014-0002-0041.

Oral testimony: In one of Mr. Tennant's areas of expertise – federal Indian law – the issues are complex and courts tend to be willing to allow parties extra brief length when needed. By contrast, Mr. Tennant recently represented a defendant-appellee in a discrimination case; the appellant submitted an under-sized brief with seven incompletely-articulated grounds for reversal. In such instances the appellee's brief needs space to address the defects and fill the gaps in the appellant's brief. Lawyers need the current 14,000 words in order to assist the court when an opponent's unskilled lawyer writes a deficient brief.

Length is a very crude measure of brief quality. But the Sisk & Heise study suggests a strong positive correlation between the length of the appellant's opening brief and success on appeal.

The Committee should conduct further study of the courts' actual practices. How do courts treat motions for permission to file over-length briefs? In the set of unduly-long briefs, can patterns be discerned? Do such briefs tend to arise in particular subject areas? Areas where the law is

settled? Multi-party cases? Appeals in which a litigant raises too many issues?

When Mr. Tennant was a law clerk, what bothered him were the briefs that omitted citations to the record and to pertinent legal authorities. He therefore prefers to err on the side of completeness. Also, lawyers must contend with "clients who make all kinds of real world demands."

At least one circuit has a local rule that requires motions for extra length to be made two weeks before the brief's due date. It can be very challenging to comply with such a timeline.

The 14,000-word limit has worked well since 1998 and should not be changed. The question on which the Committee should focus is what makes sense today, not a technical question concerning the basis for the change in 1998. It is key for litigants to feel that they have had their day in court, and with oral arguments increasingly rare, adequate space for briefing is essential.

AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission. Opposes the proposed "word limits for appellate briefs in Proposed Rules 28.1, 29 and 32." Those limits "could negatively affect our ability to convey important information in SEC briefs. Many SEC appeals arise from lengthy and complex district court or administrative proceedings that have voluminous records. In such matters, the SEC often must dedicate a significant number of words to the statement of the facts ...." Many such appeals

"involve specialized securities law issues relating to complex regulations, financial instruments, transactions, markets, and frauds. Such matters may be unexplored by the other parties in the case, particularly in some of the pro se cases, and reducing the word count could force the SEC to truncate its discussions of these complex matters, increasing the burden on the court ...."

AP-2014-0002-0043: Jonathan Block. "The proposed change to the rules ... governing the length of briefs should either be rejected or modified to maintain the current word limit, but allow a greater number of words where there are complex factual, legal and technical issues presented." For many cases involving nuclear, energy, or environmental regulation, legal and technical complexity requires briefs longer than the rules currently permit. Shortening the length limits will deprive the courts of needed information and increase the risk of judicial error.

AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP. Opposes the proposal to reduce Rule 32's length limits for briefs. The current limits "strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions.... [A] reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits." Many appeals are complex due to, e.g., "intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law." Shorter limits "would impose particular harm on parties on the same side of a

consolidated or joint appeal who, under the local rules of several circuits, must submit a joint brief." Shorter length limits would burden the courts with more frequent motions to file overlength briefs, and issues of waiver (due to inadequate briefing) would arise more often. "[A]ppeals court filings have decreased by fifteen percent over the past ten years.... Consequently, the courts are less burdened, in terms of the total amount of briefing they must review, than they were when the current word limits were adopted."

AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice ("DOJ"). As to the proposal to change page limits to word limits in Rules 5, 21, 27, 35, and 40, DOJ "defers to the views of the FRAP Committee concerning the need for such a change and whether it is more likely to reduce or exacerbate the burden on clerks' offices ...." However, the proposed word limits may be too short for some substantive motions (such as a motion for summary disposition), for petitions for a writ of mandamus, or for other filings. If those word limits are adopted, DOJ urges that the Committee Notes to Rules 5, 21, 27, 35, and 40 be amended to state in part: "Substantive filings may in some cases require additional words, and courts should apply the type-volume limits flexibly, granting leave where appropriate for a party to submit an over-length filing."

As to the proposed change in the length limits for briefs, DOJ "supports the proposal to reduce the word limit to 12,500, but with an important caveat. The Department's appellate litigators harbor a significant concern that the

proposed reduction could, in a small but important category of cases, compromise the Department's ability to discharge its duty to represent the interests of the United States, as well as its duty to serve as an officer of the court." Most briefs can be "substantially shorter than the current word limits." But in some cases (including "with some frequency" cases to which the United States is a party), longer briefs will be necessary. The Government may need to "respond in one consolidated brief to briefs filed by multiple criminal defendants"; may need to provide factual, procedural and legal context omitted from criminal defendants' briefs; or may need to respond to multiple amicus filings. DOJ urges that this type of need be addressed "either in the rule text or in the Committee Note."

