ADVISORY COMMITTEE
ON
APPELLATE RULES

Philadelphia, PA
April 23-24, 2015

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Advisory Committee on Appellate Rules
April 23 and 24, 2015
Philadelphia, PA

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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
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
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
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

FRAP Item	Proposal	Source	Current Status
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
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
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
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
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

FRAP Item	Proposal	Source	Current Status
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
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
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	Awaiting initial discussion

ADVISORY COMMITTEE ON APPELLATE RULES

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Minutes of Fall 2014 Meeting of
Advisory Committee on Appellate Rules
October 20, 2014
Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

II. Approval of Minutes of April 2014 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2014 meeting. The motion passed by voice vote without dissent.

III. Report on June 2014 Meeting of Standing Committee

Judge Colloton noted that the Standing Committee had approved for publication the Advisory Committee's proposals concerning inmate-filing provisions, length limits, and amicus filings in connection with rehearing. The Standing Committee, he observed, had made a few changes to the proposals prior to publication, and the Appellate Rules Committee had ratified those changes by email after the meeting.

The Reporter noted that Standing Committee members had provided additional guidance on aspects of the proposals. Two of those suggestions concern the inmate-filing provisions. The published proposal would amend Rules 4(c)(1) and 25(a)(2)(C) to make clear that a document

filed by an inmate is timely if it is accompanied by evidence showing that the document was deposited in the institution's internal mail system on or before the due date and that postage was prepaid. If such evidence does not accompany the filing, proposed Rules 4(c)(1)(B) and 25(a)(2)(C)(ii) provide that the filing is nonetheless timely if the court of appeals "exercises its discretion to permit" the later filing of an appropriate declaration or notarized statement establishing timely deposit and prepayment of postage. A member suggested that "exercises its discretion to permit" be shortened to "permits"; one question for the Committee will be whether the longer phrase is worth retaining in order to emphasize the court of appeals' discretion whether to permit the later filing of the declaration or statement. A member also suggested that the rules be revised to omit any reference to notarized statements; the question here is whether there is any reason to include notarized statements as an alternative, given that executing a declaration in compliance with 28 U.S.C. § 1746 presumably is easier for inmates than finding a notary.

Other suggestions concerned the proposed revisions to Rule 29. Proposed Rule 29(b) addresses amicus filings in connection with rehearing. Proposed Rule 29(b)(2) provides that non-governmental amici must obtain court leave to make such amicus filings; the prior draft's provision permitting non-governmental amicus filings based on party consent was deleted during the Standing Committee meeting in response to members' concerns about the possibility of strategic use of amicus filings to prompt recusal of particular judges. The discussion of such efforts to cause recusals through amicus filings also prompted a suggestion that the Committee consider whether the current Rule 29 – which authorizes amicus filings at the merits stage based on party consent – should be revised.

Another suggestion concerned the proposal to amend the length limits in the Appellate Rules. The proposal would set type-volume limits for filings prepared using a computer; as with Rule 32's current type-volume limits, the new type-volume limits would state alternatives in terms of line limits and word limits. A Standing Committee member asked whether it is necessary to retain line limits in addition to word limits. Mr. Gans noted that line limits would make type-volume limits a viable alternative for those who prepare their briefs using a typewriter.

Judge Colloton observed that, with respect to length limits, one important question is whether the proposals would permit a circuit to enlarge the length limits for briefs. The Reporter responded that Rule 32(e) explicitly permits the adoption of local rules that enlarge the length limits for briefs. However, Rule 28.1 – which applies to cross-appeals – does not include a provision similar to Rule 32(e); it might be worthwhile, the Reporter suggested, for the Committee to consider adding such a provision to Rule 28.1. The Reporter surmised that such an addition would not require re-publication of the proposals. A judge member of the Appellate Rules Committee observed that, in voting on the proposal at the Committee's spring 2014 meeting, he had relied on the idea that circuits could choose to authorize longer length limits for briefs.

Judge Colloton pointed out that the fall 2014 agenda materials included a memo

describing the deliberations that led to the adoption of the 1998 amendments to Rule 32. The Committee's records, the Reporter observed, indicated that the 1998 amendments were supported repeatedly by the assertion that, for briefs prepared on a computer, 50 pages was roughly equivalent to 14,000 words.

IV. Discussion Items

A. Item No. 08-AP-R (disclosure requirements)

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed,

provided helpful guidance. The opinion states that parties, for this purpose, include the debtor, members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated – namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a Magistrate Judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee – at the suggestion of the Codes of Conduct Committee – considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of "consistency" raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term "victim." The Reporter responded that Criminal Rule 1(b)(12) defines "victim" to mean a "crime victim" as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view – which accords with the view found in relevant caselaw – is that recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that

the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation – such as the identity of pseudonoymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations – for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus filings.

A member asked whether there might be a concern that parties might engineer the participation of a particular amicus in an effort to generate a recusal. Another member agreed

that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise – even before intervention is granted – in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment – which initially provided one of the sources for this agenda item – had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires disclosure of any ownership interest – not merely stock ownership – that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this

respect, it could propose amending the Rule to refer to "any publicly held entity that owns 10 percent or more of an ownership interest in the party." Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements – such as the Eleventh Circuit's requirement that corporate parties disclose their full corporate title and stock ticker symbol – do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge's interest in a party's *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

B. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton noted that, over the summer, he and the Reporter had worked with Judge Fay, Mr. Katsas, and Mr. Letter to consider whether it would be advisable to pursue an amendment that would address the appealability of orders concerning attorney-client privilege. He invited the Reporter to introduce the topic. The Reporter noted that it is difficult for a party aggrieved by a trial court's denial of a claim of attorney-client privilege to obtain review of that ruling. Mandamus review is relatively narrow. Disobeying a disclosure order in the hopes of generating a criminal contempt sanction is a problematic strategy, both because it requires a party to violate a court order and because there is no guarantee that the resulting sanction would fit within the category of *criminal* contempt sanctions (which are immediately appealable) rather than *civil* contempt sanctions (which typically are not). To obtain review under 28 U.S.C. § 1292(b), the would-be appellant not only must meet the criteria stated in that statute but also must obtain permission from both the district court and the court of appeals.

These difficulties, the Reporter noted, have generated proposals – such as that by Ms. Amy Smith – to grant the court of appeals discretion to hear interlocutory appeals from attorney-client privilege rulings. The subcommittee had taken seriously the possibility of creating such an avenue. But such a project would present drafting challenges. Which sorts of attorney-client privilege rulings should be encompassed within the provision? Should the provision also encompass work-product-protection rulings? Rulings concerning other types of privilege?

The Reporter noted that one relevant consideration is the degree to which such a new provision would burden the courts of appeals. This question had been the subject of some debate in the *Mohawk Industries* case itself. The petitioner in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and the Chamber of Commerce of the United States of America as an

amicus in that case, had attempted to assess the experience of the Third, Ninth, and D.C. Circuits – each of which permitted collateral-order appeals from privilege rulings at the time that the Court decided *Mohawk Industries*. They found that on average only one such appeal per year had occurred in the three circuits combined. This finding accorded with Justice Alito's observation, during oral argument in *Mohawk Industries*, that he did not recall such appeals presenting problems in the Third Circuit while he was serving as a judge of that court. On the other hand, the Reporter pointed out, the one-appeal-per-year figure might be unduly low, because during the early part of the twelve-year period that was studied the availability of collateral-order review for privilege orders may not have been clear in all three circuits. And most of the appeals that occurred were taken by sophisticated litigators; if a Rule were adopted to create an avenue for interlocutory appeal, the greater visibility of such a provision might raise awareness and, thus, increase the number of attempted appeals. The Reporter pointed out that the pool of attorney-client privilege rulings is a large one. A search on WestlawNext for one year's worth of district-court opinions that used the term "attorney client privilege" pulled up over 1,000 decisions (mostly unreported).

During discussions held in summer 2014, members of the subcommittee had expressed interest in knowing the extent to which parties, post-*Mohawk Industries*, were able to obtain mandamus review of attorney-client privilege rulings. The Reporter had performed a non-exhaustive search for cases on point. She noted that, in order to obtain a writ of mandamus, the applicant must show that there is no other adequate means of relief, that the applicant has a clear and indisputable right to the writ, and that issuance of the writ is appropriate under the circumstances. The courts of appeals have considerable flexibility in deciding whether to employ mandamus review. While circuits vary in their willingness to employ mandamus review of privilege rulings, it seems plain that mandamus provides a tool with which a court of appeals, if it chooses, can address lower-court confusion or remedy severe adverse effects that would otherwise result from a disclosure order. Sometimes a court of appeals will deny redress on the ground that relief will later be available on review of the final judgment. But a strong showing of harm increases the chances of mandamus review, especially if an amicus filing or other information indicates that the ruling is also adversely affecting third parties. Novel and important questions are more likely to trigger mandamus review, but review can also occur where the lower court badly misapplied established law, where the ruling is especially harmful, or where federalism or separation-of-powers concerns are present.

Because issuance of the writ requires an elevated showing of error on the lower court's part, some have noted that there is a stigma attached to having entered an order that triggers issuance of the writ. But, the Reporter noted, it is possible that a petitioner might achieve its goal even if the court of appeals decides not to issue the writ. The order of decision sketched by the D.C. Circuit in *In re Kellogg Brown & Root, Inc*., 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"), is interesting in this regard. In *KBR*, the court of appeals granted a writ of mandamus and vacated a district court order that, the court found, had created a lot of uncertainty about the scope of the attorney-client privilege in business settings. The *KBR* court stated that the first question, in reviewing a request for such a writ, is whether the district court's privilege ruling was erroneous; if the ruling was erroneous, then the remaining question is whether the error is of a kind that

would warrant issuance of the writ. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), also illustrates the potential for a party to secure a desired ruling even if it does not actually secure issuance of the writ. The Federal Circuit had found no error and denied a writ of mandamus; the Supreme Court reversed. The Court left it for the Federal Circuit to determine on remand whether to issue the writ in the light of the Court's opinion – but the Court also stated its assumption that, even if the writ did not issue, the Court of Federal Claims would follow the Court's holding on the relevant attorney-client privilege question.

Judge Colloton invited members of the subcommittee to share their thoughts on the matter. An attorney member stated that, with reluctance, he had concluded that it would not make sense to proceed with an amendment on this topic. The difficulty of obtaining interlocutory review is troubling, he noted, because while review of a final judgment can redress the erroneous *use* in a lawsuit of privileged information, such review cannot remedy the actual *disclosure* of that information. If mandamus review were unavailable for privilege rulings, he would be concerned; and even though such review does appear to be available, he is concerned that courts will not employ mandamus where the challenged ruling presents a close question. However, it would be an ambitious undertaking to draft a rule similar to Civil Rule 23(f) (which authorizes the courts of appeals to permit appeals from class certification orders). And, at present, there is not a great deal of evidence that key rulings are slipping through the cracks.

Mr. Letter expressed agreement with this analysis. An appellate judge member stated that it would be undesirable to create an avenue for permissive appeals from privilege rulings, because there would be a large number of requests for permission to take such appeals.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without opposition.

C. Item No. 13-AP-H (Ryan v. Schad and Bell v. Thompson / FRAP 41)

Judge Colloton introduced this item, which encompasses two principal questions: whether a court of appeals has discretion to stay its mandate following a denial of certiorari, and whether such a stay can result from mere inaction (i.e., from the court's failure to issue the mandate). Judge Colloton noted that a group composed of Justice Eid, Judge Taranto, and Professor Barrett had worked over the summer to consider possible amendments addressing these questions. Judge Colloton invited the Reporter to provide an overview of those discussions.

The Reporter first discussed the proposal to amend Rule 41(b) to require that stays of the mandate be effected by order rather than by inaction. Original Rule 41(b) had referred to the court's ability to enlarge "by order" the time before the mandate would issue. The words "by order" were deleted during the 1998 restyling of the Appellate Rules. The Eleventh Circuit has adopted a local rule that helps to address the problem of stays through inaction, but most circuits do not have local provisions addressing this issue. And the opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014),

illustrate that this issue will continue to arise periodically.

On the question of the court of appeals' authority (if any) to stay the mandate after the denial of certiorari, the Reporter observed that the subcommittee had considered three options: Rule 41 could be amended to state explicitly that there is no such authority; or the Rule could be amended to provide for such stays in extraordinary circumstances; or the Committee could decide not to amend the Rule. Existing caselaw suggests that the authority to stay the mandate may arise not only from Rule 41 but also partly from the courts' inherent authority and partly from statutory authority. Caselaw suggests, for instance, that courts have inherent authority to stay the mandate in order to investigate whether a party committed a fraud on the court of appeals (caselaw recognizes power to recall the mandate in such circumstances, and logically, that caselaw should also support the authority to stay the mandate before it issues). 28 U.S.C. § 2106, which authorizes an appellate court to "require such further proceedings to be had as may be just under the circumstances," may also authorize stays of the mandate. The Reporter suggested that a Rule amendment could validly channel the courts' inherent authority in this area – for example, by banning stays of the mandate after denial of certiorari but leaving in place the courts of appeals' authority to *recall* the mandate in extraordinary circumstances.

An appellate judge member of the subcommittee stated that he was on the fence about the choices to be made here. He wondered whether the Rule could be amended to refer to the Supreme Court's discussion of the power to recall the mandate in "grave, unforeseen contingencies." This member expressed concern about the idea of amending the Rule in a way that relies (as a safety valve) on a power (to recall the mandate) that the Rules do not mention. If the Committee simply left the Rule untouched, this member said, he would worry less about the possibility that a court would conclude that the Rule displaces the inherent power to recall the mandate.

Another appellate judge member of the subcommittee stated that she favored the option (shown on pages 204-05 of the agenda materials) that would amend Rule 41(d)(2)(D) to state that "[u]nless it finds that extraordinary circumstances justify it in ordering a further stay, 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 third member of the subcommittee stated that she did not think the amendments that were under consideration would transgress the limits set by the Rules Enabling Act. This member expressed support for amending Rule 41 to require that any stays be accomplished "by order." She was torn about whether to amend the Rule to address the question of the court's power to stay the mandate; if such an amendment were to be pursued, she too would favor the option shown on pages 204-05 of the agenda materials.

Judge Colloton observed that Judge Fletcher, concurring in the grant of rehearing en banc in *Henry v. Ryan*, argued that the "extraordinary circumstances" test discussed in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari – not when there were other reasons for the stay.

An appellate judge member stated that he did not like the way that the current Rule is written. He suggested that the Rule should permit the court of appeals to issue a further stay "if it finds that extraordinary circumstances exist," and he stated that the Rule should require that the court explain those findings in the order. Another appellate judge suggested that the Committee consider whether there is a phrase, other than "extraordinary circumstances," that better captures the very narrow set of circumstances that the *Schad* and *Bell* Courts envisioned as potential bases for a further stay of the mandate.

The Reporter asked whether an amendment inserting the extraordinary-circumstances test into Rule 41(d)(2)(D) should be accompanied by an amendment to Appellate Rule 2. Rule 2 states that "a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." Would the availability of authority to suspend the rules under Rule 2 frustrate the purpose of amending Rule 41? The Reporter suggested that it would not be necessary to amend Rule 2; it seems unlikely that a court would, in a given case, find that no extraordinary circumstances warranted a stay under Rule 41, but that there was good cause under Rule 2 to suspend the requirements of Rule 41. Committee members indicated agreement with the view that no amendment to Rule 2 was needed.

A member asked whether it would be worthwhile to hold off on any amendment to Rule 41 in order to see whether the Supreme Court grants review on the question of the stay of the mandate in *Henry v. Ryan*. An appellate judge asked, though, whether there would be any harm in proceeding with a proposed amendment in the meantime. The member responded that it might be better to hold off on the amendment if the Committee believes that the circumstance addressed by the amendment occur only rarely. And, this member suggested, there is always some risk of unintended consequences any time that a rule is amended.