Specifically, DOJ recommends that a new Rule 32(h) be added: "(h) A party may seek leave to file a brief that exceeds the type-volume limits imposed by these rules, and courts should grant leave when a party demonstrates that the type-volume limitation is insufficient in the specific circumstances of the case." DOJ also recommends the following addition to the Committee Notes to Rules 28.1, 29, and 32: "A party that must respond to multiple briefs by opposing parties or amici, or that must include additional information in its brief explaining relevant background or legal provisions governing a particular case, may need to file a brief that exceeds the type-volume limitations specified in these rules, and courts should accommodate those situations as they arise. Rule 32(h) recognizes that those circumstances might arise, and that courts should

accommodate them by granting leave to exceed the type-volume limitations."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. Addresses the proposal "that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words," and observes that "an effect of the proposed change (per the operation of Rule 29(d)) would be to reduce the word limit on amicus briefs from 7,000 words to 6,250 words." Opposes both these reductions.

Many briefs do not require 14,000 words, but in a complex case a limit tighter than 14,000 words will prevent attorneys "from fully developing important legal arguments" and/or will burden courts with more numerous requests to file overlength briefs. Nor will a tighter word limit improve the quality of briefs. The "principal cause" of the increase in brief length since 1998 is font size: "[T]he 1998 amendment to Rule 32 ... mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font."

States that he is "unaware of any instance in which a federal appeals court granted" a request by an amicus to file an overlength brief. Asserts that "[b]efore 1998, the page limit on amicus briefs was 30 pages," and based on that assertion, argues that "the Advisory Committee's rationale for limiting a party's brief – that a 12,500-word limit better approximates the pre-1998 50-page limit ... – is inapplicable to amicus briefs" and that "the Committee's rationale would support a 7,500-word limit (250

words/page x 30 pages) for amicus briefs ...." The "most plausible argument" for tightening the length limit for parties' briefs – that "overly long, unpersuasive briefs" waste judges' time – does not apply to amicus briefs because judges do not "feel obliged to read all amicus briefs." Drafters of amicus briefs thus have incentive to self-limit their length. If the length limits for parties' briefs are tightened, Rule 29 should "be amended to state ... that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words."

AP-2014-0002-0047: Alan J. Pierce on behalf of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction. "We have discussed and without dissent oppose the proposed word count reduction. We oppose it for the reasons set forth in the ABA Council of Appellate Lawyers' (CAL) comments, and further point out that in our bi-annual Second Circuit CLE in October 2014 the three (3) participating judges of that Court also expressed their view that there was no reason to reduce the word count of appellate briefs. If adopted, this change will likely result in unintended adverse consequences, including substantial motion practice seeking permission to file oversized briefs, and briefs full of unnecessary footnotes to meet the reduced page limit. No problem with the 14,000 word limit in place now has been documented."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis

LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. Opposes the reduction in length limits for briefs. Appeals often involve "multiple causes of action, complex statutory schemes, ever-growing bodies of precedent, disputes among lower courts, threshold questions of jurisdiction and standing, interactions between state and federal law, ... complicated technologies or business arrangements[,] .... statutes with complicated common-law backgrounds or legislative histories, ... cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand." A tighter word limit could require a litigant to forgo an argument or brief it inadequately. Decreasing the length limit would burden judges with an increase in motions to file overlength briefs and with extra work to fill the gaps left by inadequate briefing. Where there are multiple litigants on the same side, shorter length limits may result in "an ineffective joint submission, or multiple briefs." The U.S. Supreme Court gives litigants 15,000 words for opening merits briefs "addressing what is often a single question of law (and usually in a clean vehicle)." The 1993 study by the D.C. Circuit Advisory Committee on Procedures surveyed "only fifteen opening briefs and thirteen reply briefs," and 11 of those briefs "would have exceeded the proposed new limits." Also, "Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio."

"If the Committee decides to reduce the word limits in Rule 32 notwithstanding these concerns, it should, at a

minimum, add a statement making clear that nothing in the rule prevents the courts of appeals from granting increased page limits, especially in cases where the parties agree that the case is a complex one and warrants more words."