An attorney member asked whether the Committee could publish for comment the proposal to amend Rule 41 to require that stays be effected "by order," and simultaneously solicit comment on whether the Rule should be amended to address the question of the court of appeals' authority to stay the mandate after denial of certiorari. Professor Coquillette responded that the typical way to solicit such comment would be to publish a proposed amendment addressing the authority question and also to highlight the issue in the memo that accompanies the published proposals. The attorney member observed that, if the Committee were to commence the process for adopting an amendment addressing the authority question, the Committee could withdraw the proposal if subsequent developments rendered it moot. Mr. Letter expressed agreement with this point. An appellate judge member noted that the Ninth Circuit's en banc decision in *Henry v. Ryan* would be informative.

Turning back to the language of the option favored by some Committee members – which would amend Rule 41(d)(2)(D) to forbid a court of appeals to order a further stay "[u]nless it finds that extraordinary circumstances justify" such a stay – an appellate judge member asked whether it is necessary to include the reference to a finding, or whether instead "it finds that" could be deleted. Another appellate judge member noted that if the propriety of such

a stay is challenged in the Supreme Court, the party defending the stay will articulate the basis for the stay. Mr. Letter suggested, though, that including the requirement of a finding might help to ensure that the court of appeals carefully considers the basis for the stay before entering the stay order.

By consensus, the Committee retained this item on the agenda, with the expectation of discussing it further at the Committee's spring 2015 meeting.

D. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (changes to FRAP in light of CM/ECF)

Judge Colloton invited the Reporter to introduce these items, which concern matters relating to the shift to electronic filing and service. The Standing Committee's Case Management / Electronic Case Filing ("CM/ECF") Subcommittee, with Judge Chagares as its Chair and Professor Capra as its Reporter, has been leading a discussion among the advisory committees concerning possible amendments that would take account of the shift to electronic transmission and storage of documents and information. The Appellate Rules Committee has published for comment an amendment to Appellate Rule 26 that would abrogate the "three-day rule" as it applies to electronic service; similar proposals concerning the relevant Civil, Criminal, and Bankruptcy Rules have also been published for comment.

The Subcommittee has also discussed the possibility of drafting amendments that would adopt global definitions to adjust the Rules to the world of electronic filing and case management. The first portion of the Subcommittee's proposed template rule on this subject (set out at page 226 of the agenda book) would define "information in written form" to include electronic materials. This provision, the Reporter noted, seems both unproblematic and useful. The second portion of the template would define various actions that can be done with paper documents to include the analogous action performed electronically.

Adopting that second part of the template in the Appellate Rules would, the Reporter suggested, be more complicated. Such a rule should not pose problems for the operation of the starting points and end points of time periods under the Appellate Rules. The proposed template rule allows action to be taken electronically but does not address the ancillary effects of an actor's choice of electronic or other means of taking the action; thus, provisions addressing whether a filing is timely by reference to the filing method should be unaffected by the adoption of the template. It is more important, the Reporter argued, to focus on rules that discuss actions that might be taken electronically, rather than on Rules that address the ancillary timing effects of choices among different methods of filing or service.

One key topic concerns the filing of a notice of appeal as of right from a judgment of a district court, a bankruptcy appellate panel ("BAP"), or the United States Tax Court. The Appellate Rules set the time period for filing the notice of appeal, and they specify that the notice must be filed in the relevant lower court. As to notices of appeal filed in the Tax Court, the Appellate Rules specify the manner of filing the notice and they also specify how to

determine the timeliness of the notice. The Appellate Rules also set special timeliness rules that can be employed by an inmate who files a notice of appeal. And the Appellate Rules (like the other sets of national Rules) include a time-computation provision that says how to determine when the "last day" of a period ends. But the Appellate Rules do not specify how to file a notice of appeal in a district court or with a BAP. Rather, Appellate Rule 1(a)(2) directs litigants who file a document in a district court to comply with the district court's practices. The template rule says that it governs actions discussed "[i]n these rules," so adopting that template as part of the Appellate Rules would not affect the manner of filing a notice of appeal in a district court or with a BAP. However, the template would affect the operation of Appellate Rule 13(a)(2), which specifies how to file the notice of appeal in the Tax Court; when read together with Rule 13(a)(2), the template would authorize electronic filing in the Tax Court. That would countermand the current practice of the Tax Court, which does not permit notices of appeal to be filed electronically (though it does have an electronic filing system for other types of filings). If the Appellate Rules Committee were to propose adopting the second part of the template, it would seem advisable to make an exception for notices of appeal from the Tax Court.

To get a sense of other types of actions on which the Committee might wish to focus when considering the operation of the second part of the template rule, the Reporter reviewed local circuit provisions relating to electronic filing and service. Some local circuit provisions state that certain actions may be taken electronically; other such provisions state that certain actions may *not* be taken electronically. Using those sets of provisions as a starting point, it is possible to see that there are some types of actions for which the application of the template rule would be harmless and even beneficial. Thus, for example, it may be useful to provide that actions such as the entry of judgments, or service by the clerk on a CM/ECF user, or non-case-initiating filings by a CM/ECF user, or service between parties who are CM/ECF users, can be done electronically. But there might be problems with a national rule that permits electronic completion of some other types of actions – such as filing case-initiating documents, or filing documents prior to a matter's docketing in the court of appeals, or filings under seal. It might not be easy, the Reporter suggested, to draft exemptions that would cover all of these areas.

Instead, the Reporter proposed that the Committee consider the possibility of adopting provisions that would mandate electronic filing and authorize electronic service, subject to certain exceptions. Currently, Appellate Rule 25(a)(2)(D) authorizes local rules to mandate electronic filing (subject to reasonable exceptions). The Appellate Rules do not currently authorize local rules to require electronic service; rather, the Appellate Rules allow electronic service only with the litigant's written consent. However, all of the circuits have local provisions specifying that registration to use CM/ECF constitutes consent to electronic service (which typically would mean service by means of the notice of docket activity generated by CM/ECF). The circuits all presumptively require attorneys to file electronically, though they permit exemptions on a showing of sufficient cause. The circuits vary in whether and when they permit pro se litigants to file electronically.

The Reporter noted that the Civil Rules Committee, at its fall meeting, would be considering a proposal for a national rule that would make electronic filing mandatory (subject to

exceptions based on good cause or on local rules). The proposal would also authorize electronic service (other than for initial process) irrespective of party consent (also subject to the good-cause and local-rule exceptions). The Reporter suggested that the Appellate Rules Committee might wish to consider amending the Appellate Rules to require CM/ECF filing (unless good cause is shown for, or a local rule permits or requires, paper or another non-CM/ECF mode of filing) and authorize service by means of the CM/ECF system's notice of docket activity (unless good cause is shown for exempting, or a local rule exempts, the person to be served from using CM/ECF). Judge Colloton noted that the Reporter's suggested language would authorize local rules to "permit or require" paper filings, whereas the language to be considered by the Civil Rules Committee referred only to local rules that "allow" paper filings. The Reporter argued that it would be desirable to authorize local rules to require paper filings, given the range of circumstances in which local circuit provisions currently evince a preference for paper filings.

Professor Coquillette noted that the importance of paper filings for certain purposes had also been a topic of discussion in the Bankruptcy Rules Committee. In particular, he observed, the Bankruptcy Rules Committee had discussed in some detail the topic of "wet" versus electronic signatures. Mr. Letter noted that the question of signatures has not seemed to present problems outside of the bankruptcy context. Professor Coquillette asked whether the e-filing and e-service provisions would be affected by the adoption of the next generation (NextGen) version of CM/ECF. Mr. Gans noted that the NextGen system is already being tested in the Second Circuit. One relevant change, he reported, would concern payment for filing case-initiating documents. Currently, the need to pay the filing fee presents a barrier to electronic filing of some case-initiating documents. The NextGen system will enable filers to make such payments via pay.gov.

Judge Colloton, summarizing the discussion thus far, noted that the Reporter was proposing that the Committee consider adopting part (a) of the Subcommittee's template rule (the portion stating that "[i]n these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information") and that the Committee consider adopting national rules presumptively requiring electronic filing and presumptively authorizing electronic service (subject to the noted exceptions). He suggested that the Reporter convey to the Civil Rules Committee's Reporter the Appellate Rules Committee's discussion about the desirability of authorizing local rules to require, as well as to allow, paper filings. The Reporter undertook to draft proposed amendments to Appellate Rule 25 (concerning electronic filing and service) for consideration at the Committee's spring meeting.