AP-2014-0002-0049: Professor Gregory Sisk. Attaches a paper coauthored with Michael Heise: Gregory C. Sisk & Michael Heise, "Too Many Notes"? An Empirical Study of Advocacy in Federal Appeals, 12:3 Journal of Empirical Legal Studies (forthcoming 2015). "Studying civil appeals in the U.S. Court of Appeals for the Ninth Circuit, we found that, for appellants in civil appeals in which both sides were represented by counsel, briefs of greater length were strongly correlated with success on appeal. For the party challenging an adverse decision below, persuasive completeness may be more important than condensed succinctness. Rejecting as foolish the proposition that prolixity is a positive value in itself, we suggest that the underlying cause of both greater appellant success and accompanying longer briefs may lie in the typically complex nature of the reversible civil appeal. In light of our findings, reducing the limits on number of words in federal appellate briefs could cut more sharply against appellants."

AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP. Opposes reducing the length limits for briefs. "[T]he proposed limit of 12,500 words for principal briefs and the correspondingly reduced limits for cross-appeal and reply briefs are too low and would negatively affect the quality of briefing in complex cases involving multiple issues."

Doubts that the 1998 amendment actually increased the permitted length of briefs: "although 14,000-word briefs prepared after the 1998 amendment typically exceed 50 pages because of the increase in the minimum font size to 14 points, many if not most 50-page briefs filed before the rule change were in 12-point type and contained more than 14,000 words." It is already difficult in a complex case to address the facts, cite evidence and legal authority, and include required components of the brief. A shorter limit would mean fewer useful record citations and parentheticals; more artificial devices to cut length (such as use of acronyms); and choices between paring down all arguments or omitting certain issues entirely. The latter is risky: "Members of our practice have repeatedly prevailed on appeal based on arguments that they deemed to be the least likely to succeed and that they would have jettisoned had they been required to file a shorter brief." Predictions are particularly difficult because in most circuits "the identity of panel members is unknown at the time of briefing ...." Challenges to a punitive damages award illustrate the broad range of issues on appeal, any one of which might prove decisive. The shorter limit would particularly disadvantage appellants (whose briefs have more required components). It would also lead to the omission "of important context[]," leaving courts unaware of potential broader implications of a decision. The courts will likely remain unwilling to grant requests for extra length, and such requests will burden the courts and impose uncertainty, cost, and delay on litigants.

AP-2014-0002-0051: Dershowitz, Eiger & Adelson, P.C. Voices "deep concerns about the proposed reductions

in the word limitations." Many of the firm's cases "have involved multi-defendant trials with 10,000 pages of transcripts, hundreds of exhibits, multiple pre-trial motions and hearings, jury deliberations that last for days, and multi-day sentencing proceedings. Some indictments are ninety counts, with verdicts split irrationally on the counts of conviction. Sometimes argument by trial counsel over an evidentiary or expert issue will spread over many days of transcript, and frequently the district court will revisit an issue repeatedly during a trial. It is not uncommon for such large and complex cases to involve eight or ten meritorious issues on appeal." "Very often we are required to dedicate several days to a substantial editing process in order to meet the current word limits. Of course, we must ... preserve issues or risk waiver ... [and] the government's claims of waiver by appellants seem to have increased substantially." And collateral review may be unavailable for issues "not adequately preserved on direct appeal." Sometimes an appeal will be decided based on an issue that "counsel intended to address and dispose of" but did not, "due to space constraints." And addressing whether an error was harmless "is difficult ... under severe word limitations."

AP-2014-0002-0052: Howard J. Bashman. Opposes "the proposed word limit reduction amendment."

"[T]he Advisory Committee's explanation offered for the proposed word limit reduction appears to be erroneous," because "the current 14,000–word limit was not adopted in error." "The previous 50-page limit permitted the filing of professionally typeset printed briefs,

resembling the printed booklets that advocates in 'paid' cases are still required to file in the U.S. Supreme Court"; such a brief could "contain[] far more than what a 50–page brief prepared on 8 1/2 by 11 inch paper would have allowed."

The proposed "11-percent across-the-board reduction in maximum brief size" is unjustified, will "[d]epriv[e] many litigants of the opportunity to say what needs to be said in their only appeal as of right," and "will disproportionately impact in a negative way the quality of the appellate briefing in the most important and complex cases, cases that are ordinarily handled by the most talented appellate advocates." "[E]ven the most highly regarded appellate advocates in particularly complex cases regularly find it necessary to file briefs that approach the current word limits." The court of appeals can affirm on a ground not addressed by the trial court, and multiple appellees sometimes file separate briefs, with the result that the appellant's reply brief may need to address a great many issues. Appeals often involve complex facts and/or law (such as foreign law) and a 14,000-word brief may be necessary to educate generalist judges.

Tightening the length limits will burden judges with the need to research issues that are briefed inadequately "(albeit not to the point of waiver)" and may increase the number of separate briefs filed per side when there are multiple parties per side on appeal. (Mr. Bashman also appears to suggest that tighter length limits might make appeals more difficult to decide because briefs that go on too long or "unnecessarily raise too many issues can make

a case easier to decide, by reducing the effectiveness of all the claims of error.")

AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California's Committee on Federal Courts. "[O]pposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40."

Although "many appellate briefs are longer than they need to be," complexity (such as that arising from "novel legal issues or divergent precedents, or ... a complex factual record") may require longer briefs. In order properly to assist the court, a brief may need to include specific record citations, explanation of conflicting legal authorities, and/or correction of inaccuracies and omissions in an opponent's brief. The tighter length limits would fail to address briefs that are unduly long but shorter than 12,500 words, and would "disproportionately affect cases that actually require long briefs." The change would thus impair judicial decisionmaking "while doing little to lessen judges' overall burden from overlong briefs." The increase in motions for leave to file overlength briefs will burden courts and litigants, outweighing "any efficiency savings achieved by the word count reductions." Such motions will occur at an early stage in the appeal, requiring the decisionmaker either to invest time in learning the relevant facts and law for purposes of deciding the motion or to "risk inappropriately refusing extensions."

The word limits in Rules 5, 21, 35, and 40 should be derived using a conversion ratio of 280 words per page

rather than 250 – yielding limits of 5,600 words (Rule 5(c)); 8,400 words (Rule 21); and 4,200 words (Rules 35 and 40). For petitions for panel rehearing and/or rehearing en banc, the length is needed to explain why rehearing is appropriate – such as "when an opinion has created major conflicts with circuit precedent, or when circuit precedent needs reconsideration in light of intervening Supreme Court rulings or a trend in other circuits." Also, proposed Rule 29(b)(4)'s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (not 2,000 words).

"We take no position on the other aspects of the proposed changes ... , including the proposed word count limits for motions under Rule 27, and the proposal to require word count limits instead of page limits in submissions prepared on computers. The Committee supports the proposed amendment to Rule 32(f) setting forth a uniform list of items that can be excluded when computing a document's length."

AP-2014-0002-0054: James S. Azadian on behalf of the Appellate, Writs, and Constitutional Law Practice of Enterprise Counsel Group ALC. Opposes "the proposal to reduce the maximum size for principal briefs."

Such a change would increase court burdens and delay by spurring "the proliferation of principal briefs as well as motions to file oversized briefs." Because a number of state appellate courts permit briefs to be 14,000 words or longer, lawyers who frequently practice in state court "are

likely to more frequently file oversized-briefing motions." A 12,500-word brief typically does not suffice in "more complex or multiple-issue appeals presenting, for example, challenges to multiple trial court rulings or agency determinations." Moving for permission to file an overlength brief is burdensome and the courts of appeal disfavor such motions (as evidenced by local rules from the Second and Ninth Circuits, a standing order from the Third Circuit, and a 2012 article by Third Circuit Chief Judge Theodore A. McKee reporting the results of an informal survey (of the Circuit Clerks) by the Third Circuit Clerk's Office).

Michael Gans's research "signals the proposed rule change may be 'a solution in search of a problem' because such a change is expected to affect the maximum size of briefs in only approximately ten percent of appeals." The shorter length limit would prevent adequate briefing in complex cases and would not prevent unwarranted length in cases where the briefs should be shorter than 12,500 words. The solution for prolixity is better training (of inexperienced lawyers) by law schools, continuing legal education, and more experienced lawyers.

Other commenters have submitted "compelling evidence that the length of principal briefs was not mistakenly increased in 1998." And even if the 1998 change was a mistake, "correction after approximately 17 years" would not be appropriate.

AP-2014-0002-0055: Andrew G. McBride, Matthew J. Dowd, & Kevin P. Anderson. "[S]trongly

urge" rejection of the proposed reduction in brief length limits (while acknowledging "valid reasons to use word limits instead of page limits for all submissions to the courts").

Any benefit from the length-limit reduction "would be outweighed by the detriment to briefing in complex appeals, particularly in patent and telecommunications appeals." Argue that Judge Easterbrook's comment (AP-2014-0002-0006), "casts serious doubt on the correctness of the Advisory Committee's conclusion" that the 1998 choice of a 14,000-word limit was the product of an error. In any event, the "key inquiry" is whether the current word limit works well, and it does. They always strive for conciseness in writing briefs, but length is necessary to address complex technologies in patent cases or "lengthy administrative hearings or rulemaking proceedings" in telecommunications cases. The availability of a motion to file an overlength brief "is not a sufficient safeguard"; such motions are often denied, and even if granted, require extra work for litigants and the court.