The Reporter turned next to the proposal to amend Appellate Rule 25(d) so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity generated by CM/ECF. Because twelve of the thirteen circuits have local provisions that make clear that the notice of docket activity does not replace the certificate of service, the Chair and Reporter had asked Mr. Gans to survey his colleagues to ascertain their views on this topic.

Mr. Gans reported that the local circuit provisions likely reflected the view that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. A majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF – though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF. But a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, Mr. Gans noted, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred. It is time, he suggested, to eliminate the certificate-of-service requirement for cases where all filers are CM/ECF participants.

Judge Colloton directed the Committee's attention to the sketch on pages 242-43 of the agenda materials, which illustrated a possible amendment to Rule 25(d). An appellate judge member questioned the sketch's reference to "a notice of docket activity generated by CM/ECF." The Rules, he noted, do not usually use acronyms such as "CM/ECF," and it would be better to refer instead to the "official electronic filing system." The Reporter promised to revise the wording of the sketch in preparation for the Committee's spring meeting.

V. New Business

Judge Colloton noted that a federal appellate judge had suggested that the Committee consider amending the Appellate Rules to state that Appellate Rule 29 establishes the exclusive means by which a non-litigant may communicate with the court about a pending case, and that non-litigants must not contact judges of the court directly. Judge Colloton invited the Reporter to discuss this suggestion.

The Reporter noted that, in certain rare emergencies, it may be necessary for a litigant's counsel to make direct contact with a judge of the court of appeals – for example, to make an emergency request for a stay of execution. But it is difficult to imagine circumstances that would justify a non-litigant in making a direct contact with an appellate judge about a pending case. Indeed, if a judge received such a communication, Canon 3(A)(4) of the Code of Conduct for United States Judges would direct the judge to notify the parties about the communication and allow them an opportunity to respond. However, most circuits do not have local provisions specifying that such communications are inappropriate. The only pertinent provision (encompassing non-party communications) that the Reporter was able to find was Federal Circuit Rule 45(d), which provides that all correspondence and calls concerning cases "must be directed to the clerk." Other circuits may use less formal means to make the same point; for example, the Seventh Circuit's web page on "Contact Information" makes clear that all inquiries and contacts should be directed to the Clerk's Office.

An initial question for the Committee, the Reporter suggested, is whether national rulemaking on this topic is warranted. Mr. Letter noted that care would be required in drafting rules concerning non-party communications to the court. In cases involving national security issues, the government – as a non-party – might engage in ex parte, in camera communications with a district judge. Thus, any rule limiting ex parte communications by non-parties might require a carve-out for situations implicating national security. An attorney member noted as well that if such a rule were adopted, it might be implicated by casual mentions of a case at a cocktail party.

An appellate judge member suggested that this issue is likely to arise only very rarely and that there is no need for a national rule on the subject. Two other appellate judge members expressed agreement with this suggestion. Judge Colloton asked Mr. Gans what would happen if the Judge received an unsolicited letter from a non-party and forwarded it to the Clerk's Office. Mr. Gans stated that he would send the non-party a generic response; the Clerk's Office, he noted, often receives communications forwarded to the Office by the Chief Judge. Mr. Gans expressed doubt about the need for rulemaking on this topic.

Judge Colloton wondered if the reason for the rulemaking suggestion is that a judge might wish to have a provision in the Rules that can be cited to a lay person. Professor Coquillette suggested, however, that if the goal is to educate non-lawyers, a statement on the court's website is likely to be more effective than a provision in the Rules. Mr. Byron questioned whether it would be appropriate for the Appellate Rules to attempt to regulate the conduct of non-lawyers who are not parties to a proceeding in the court of appeals.

A motion was made that this item not be added to the Committee's study agenda. The motion was seconded and passed by voice vote without opposition.

VI. Other information items

Judge Colloton noted that the Civil / Appellate Subcommittee has been re-convened. Judge Scott Matheson will chair the Subcommittee. Judge Fay, Mr. Newsom, and Mr. Letter have agreed to serve as the Appellate Rules Committee's representatives on the Subcommittee. The Subcommittee will focus its efforts on two items. One is the topic of "manufactured finality" – i.e., the doctrine that addresses efforts by a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The second item concerns the operation of Civil Rule 62, which addresses supersedeas bonds.

Judge Colloton reported that the Criminal Rules Committee had formed a subcommittee to consider a proposal by Judge Jon Newman that Criminal Rule 52(c) be amended to permit appellate review of unraised sentencing error that did not rise to the level of plain error so long as the error was prejudicial and redressing it would not require a new trial. The Appellate Rules Committee's Reporter had participated in the Subcommittee's conference calls on this topic. After speaking with Judge Newman by telephone to discuss his proposal, the Subcommittee

members had decided not to recommend proceeding with the proposed amendment.

Judge Colloton observed that the Civil Rules Committee's Rule 23 Subcommittee is planning to convene mini-conferences to obtain the views of knowledgeable participants concerning various aspects of class action practice. Judge Robert Dow, the Chair of the Subcommittee, has agreed that the topics of inquiry will include appeals by class action objectors. Mr. Rose noted that the Subcommittee might hold such an event in connection with the Civil Rules Committee's April 2015 meeting in Washington, D.C.

VII. Date of spring 2015 meeting

Judge Colloton reminded the Committee members that the Committee's spring meeting would be held on April 23 and 24, 2015.

VIII. Adjournment

The Committee adjourned at 1:45 p.m. on October 20, 2014.

Respectfully submitted,

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Catherine T. Struve
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 8–9, 2015
Phoenix, Arizona

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Appellate Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

TAB 4

OTHER INFORMATION ITEMS

TAB 5

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E: "Timely" tolling motions and FRAP 4(a)(4)

Among the proposals published for comment in summer 2014 is the amendment to Appellate Rule 4(a)(4), which addresses the lopsided circuit split that has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4).

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. In this view, where a district court purports to extend 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[1] stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

The proposed amendment would implement the majority view concerning the meaning of "timely." Part I of this memo sets out the proposal as published. Part II summarizes the public comments.[2] Part III notes that the Committee has previously considered the concerns voiced in the sole set of critical comments, and observes that overall the comments would support adoption of the proposal as published – although the comments do provide an occasion to consider carefully the Committee's decision to place explanatory language in the Committee Note rather than the Rule text.

[1] Under *Bowles v. Russell*, 551 U.S. 205 (2007), statutory appeal deadlines are jurisdictional, and the "unique circumstances" doctrine is unavailable to excuse noncompliance with such deadlines.

[2] I enclose copies of the public comments.

I. Text of Rule and Committee Note as published

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.

II. 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).

III. Analysis

Five commentators support the proposed amendment. The PBA is the sole commentator to oppose it. Although the PBA's comments may provide a reason to reassess the Committee's choice between the "concise" and "definitional" approaches to the drafting of the proposed amendment, the concerns voiced in the enclosure to the PBA's comments track concerns that the Committee already weighed in its prior deliberations on this proposal.

The PBA's objections focus both on the choice between the minority and majority views in the circuit split and on the choice of Rule language with which to express the majority view. On the merits of the choice between the minority and majority approaches, the PBA's arguments roughly track[3] arguments that were voiced during

[3] The memorandum enclosed with the PBA's comments refers to instances "where a district court considers and decides [an] untimely post-judgment motion, thus effectively extending the time for such a post-judgment motion, as the district courts apparently have discretion to do." I take this to refer to instances where there is no objection to the

participants' prior discussions of the proposal; I thus do not discern in the PBA's comments a reason for the Committee to revisit that choice.

Admittedly, the PBA's comments might provide a reason to revisit the Committee's choice of the language by which to implement the majority view. At its spring 2014 meeting, the Committee discussed whether to adopt the "concise" approach ultimately chosen for the published proposal or to adopt instead a lengthier alternative that would have defined "timely." The "definitional" approach would have added a new Rule 4(a)(4)(C):[4]

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time allowed by the Federal Rules of Civil Procedure. A motion made after that time is not rendered timely for purposes of Rule 4(a)(4)(A) by, for instance:
>
> (i) a court order that sets a due date that is later than permitted 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.

It might be argued that the PBA's reaction provides a reason to reconsider whether the concise approach provides sufficient notice. The concise approach places in the Committee Note information that the definitional approach places in Rule text. Will lawyers (or pro se litigants) be sufficiently alerted to the issue by the reference in Rule text to "the time allowed by" the Federal Rules of Civil Procedure? Will they consult the Committee Note? The PBA thinks that they will not.

It is difficult to predict how often a lawyer or pro se litigant will overlook the implications of the proposed Rule text. On the other hand, the revised Rule text, as published, provides more notice of the potential pitfall than the current Rule. That is to say, while a reader might think that a "timely" motion can be one that the district court is willing to say is timely, the proposed amendment's reference to "the time allowed by" the Civil Rules could alert a reader to the need to look at the deadlines set by the Civil Rules. When such a reader searches for the applicable deadlines in the Civil Rules, that search will disclose the 28-day deadlines in Civil Rules 50, 52, and 59, and might also

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motion's untimeliness. The emerging consensus that the 28-day deadlines in Rules 50, 52, and 59 are claim-processing rather than jurisdictional rules would not excuse noncompliance with those rules when a timely objection is made.

[4] A cross-reference could then have been added, in Rule 4(a)(4)(A), to the new Rule 4(a)(4)(C): "(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure and the motion is timely as defined in Rule 4(a)(4)(C), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:"

disclose Civil Rule 6(b)(2)'s admonition that "[a] court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."

The net effect of the published amendment would differ by circuit. In the four circuits where an untimely Rule 50, 52, or 59 motion has, post-*Bowles*,[5] been ruled ineligible for tolling effect under Rule 4(a)(4),[6] adoption of the proposal as published could only lessen concerns that the Rule sets a "trap for the unwary." As for the eight circuits that have not directly addressed this issue in a precedential opinion since *Bowles*,[7] the amendment as published would remove the possibility that the circuit in

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[5] There does exist some pre-*Bowles* caselaw on this question. For example, the Second Circuit had ruled, prior to *Bowles*, that a district court's extension of time to move for reconsideration did not render the reconsideration motion (filed outside the then-applicable Rule 59(e) deadline) "timely" for purposes of tolling the time to appeal under Rule 4(a)(4). *See Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 401 (2d Cir. 2000); *see also id*. at 403-04 (holding, over a dissent, that the "unique circumstances" doctrine was inapplicable). I have not attempted to canvass the pre-*Bowles* caselaw, because even if a circuit had ruled, prior to *Bowles*, that such a motion failed to toll appeal time, it is possible that the circuit in question could reach a different view after *Bowles*.

[6] Four circuits – the Third, Seventh, Ninth, and Eleventh – have issued rulings, since *Bowles*, stating that such a motion cannot toll the appeal time. *See Lizardo v. United States*, 619 F.3d 273, 280 (3d Cir. 2010) ("[A]n untimely Rule 59(e) motion, even one that was not objected to in the district court, does not toll the time to file a notice of appeal under Rule 4(a)(4)(A)."); *Blue v. International Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Justice v. Town of Cicero*, 682 F.3d 662, 665 (7th Cir. 2012) ("The motion did not extend the time for appeal … , because Fed. R. App. P. 4(a)(4) comes into play only when a Rule 59 motion is timely."); *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1098 (9th Cir. 2008) (holding that motion filed outside 10-day time limit did not toll time to appeal), *adhered to in relevant part on reh'g en banc*, 621 F.3d 1162, 1167 (9th Cir. 2010) (en banc, per curiam opinion) ("The three-judge panel unanimously held that the government's appeal … was untimely…. We agree with the panel and adopt its analysis of the issue…."); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc*., 615 F.3d 1352, 1359 n.15 (11th Cir. 2010); *Green v. DEA*, 606 F.3d 1296, 1300, 1302 (11th Cir. 2010).

[7] I am aware of no such post-*Bowles* precedents in the First, Second, Fourth, Fifth, Tenth, D.C., or Federal Circuits.

There is an Eighth Circuit decision that could be read to suggest that an untimely, unobjected-to motion could have tolling effect, but that decision did not squarely address the issue in a holding. *See Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (deciding "that Federal Rules of Civil Procedure 6(b)(2) and 50(b) are nonjurisdictional claim-processing rules," but holding that the nonmoving party timely raised an objection to the motion's untimeliness by objecting before the district court decided the motion on the merits); *id.* at 619 ("Because the district court had not ruled [on the Rule 50(b) motion], we hold that Dill properly and timely raised the untimeliness defense …. As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal.").

For purposes of this count, I leave aside the analytically separate question

question would join the minority side of the circuit split; by removing that possibility, one could argue that the amendment would disadvantage a litigant who relied on the possibility that a untimely but district-court-approved motion could have tolling effect. On the other hand, by making at least somewhat clearer, in the text of the rule, that such a motion cannot have tolling effect, the amendment would help at least some litigants in those circuits to avoid reliance on the idea that such a motion would have tolling effect. Given the current lopsidedness of the circuit split, it seems likely that many undecided circuits would take what is currently the majority view; thus, overall, the published amendment could be viewed as providing some net benefit to litigants in the as-yet-undecided circuits by decreasing the likelihood that a litigant would think that an untimely postjudgment motion could qualify for tolling effect. Admittedly, in the Sixth Circuit, the amendment would disadvantage any litigants who failed to catch the implications of the amended Rule 4(a)(4) language and who relied on what they erroneously thought to be the tolling effect of an unobjected-to, untimely postjudgment motion.

In sum, if the question is narrowed to a choice between the status quo and the proposed amendment as published, the PBA's insufficient-notice concern seems most salient with respect to litigants in the Sixth Circuit; seems less so as to litigants in the undecided circuits; and arguably does not apply (or does not provide a reason to reject the proposed amendment as published) as to litigants in the four circuits that have already held, post-*Bowles*, that untimely postjudgment motions cannot have tolling effect. If the question is expanded to encompass a further choice between the proposal as published and alternate language that would define "timely" in the text of the Rule, then the question becomes whether the PBA's concerns provide a reason for the Committee to

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whether Rule 4(a)(4)'s timeliness requirement is itself merely a claim-processing rule or is instead a jurisdictional requirement. *Compare Blue*, 676 F.3d at 582 (characterizing the question – whether an untimely motion has tolling effect under Rule 4(a)(4) – as "a matter of jurisdictional importance"); *Justice*, 682 F.3d at 663 (stating that the notice of appeal "is timely if [appellant] filed a timely Rule 59 motion, see Fed. R.App. P. 4(a)(4), but otherwise is untimely … and jurisdictionally so"); *Comprehensive Drug Testing*, 513 F.3d at 1101 ("If [Rule] 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule…. If [Rule] 4(a)(4) is non jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of [Rule] 4(a)(1)."); *Advanced Bodycare*, 615 F.3d at 1359-60 n.15 ("[The] Rule 50(b) and Rule 59 motions were untimely and did not toll the time period for appealing …. As Federal Rule of Appellate Procedure 4(a) is a jurisdictional rule, Advanced's appeal … was untimely, and we lack jurisdiction to hear it."); and *Green*, 606 F.3d at 1301, with *Obaydullah v. Obama*, 688 F.3d 784, 788-91 (D.C. Cir. 2012) (per curiam) (adopting parties' view "that FRAP 4(a)(4)(A)'s timeliness requirement is a 'claim-processing rule' subject to waiver"), *cert. denied*, 133 S. Ct. 2855 (2013). *See also Wilburn v. Robinson*, 480 F.3d 1140, 1147 (D.C. Cir. 2007) (pre-*Bowles* decision) ("Because Robinson failed to timely assert the timeliness defense afforded by Rule 4(a)(4)(A)(vi), we deem Wilburn's Rule 60(b) motion to have tolled the period to appeal the summary judgment order.").

revisit its prior decision to use the more concise Rule language and relegate the specific explanation (concerning events that do *not* render an untimely motion eligible for tolling effect) to the Committee Note.

IV. Conclusion

Unless the Committee wishes to revisit its choice of the "concise" approach over the "definitional" approach, the comments do not provide a reason to abandon the proposed amendment to Rule 4(a)(4).

Encl.