AP-2014-0002-0056: Patrick Bryant. "[O]ppose[s] the proposed word-limit reductions." The proposed change will fail to improve brief quality. The burden of adjudicating more motions to file overlength briefs (and/or motions for extensions of time) will outweigh the burden of reading "the small number of briefs" that exceed 12,500 words under the current rules. Federal criminal cases are increasingly complex, and full briefing is all the more important because oral argument is so rare in the Fourth Circuit. "The proposed word-limit reduction might be

unobjectionable if it were accompanied by a liberalization of court rules concerning oversize briefs. However, in most courts such motions are disfavored." The time for seeking extra length is especially tight in the Fourth Circuit, which requires such motions to be made "10 days in advance" and which sets "shortened deadlines for briefs in criminal cases."

AP-2014-0002-0057: Steven Finell. "[J]oin[s] in the comments submitted by the American Bar Association Council of Appellate Lawyers concerning the proposal to reduce the maximum length of briefs and other papers."

Points out that "[t]he proposed amendments would delete Rule 32(a)(7)(C), which requires a certificate of compliance, and move its content (with substantial amendments) to Rule 32(g). Therefore, if Rule 32(a)(7)(A) is retained, the reference to '(C)' must be changed to 'Rule 32(g).'"

Supports "the proposal to adopt type volume limits for all length limits" in the Appellate Rules, because "type volume limits are fair and avoid gamesmanship." But "the structure of the proposed amendments is unnecessarily complex." Instead, "each type of brief or other document should have a word limit if prepared on a computer, and a page limit only for persons who do not have reasonable access to a computer on which to prepare the document." There is no need to give computer users the option of using a line limit. And giving computer users the option of a page limit for briefs invites the use of "hideously narrow,

hard-to-read, condensed serif fonts" and the reduction of "letter and word spacing."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[O]pposes these proposed amendments to the extent they would reduce current word limitations or apply a conversion rate of 250 words per page to those rules that are currently based on a page limit, not a word limit." But "supports the other proposed amendments to" Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6.

The California Court of Appeal sets a 14,000-word limit for principal merits briefs; "[i]n our experience, that word limit works best and should not be reduced." The proposed shorter limits "will impair the ... sufficient development of the facts and issues in complex appeals." The reduction "may also increase" the courts' workload by generating more motions for extra length and/or "by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs."

AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Oppose the proposed reduction in brief length limits. The "shortened word limits will likely present attorneys in complex cases with a dilemma: drop valid claims or raise them in such an abbreviated form as to risk losing the claim and making bad law." The problem will be especially acute "in cases involving review of governmental agency actions, many of which are heard for

the first (and only) time in the federal courts of appeals," and which can affect the public as well as the litigants.

Agency records "are often extensive, and parties may have valid legal objections to numerous different parts of the regulation, each of which needs to be explained separately." Adequate briefing is particularly important both to avoid waiver and to overcome the applicable standard(s) for deference to agencies' statutory interpretations and factual findings.

Agency review cases often involve multiple parties with "different (and often adverse) interests." For example, "regulated entities [may] claim that a regulation is too stringent and ... environmental groups [may] claim it is insufficiently stringent." The D.C. Circuit, in such cases, "typically receives two or more petitioner briefs," but "usually reduces the number of words allowed in any individual brief substantially." If the length reductions are adopted, "it is likely that courts will continue to shorten [the limits] further in multi-party cases."

"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 valid claims." Not only would that harm public policy, but also it "would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions."

Motions for extra length "are hardly ever granted" (as illustrated by the D.C. Circuit's local rule), and even where they are granted, they are burdensome to litigants and the court. And "the current 14,000 word limit was established before the establishment of circuit rules that require parties' briefs to include additional sections" – for example, D.C. Circuit Rule 28(a)(7)'s requirement concerning the basis for standing; "such additional sections ... can substantially reduce the number of words available for merits arguments."

April 2015 testimony, James S. Pew, Earthjustice. Mr. Pew's written testimony reiterates the concerns stated in Comment AP-2014-0002-0059 and notes that judicial review of agency action frequently involves a lengthy record, intricate regulations, and "multiple claims involving complex technical issues."

Oral testimony: Mr. Pew's oral testimony reiterated concerns raised in his written submissions. Most of Mr. Pew's practice involves proceedings in the D.C. Circuit seeking judicial review of federal agency action. These cases implicate the public interest, and judicial review provides the only check on federal agencies' exercise of authority. Proceedings before the agency do not narrow the issues presented for judicial review. Rather, the petitioner may need to request that the court remand to the agency with directions to address multiple defects in the prior agency determination. A one-size-fits-all length limit does not make sense, because the need for length depends on the number of issues. An unduly short limit could force litigants to drop valid claims; and motions for extra length

are not a good solution because courts are less likely to grant such motions when the motion is made by a private litigant than when the motion is made by the U.S. Government.