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Rule 4(a)(4) / Tolling Motions

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ftu-2gxf
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0015
Position Paper of James C. Martin, on behalf of American Academy of Appellate Lawyers

Submitter Information

Name: James C. Martin
Organization: American Academy of Appellate Lawyers

General Comment

See Attached

Attachments

Academy Position Paper

AMERICAN ACADEMY OF APPELLATE LAWYERS

December 1, 2014

Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: Request to testify on proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Rose,

The American Academy of Appellate Lawyers requests the opportunity to testify at the public hearing on the proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, on January 9, 2015 in Phoenix, Arizona. The Academy is a professional association of nearly 300 members from across the country, whose membership is limited to lawyers, judges and educators dedicated to appellate practice and the administration of justice on appeal.

The Academy has submitted comments on the proposed amendments and a copy of its position paper is attached. The Academy's incoming president, Charles A. Bird, from San Diego, California, would be pleased to offer the Academy's views.

Very truly yours,

James C. Martin
President
American Academy of Appellate Lawyers

AMERICAN ACADEMY OF APPELLATE LAWYERS

AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The American Academy of Appellate Lawyers submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35 and 40 of the Federal Rules of Appellate Procedure. When appropriate, the comment below addresses changes common to groups of rules, not each rule separately.

The Academy supports all of the proposed amendments except for the proposal to reduce the word limits on briefs and to apply a conversion rate of 250 words per page to documents being converted from a page limit to a word limit. The Academy believes that the Advisory Committee's rationale does not support the proposed reduction in the word limits and proposed conversion rate. It also believes that such a reduction will not improve appellate advocacy and may well increase the workload of the courts.

A. Statement of Interest

The Academy is an invitation-only professional association of nearly 300 members from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

B. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C).

The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of the documents covered by these rules. Under the proposed amendments, and assuming the other rule requirements are met (*i.e.* postage), the filing date would be 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.

The Academy believes that the proposed amendments are designed to clarify and improve inmate-filing rules, and would promote the fair administration of justice. The Academy supports these proposed changes.

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

The proposed amendment to appellate Rule 4(a)(4) addresses a circuit split over whether a motion under Civil Rules 50, 52, or 59 is "timely" when filed within a court-ordered "extension" of a non-extendable deadline under those rules. Adopting the majority view, the proposed amendment would make clear that post-judgment motions filed outside the deadline set by the Civil Rules are not "timely" under Rule 4(a)(4), even if the district court has erroneously granted an extension of the deadline, and therefore do not toll the time for filing a notice of appeal under Rule 4(a)(4).

The Academy supports this proposed amendment, because it is consistent with the understanding of Academy members that a district court lacks the authority to extend these specific deadlines and that a motion filed outside the time permitted under Rules 50, 52, or 59 does not toll the deadline for filing a notice of appeal.

D. Length Limits: Rules 5, 21, 27, 28.1, 32, 35 and 40

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the page limits currently applicable to documents filed under those rules. The type-volume limit would be based on a conversion ratio of 250 words per page. The change would apply to documents prepared on a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

The proposed amendments also would reduce from 14,000 words to 12,500 words the word limit for briefs on appeals under Rule 32 and for briefs on cross-appeals under Rule 28.1.

1. The Academy supports the principle of replacing other length limits with word-number limits.

The Academy supports the core concept of parts C and D that the permitted length of appellate filings produced on computers should be determined by word count. The Academy explains below why it opposes the proposed word numbers in parts C and D more strongly than it supports the underlying concept.

2. For all purposes in the proposed rules, the Academy opposes the 250-word-per-page conversion ratio.

The Academy respectfully opposes both the reduction in permitted word-count of briefs and the 250-word-per-page conversion ratio applied to other filings. The Academy believes the proposed conversion ratio, particularly in reducing the length of briefs, is not

supported by the published materials or the Advisory Committee's process, and is unwise.

3. The published background does not support the proposed conversion ratio.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000-word limit for principal briefs. The same amendments set the word limit for reply briefs derivatively and set the limit for appellees' combined briefs in cross-appeals by related reasoning. Rule 32 determines the length of briefs of amicus curiae derivatively under rule 29(d). The proposed amendments reduce the limit for principal briefs to 12,500 words, reduce the limit for reply briefs derivatively, and reduce the limit for appellees' combined briefs by related reasoning. According to the Advisory Committee, the 1998 change was based on an assumption that the appropriate conversion rate was 280 words per page applied to the 50-page limit for briefs then in effect. The Advisory Committee states that the proposed reduction is based on a study of D.C. Circuit briefs filed under the pre-1998 rules, which showed that the average in those briefs was closer to 250 words per page.

Our research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken. The genesis of that comment appears to be oral discussion reported in the minutes of the Spring 2014 meeting of the Advisory Committee on

Appellate Rules. The May 8, 2014 Report of Advisory Committee on Appellate Rules to the Committee on Rules of Practice and Procedure states that the word limit "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)." That quotation appears at page 18 of the materials for public comment. The proposed committee-notes to the proposed amendments to rules 28.1 and 32 now unequivocally state that the 1998 Advisory Committee used the 280-word assumption. But those notes also acknowledge: (i) that the current Advisory Committee does not know the basis for that assumption, and (ii) that the 1998 amendments intentionally superseded "at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs."

In contrast, Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, has posted a public comment stating that the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. To the extent we have been able to trace the history of the 1998 amendments, including through Fellows of the Academy who participated, we believe the assertion that the 1998 Advisory Committee incorrectly "assumed" a word ratio in appellate briefs is inaccurate. The record suggests that, regardless of the data on the table, the Advisory Committee selected the 14,000-word limit because it appeared wise and reasonable.

The Academy does not believe that a rule amendment should be adopted without a clear, articulated guiding rationale. That articulated rationale also should be supported with a detailed analysis of why the change is necessary to the administration of justice. The proposed reduction of word limits for briefs, and the parallel adoption of the 250-word conversion ratio for other appellate filings, do not adhere to these principles, and the Academy opposes them for that reason.

4. The Advisory Committee record does not support the proposed conversion ratio.

The Academy also is concerned that the Advisory Committee's record does not support the suggestion that the 250-word conversion ratio is intended or necessary to correct historical error. The minutes of the Advisory Committee's April 2014 meeting do not reflect a shared concern among its voting members about correcting error. Rather, the reported comments of the voting members focus on a desire of appellate judges for shorter briefs, the unwillingness of some circuits to allow longer briefs, and "whether the bar would be shocked by a proposal to reduce length limits to 12,500 words. . .." The minutes also reflect that the committee's professional support staff had received no complaints about the actual length of appellate filings.

The minutes of the Advisory Committee's discussion do not suggest that the committee received any analysis of how the length limits for briefing work in the courts of appeals. The publicly available

history of the proposed amendment supports an inference that changing the word limits—and adopting the 250-word ratio for new limits—arose late in the process without debate or analysis. *See, e.g.*, Minutes of the Advisory Committee on Appellate Rules, Sept. 27, 2012; Memo, Catherine T. Struve, Reporter, to Advisory Committee on Appellate Rules (Mar. 25, 2013) (using 280-word conversion ratio).

The Advisory Committee voted 6–4 to move the proposal forward. This vote appears to rest on six members' individual preferences, perhaps supplemented by unreported anecdotal information. In any event, the record does not support making the proposed material change in appellate due process for litigants and appellate lawyers. The amendments are not supported by a factual record and reasoned analysis appropriate for the federal judiciary.

5. *The proposal to reduce briefing length-limits is not beneficial.*

The proposed amendment to rules 28.1 and 32 would adversely affect developing issues in complex appeals. In the Academy's experience, the current word limits enable counsel in complex cases to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal. Reducing the word limit would impair fair recitation of the facts after all but short trials. Even when the statement of facts can be compact, reducing the word limit would impair appropriate development of difficult and

controversial legal issues. The inevitable results include more motions to file briefs exceeding the limits and inappropriately constricted presentation of complex appeals when counsel fears requesting additional words or a circuit has a practice of denying exceptions.

The proposal also would impair parties' access to court. While lawyers primarily control how briefs are drafted, a client has the right to control which (nonfrivolous) issues are argued. Criminal defense counsel lack discretion to omit a weak but non-frivolous issue.

In the Academy's anecdotal experience, fewer civil cases go through trial and appeal after the beginning of the Great Recession. But the tried cases tend to be the most complex and to involve the highest stakes. If the average civil-case brief is longer today than in 1998, the reason could be that appeals in civil cases are more complex. Many judges who participate in our seminars report that this is so, and that the increasing volume of white-collar crime prosecutions pushes a similar trend in criminal appeals.