Adequate space is important in the reply brief as well as the opening brief; the respondent's brief may raise a new issue, such as standing, that the reply brief must address.

The D.C. Circuit already shortens briefing length limits on a regular basis, so the courts already have a process for addressing undue length without any change to the Appellate Rules. (In response to a question, Mr. Pew stated that he is unsure whether the D.C. Circuit shortens the length limits for briefs in cases that do not involve multiple parties on a side.) If the default length limits set by the Appellate Rules are decreased, the D.C. Circuit may continue its practice of shortening the default length limits in multi-party cases.

A system setting shorter default length limits and relying on motion practice to tailor those limits in cases that require greater length may actually end up consuming more judicial resources than the current system.

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Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~(b)~~ (3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~(c)~~ (4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(2)~~ (B) a table of contents, with page references;

~~(3)~~ (C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

~~(A)~~ (i) a party's counsel authored the brief in whole or in part;

~~(B)~~ (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~ (iii) a person—other than the amicus curiae, its members, or its counsel—

contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance, if required by Rule 32(a)(7).

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs 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.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length**. Rule 29(a)(4) applies to the amicus brief. The brief must

include a certificate under Rule 32(g) and not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Changes Made After Publication and Comment

The Committee changed the presumptive length limit under Rule 29(b)(4) from 2,000 words to 2,600 words and deleted the alternative line limit. The Committee changed Rule 29(b)(5)'s presumptive deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing.

Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal, except that "2,000 words for a brief of an amicus curiae on rehearing is too short." Such briefs "tend to be filed in ... difficult cases." Amici should have the same limit as the party – which, according to the comment, should be at least 4,200 words. (The comment asserts that the 15-page limits in Rules 35 and 40 should be "converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.")

AP-2014-0002-0016: Molly C. Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice). States that the time limits proposed for amicus filings in connection with rehearing petitions are too short. "[The] short turnaround time is likely to negatively impact the quality of the briefing and invite motions for extensions of time to file such briefs. Ninth Circuit Rule 29-2(e)(1) provides a 10-day period within which to file a brief to support or oppose a petition for rehearing."

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Argues that the deadline for amicus filings in support of or opposition to a petition for rehearing should be seven days after the filing by the party supported. Argues that the

seven-day time lag is needed so the amicus can read the filing by the party that it supports and that such a deadline would not cause undue delay and could be shortened by order when necessary. Complains of the lack of an explanation for the shorter deadlines set by proposed Rule 29(b)(5).

As noted elsewhere in the agenda materials, the Committee on Federal Courts also appears to suggest that length limits for these amicus filings should be set using the 280-words-per-page conversion ratio.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission. Supports the idea of specifying timing for amicus filings in connection with rehearing petitions, but disagrees with specifics of timing and length.

A deadline of "one week after the party's rehearing petition" would be preferable. Three days is too short, especially "where the Office of General Counsel would have to obtain Commission approval before filing an amicus brief."

"[T]he word limits for amicus briefs and party petitions should be the same. That is the rule in most

circuits now ...." Amici "must ... include a statement of interest" and they need space to develop their argument. Complains that the proposal does not explain the reasons for setting the limit at 2,000 words.

AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center. The NIJC "welcomes additional rulemaking to clarify the standards for amicus briefs filed at the rehearing stage, but submits that the word count limitations are likely so limited as to be unhelpful to courts of appeals."

Supports "the proposed timing of amicus briefs." There should be some time lag between the party's due date and the amicus's due date. It is not always appropriate for amici to coordinate with the party whose position they support.

However, the proposed length limit (2,000 words) is too short. The party's briefing may be inadequate, leaving to the amicus the task of adequately explaining the need for rehearing. This is often true in immigration cases. "The proposed word limits might be sufficient for amicus efforts which focus on the importance of an issue for en banc review; but this is surely not the only (or even the princip[al]) benefit of amicus briefing at the rehearing stage.... One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision" (for example, a panel might narrow its reasoning and reserve some issues for future decision). "Adoption of the Tenth Circuit's [3,000-]word limit would be more likely to permit helpful amicus filings at the rehearing stage ...."

AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL favors the amendment of Rule 29 to set forth default rules regarding the filing of amicus briefs in connection with rehearing. However, CCL opposes the unrealistic limitations in proposed Rule 29(b) and questions limiting proposed Rule 29(a) to 'the initial consideration of a case on the merits.'"

Amici should have more time and more space. The amicus's deadline "should be extended from 3 days to one week after the party has filed the petition for rehearing." 2,000 words is too short; "[r]ehearings are often sought by parties on the basis of facts that were not available to the initial panel or intervening developments in the law which would have altered the result."

Proposes "that proposed Rule 29(a) either be changed to delete the words 'initial' from both the subheading and the text of Rule 29(a)(1), or that the Committee add a provision Rule 29(c) regarding amicus filings during the panel's or en banc court's subsequent consideration of the merits. The current rule does not limit when amicus briefs may be permitted ...." Amici may wish to brief the merits "after rehearing en banc has been granted or after a case has been remanded from the Supreme Court."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee generally supports this clarification, particularly

in light of the room it leaves for courts to develop their own rules." However, an amicus opposing rehearing should have a time lag of three days after the filing by the party opposing rehearing. An amicus will need "to point out how its own interests in the outcome differ from those of the parties and how its position is not otherwise adequately represented in the briefs that are already before the court" – a task that requires the amicus to review the party's brief before finalizing its own.

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. "NACDL applauds the Committee for addressing this long-overlooked issue." However, for amicus filings in connection with a petition for rehearing, the word limit should be 2,250 words rather than 2,000. Also, the proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short. "[A] five-day rule would allow the volunteer private counsel who typically author such documents a better chance to communicate with party counsel, obtain copies of needed record documents, and then fit this pro bono work into their schedules."

AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission. Opposes the proposed "word limits for appellate briefs in Proposed Rules 28.1, 29 and 32."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. "[L]argely

support[s]" the proposal. "Nationwide uniformity" is important. Proposed Rule 29(b)(5)'s three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) gives the amicus time to read the petition without "unduly interfer[ing]" with the court's process. But the length limit should be 2,500 words rather than 2,000 words; 2,500 words "better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages."

AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP. Especially in connection with a request for rehearing en banc, amicus briefs can usefully provide expertise, illuminate a holding's implications, and address points omitted by the parties. The proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short: "[A] potential amicus would have only 17 days after entry of judgment to evaluate the panel's opinion, learn whether either party plans to seek rehearing, obtain the necessary internal and external approvals to submit an amicus brief, retain counsel, and prepare the brief." Proposes "that the proposed rule be modified to require the amicus to file only a notice of intent to file a brief at the three-day deadline but permit an additional seven or ten days for the preparation and filing of the brief." As a second-best alternative, proposes "that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed."

AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California's Committee on Federal Courts. Proposed Rule 29(b)(4)'s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (i.e., (2,000 * 280) / 250).

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[S]upports clarifying the procedures for filing amicus curiae briefs at the petition for rehearing stage for those circuits that do not have existing local rules on the subject, but opposes the short word-length limits and due dates proposed. In the experience of our Committee members, the Ninth Circuit's existing local rule, Rule 29-2, serves as a better model and has proven workable." Notes that the proposed Rule 29(b) merely sets default rules and would leave the Ninth Circuit's rule in place, but argues that Rule 29(b)'s default rules should track the Ninth Circuit's rule because the latter "provides a well-tested and preferable model for other circuits."

2,000 words "is insufficient for amici to explain both their interest in the subject matter of the case and their unique view of the issue(s) presented"; Ninth Circuit Rule 29-2 permits 4,200 words. The proposed due date ("within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support") provides "insufficient [time] for amici to review the brief of the party being supported to avoid redundancy"; Ninth Circuit Rule 29-2 sets a due date of 10 days after the filing by the party supported.

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Rule 26. Computing and Extending Time

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(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic

transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act. . . after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Changes Made After Publication and Comment

The Committee added language to the Committee Note to recognize the need for extensions of time in appropriate cases.

Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal.

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Supports the proposal.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her

comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. A majority of the Committee's members "generally endorses" the proposal (a minority dissents from this endorsement, fearing that the amendment "will lead to 'gamesmanship'"). Observes that electronic service after business hours, particularly on a Friday night, can be unfair, especially where the papers are voluminous and will need to be printed. However, difficulties can be worked out by agreement or by seeking relief from the court.

Notes that "in the New York State court system, where electronic service is permitted it is considered equivalent to service by hand; that is, it does not give rise to additional time to respond. We are not aware of any systemic problems with this practice; indeed, we understand at least anecdotally that practitioners in New York are so accustomed to electronic service being treated as equivalent to service by hand that many do not take advantage of the three extra days in federal court."

AP-2014-0002-0038: Walter K. Pyle. Opposes the proposal. "[T]he same concern exists today [as in 2002] – particularly for the small law office – that an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not." Mr. Pyle reports personal experience with lawyers who "invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve

complex motion papers electronically." Nor is the computation of the three added days difficult.