In simpler cases, generally the briefs are shorter and the 14,000-word limit is not implicated. Consequently, the proposed amendments will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.

To the extent that verbose or unnecessarily long briefs are being filed—which is not the Advisory Committee's stated justification for the proposed amendments—that problem is far better addressed through meaningful training by and guidance from judges and lawyers experienced in effective appellate practice The Advisory Committee can find some of the Academy's views on such initiatives in its Statement on the Functions and Future of Appellate Lawyers, prepared for the 2005 National Conference on Appellate Justice and reprinted at 8 J. App. Prac. & Process 1 (2006).

6. The 250-word conversion ratio should not be applied to other rules.

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the current page limits. Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits. The deleterious effect of the 250-word conversion rate would likely be even more pronounced on documents currently subject to shorter page limits – writs, rehearing petitions, petitions for leave to appeal – which often warrant greater development than the current page limits allow. The Academy requests that the length limits under all of those rules be converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.

As to proposed Rule 29(b), 2,000 words for a brief of an amicus curiae on rehearing is too short. At this stage, the great majority of AC briefs are filed in support of en banc review. That is, they tend to be filed in some of a court's most difficult cases. The proposed word length is barely sufficient for a party other than the government to explain its case-specific interest. The length for these briefs should be the same as the allowed length for the party's petition.

7. Conclusion

The record indicates that proposal 12-AP-E was an excellent idea that made a wrong turn. The good parts of it should be preserved, and the unjustifiably low conversion ratio should be revised. No amendment is needed to rules 28.1 and 32. The other rules should be amended, but the word limits should be based on a conversion ratio of 280 or more. Finally, briefs of amicus curiae on rehearing, which have no current limit, should have a 4,200-word limit.

E. Amicus filings in connection with rehearing: Rule 29

The proposed amendment would renumber the existing rule 29 as 29(a) and would add a new Rule 29(b). The new 29(b) would set a default for the treatment of amicus filings in connection with petitions for rehearing. While the proposed rule would continue to allow the United States, its officer or agency, or a state to file, without seeking leave, an amicus brief in support of rehearing, any other amicus brief regarding rehearing could be filed only by leave of court. In addition to

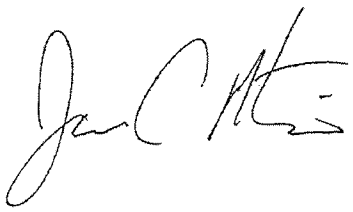
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

With the exception of a word limit based on a conversion rate of 250 words per page, discussed above, the Academy supports this proposed amendment.

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

The Advisory Committee proposes to amend Rule 26(c) to eliminate the three-day grace period when a brief is served electronically. Under the proposed amendment, 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. This proposed change would be accomplished by amending the rule to state that a paper served electronically is deemed to have been delivered on the date of service stated in the proof of service.

Although the Academy notes that electronic filing allows parties to file briefs late in the evening on the due date, the date of service is not counted in determining the deadline for filing and courts generally grant reasonable extensions of time for filing briefs. The Academy supports this proposed change to Rule 26(c).



James C. Martin
President, American Academy of Appellate Lawyers
November 24, 2014

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gwi-nnyd
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0020
Comment from Dorothy Easley, Easley Appellate Practice

Submitter Information

Name: Dorothy Easley
Organization: Easley Appellate Practice

General Comment

Please see attached article in The Florida Bar Appellate Practice Section that details the concerns, but an abstract of that articles is:
The concern among many appellate practitioners is this reduction in word count and its impact on the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived. The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are deemed most certainly waived. Further reducing word count could have a significant adverse impact on appellate briefing and preservation.
Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients. But consider this-- twenty-five percent of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. These statistics and judicial observations that appellate briefs are increasingly THE most important tool in understanding the issues on appeal indicate that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.
Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. Increased work load to further research and understand the appellate issues, to make well-informed decisions, in both civil and criminal appeals that are fact-intensive (e.g. employment law cases, Section 1983 cases, criminal law cases concerning intent etc.). 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. In other words, word count reductions may actually increase the appellate courts labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex. Insufficient room to explain those complexities coupled with appellate issue preservation restrictions and reductions in oral argument do not aid the appellate process that labors to make decisions that are correct, not decisions that are the most expedient.

Attachments

APP-winter2014 EASLEY ARTICLE

Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

By Dorothy F. Easley[1]

D. EASLEY

With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "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."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

continued on page 9

Proposed Amendments
from page 2

(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "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".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

1 Dorothy F. Easley earned her J.D., with honors, in 1994 from the University of Miami School of Law and her M.S., with highest honors, in 1986 from SUNY/CESF. She is board certified in appellate practice, managing partner of Easley Appellate Practice, PLLC, and is admitted to practice in all Circuit Courts of Appeals and the Supreme Court. Ms. Easley is a past chair of the Appellate Practice Section, 2009-2010.

2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) BAR ASS'N THIRD CIR. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h59-jdyy
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0035
Comment from Jeffrey R. White, Center for Constitutional Litigation

Submitter Information

Name: Jeffrey R. White
Organization: Center for Constitutional Litigation

General Comment

Please see the attached comments submitted by the Center for Constitutional Litigation.
See attached file(s)

Attachments

CCL Comments 021115

CENTER FOR
CONSTITUTIONAL LITIGATION
A PROFESSIONAL CORPORATION

Via Electronic Submission

February 11, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

The Center for Constitutional Litigation, P.C. ("CCL") submits these comments on proposed amendments to the Federal Rules of Appellate Procedure currently being considered by the Committee. We sincerely appreciate the Committee's willingness to consider CCL's views.

CCL has served as an appellate firm for the plaintiffs' bar since 2001. Trial lawyers turn to CCL to represent their clients in civil appeals involving complex legal issues. CCL has represented parties in high-profile cases in the Supreme Court of the United States and in all the federal circuit courts of appeals, excepting the Federal Circuit. In addition, CCL represents the American Association for Justice as amicus curiae in courts around the country, including the federal courts of appeals. The ability to write effective appellate briefs is vital to our success and to the vindication of the rights of our clients.

CCL therefore offers the following comments regarding the proposed changes.

Rule 4: Tolling Motions

CCL does not oppose the proposed amendment to Rule 4(a)(4)(a) that would adopt the majority view that post-judgment motions made outside of the time limits of the Civil Rules are not "timely," and thus cannot toll the time for filing a civil appeal.

Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6: Type-Volume Limitations

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.

CCL agrees with the Committee's observation that the Rules' reliance on page limits has "been largely overtaken by changes in technology." In 1998, the Committee recognized that widespread use of personal computers had opened the door to manipulation of fonts, kerning, margins, and other "tricks" that threatened to make the existing 50-page limit "virtually meaningless." Advisory Committee Note to 1998 amendments. Rule 32 was therefore sensibly

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amended to incorporate type-volume limits as a more effective means of controlling the length of briefs. In 2005, Rule 28.1 adopted limits on cross-appeal briefs that were based on the Rule 32 type-volume limitation. The same recognition of the impact of technology supports the conversion of page limits in other rules to equivalent word limits, and CCL supports that conversion.

The proposal to shorten briefs and other documents is another matter entirely. The proffered justification for the proposed change is that the 14,000 word limit adopted in 1998 was based on the Advisory Committee's erroneous determination that 50-page briefs contained approximately 280 words per page. The proponents of lower limits contend that the true conversion rate should have been 250 words per page.

Judge Frank Easterbrook was present at the creation of the 1998 rule and disputes this version of events. His comment indicates that the 50-page to 14,000-word conversion was based on his own word count of printed briefs. Similarly, the comment by the General Counsel of the Equal Employment Opportunity Commission states that some of the EEOC's briefs under the 50-page limit contained over 14,000 words. The American Academy of Appellate Lawyers has commented that the record of the proceedings leading up to the 1998 amendments does not provide "any basis to support the comment that the 1998 Advisory Committee was confused or mistaken."

The Advisory Committee in 1998 arrived at 14,000 words as the enforceable equivalent of a 50-page filing that would work no change in the amount of content of principal briefs. Even when the Advisory Committee was given the opportunity to "correct" any error in the conversion ratio in 2005, the Committee instead applied the same conversion ratio in Rule 28.1 as it used in Rule 32. After almost a decade of practice under the type-volume limits of Rule 28.1 and more than fifteen years of practice under Rule 32's type-volume limits, the suggestion that those limits must now be reduced threatens to disrupt appellate practice nationwide. The technology rationale for converting to type-volume limits provides no justification for enlarging or reducing those limits; it is a rationale for preserving existing practice and settled expectations.

Nor has any persuasive rationale for shorting type-volume limits been advanced. The judges of the Tenth Circuit and Judge Silberman of the D.C. Circuit have commented that many briefs filed in their courts are too long. But wordy and unfocused briefs come in all sizes, including 12,500 words. Lower limits on the quantity of written advocacy will not likely improve its quality.

To the contrary, CCL believes that blanket reduction in the size of briefs and other filings will reduce the quality of appellate advocacy and undermine proper decision making by the federal appellate courts. Those civil actions that proceed to trial and then to appeal are often the most complex and intractable disputes. Justice is not served when counsel cannot lay out the facts of a complex case in sufficient detail, identify all the issues of consequence, and set forth the governing statutory and precedential law. The opportunity to fully present the facts, issues and law in appellate briefing is especially important because any federal appeal may be decided without oral argument, even if oral argument is requested by the parties. Fed. R. App. P. 34(a)(2)(C); *see also* United States Court of Appeals for the Fourth Circuit Local Rule 34(a)

("*Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.*").

The law that must be discussed in appellate briefing has not become simpler in recent decades. The inexorable growth of statutes and regulations – "hyperlexis" – is well known. *See* Mila Sohoni, *The Idea of "Too Much Law,"* 80 Fordham L. Rev. 1585, 1591 (2012); Dru Stevenson, *Costs of Codification*, 2014 U. Ill. L. Rev. 1129 (2014). Supreme Court opinions, the authoritative declarations of federal law, have become substantially longer. Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 634 (2008). There is no reason to believe federal appellate opinions have not followed suit. The growth of computerized legal research has enabled counsel to better identify and organize the weight of legal authority governing the issues in his or her case. A blanket reduction in word limits moves the advocate away from nuanced discussion toward a string of citations.

It is no answer that counsel can move for an enlargement of the word limits. Even if such requests were routinely granted, the shortened limits would have succeeded only in increasing the work of courts and counsel. In our experience, amici curiae rarely seek and courts rarely grant enlargement of the word limit for amicus briefs. 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, thus increasing the number of briefs (and words and pages) filed, not reducing them.

Because CCL regularly prepares and files amicus curiae briefs on behalf of the American Association for Justice and other clients, CCL notes that the proposed reduction in type-volume limitations will affect amicus briefs disproportionately. Under Rule 29, the word limit for amicus briefs is half of that for a party's principal brief, and so would be reduced more than 10 percent to 6,250 words. However, Rule 29 also requires a "statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." An amicus must also state "whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) 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, identif[y] each such person." Both these statements count against the word limit.

Because there appears to be no good reason to impose a blanket reduction in the size of all filings, CCL submits that the proposed amendments to Rule 32 and 28.1 be withdrawn, and the page limits for Rules 5, 21, 27, 35, and 40 be converted using the existing ratio of 280 words per page.

Rule 29: Amicus Filings in Connection With Rehearing

Similarly, 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."

Proposed Rule 29(b) would make special provision for amicus filings during a court's consideration of petitions for rehearing or rehearing en banc. No rule currently governs such filings, and CCL agrees with the Advisory Committee that the bar would welcome clear guidance on this point.

CCL agrees with the comment submitted by the General Counsel for the EEOC that the proposed deadline for filing an amicus brief should be extended from 3 days to one week after the party has filed the petition for rehearing. Amici should be afforded reasonable time to consider the petition and to fulfill their internal requirements for approval of amicus participation.

CCL disagrees with the proposal to limit amicus briefs to 2,000 words. Rehearings 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. Addressing those matters in addition to setting forth the identity and interest of the amicus often may require longer briefs.

It is significant that the federal circuits that have local rules on this point set substantially higher word limits. *See* Ninth Circuit Rule 29-2(c) (An amicus brief submitted while petition for rehearing is pending is limited to 4,200 words.).

CCL further suggests 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, the proposed Rule 29(a) limits its application to amicus filings during a court's initial consideration of a case on the merits. CCL questions the rationale for limiting amicus briefs to a court's initial consideration of a case on the merits, which is not explained in the Committee Notes.

On rare occasions, CCL and/or the American Association for Justice present amicus briefs at a later consideration of the case on the merits where no brief was filed during the court's initial consideration of the merits—either after rehearing en banc has been granted or after a case has been remanded from the Supreme Court. On these rare occasions, our amicus briefs have focused on issues that were raised by the panel's or the Supreme Court's majority or dissenting opinions, or were necessary to present our client's interests in a case where those interests were not clear before the initial consideration of the merits by the court. We believe it is unwise to limit Rule 29(a) to the "initial" consideration of the case on the merits.

CCL thanks the Committee for this opportunity to comment on these proposed rule changes.

Regards,

Jeffrey R. White
Senior Litigation Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h5v-szuf
Comments Due: February 17, 2015

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Comment from Federal Courts Committee NYCLA, Federal Courts Committee of the New York County Lawyers Associaton

Submitter Information

Name: Federal Courts Committee NYCLA
Organization: Federal Courts Committee of the New York County Lawyers Associaton

General Comment

Please see the attached Report by the Federal Courts Committee of the New York County Lawyers Association.

Attachments

Report on Federal Rules of Appellate Procedure FINAL 2-12-15

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Vincent T. Chang
Co-Chair
Hon. Joseph Kevin McKay
Co-Chair
Federal Courts Committee

February 12, 2015

FEDERAL COURTS COMMITTEE OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Courts Committee (the "Committee")[1] of the New York County Lawyers Association ("NYCLA") has approved the following comments concerning the proposed amendments to the Federal Rules of Appellate Procedure (the "Proposed Amendments") proposed by the Judicial Conference Advisory Committee on Appellate, Bankruptcy, Civil and Criminal Rules (the "Advisory Committee") and published for public comment on August 15, 2014.[2] If enacted, the amendments will become effective December 1, 2016.

NYCLA is an organization of nearly 9,000 lawyers. Its Federal Courts Committee comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA and its Federal Courts Committee issue reports and position papers on matters of interest to our membership, including proposed changes in law and procedure that we believe impact the public interest.

As further detailed below, the Committee generally supports the Proposed Amendments, but opposes certain of the proposed amendments and suggestions with respect to other items. In particular, the Committee opposes certain changes to the requirements for inmate filings. In the sections below, we first comment on a proposed amendment to the so-called "three days are added" rule, which we also address in our separate comments on the Federal Rules of Civil Procedure, and then offer comments on the proposed amendments to other rules in the Federal Rules of Appellate Procedure, including rules on inmate filings and changes in word count limits and amicus briefs.

PROPOSED AMENDMENTS AND COMMITTEE COMMENTS

A. "Three Days Are Added" Rule

Proposed Amendment:

The Federal Rules of Appellate Procedure provide that where a party's time to act is measured from the service of a paper, three days are added to that time if the paper is served other than by hand delivery. *See* Fed. R. App. P. 26(c). The Proposed Amendments would

[1] The views expressed are those of the Federal Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

[2] The Advisory Committee simultaneously published proposed amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure; however, the comments contained herein are limited to the proposed amendments to the Federal Rules of Appellate Procedure. The Committee has issued separate comments on the proposed amendments to the Federal Rules of Civil Procedure.

eliminate electronic service from the types of service that add three days to the other party's time to act. In other words, for purposes of the "three days are added" rules, electronic service would be the functional equivalent of service by hand and would no longer trigger the rule.

The Proposed Amendment to the Federal Rules of Appellate Procedure is as follows[3]:

Rule 26. Computing and Extending Time

****

(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.

The Proposed Amendments – and parallel Proposed Amendments to Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Criminal Procedure[4] – are based on the same underlying rationale. Fed. R. App. P. 25 was amended in 2001 to provide