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. Opposes the proposal as based on "arid logic." Criminal defense lawyers are overburdened and many work solo or in small firms with little support. Many "do not see their ECF notices – much less open and study the linked documents – immediately or even on the same day they are 'received' at the attorney's email address." These attorneys need the extra three days when served electronically. The change would increase the number of motions for extra time.

"[I]f the 3-day addition is to be retained," NACDL proposes adding "a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within which the party must act is determined by the date the document is deemed filed by the clerk, unless a new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. Opposes the proposal. Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed

Amendments to Appellate Rules." The memo expresses "concern[] that electronic service may happen at any time of day or any day of the week," and argues that "the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times."

AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP. Acknowledges that the three-day rule for electronic service "is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously." But argues that, if electronic service is excluded from the three-day rule, Rule 31(a)(1)'s deadline for reply briefs should be augmented by 3 days in order to retain what is now the "de facto" 17-day deadline ("fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)"). The 17-day period "allow[s] counsel sufficient time to draft such briefs, coordinate with clients or other parties, and avoid burdening courts with an increase in requests for extensions of time."

AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice (DOJ). Notes that "in most cases" there may no longer be a need for three extra days when service is made electronically, but that the extra time may be necessary if a filing is made in a different time zone, late at night, on a Friday, and/or before a holiday weekend. Otherwise attorneys might have "as little as five business days ... to respond to substantive or

complicated jurisdictional motions." Government lawyers "typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases."

Proposes that, if Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) are amended to exclude electronic service from the three-day rule, the Committee Notes should contain language to the following effect:

> "This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. "[L]argely support[s]" the proposal, because "the three-day rule ...

makes little sense in the context of electronic service." But many lawyers "file and serve briefs ... late in the day," after their opponents have gone home. The proposal should be revised to provide "that if electronic service is sent to other counsel after 6 p.m. in that counsel's time zone, a paper served electronically will be deemed to have been delivered on the next business day (Monday through Friday, excluding holidays) following the date of service stated in the proof of service."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. "We agree that a paper served electronically should be treated as delivered on the date of service." But if Rule 26(c) is amended to eliminate the three-day rule where service is made electronically, the deadline for reply briefs should be extended to 17 or 21 days. "The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread." Lawyers need the extra time when "juggling competing deadlines[,] representing incarcerated ... clients," or briefing complex cases. And a longer deadline can be shortened when necessary and, in other cases, will "reduc[e] the number of extension requests." As a point of comparison, "the Supreme Court sets a thirty-day deadline for merits reply briefs."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[A]s appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c)" (and not the parallel proposals for the Civil, Criminal, and Bankruptcy rules). "Although the Committee would support a reduction of the current three days, the Committee does not support a rule that would add zero days." In contrast to personal service (which must be made at counsel's office during business hours), electronic service can occur at any hour, wherever the intended recipient may be, yet "only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device." The Rules should not presume "[a]n 'instantaneous' review of all incoming electronic transmittals." There should be "some time" added when electronic service is used, in order to forestall "gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically)."

AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Opposes the proposal, which the commenters assert "would eliminate the 3-day rule." "The practical effect of the proposed changes is to reduce the times for submitting [motion] responses and replies to a short period that will be, in many instances, inadequate." The change will not appreciably expedite motions' resolutions but it will burden courts and litigants with motions for extra time and "will prevent attorneys from fully presenting their

reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions." The problem will be acute with respect to "dispositive motions (such as motions to dismiss) and motions to stay government regulations pending judicial review." Such motions can gravely affect both the litigants and the public – for example, when the question is whether to stay "government regulations that limit emissions of toxic pollution."

Observes that without the three-day rule, "responses to a motion filed at 11pm on the Friday before a holiday weekend would be due ... just 5 working days later." Asserts that "[w]here responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – again, just 5 working days later." Observes that "[e]ven 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."

Asserts that, prior to 2009, there was a 10-day period for motion responses, calculated by skipping intermediate weekends and holidays; and asserts that, prior to 2009, there was a 7-day period for motion replies, calculated by skipping intermediate weekends and holidays. Based on those assertions, argues that "although the proposed rule change appears to be 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."

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) ‘‘Last Day’’ Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court’s time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk’s principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under

Rule ~~13(b)~~13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

* * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

No Public Comment

As a technical amendment, this proposal is being forwarded for final approval without public comment.

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2015

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15

FRAP Item	Proposal	Source	Current Status
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in Morris v. Atchity (No. 13-1266)	Margaret Morris	Awaiting initial discussion
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee
15-AP-C	Consider amendment to Rule 31(a)(1)’s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion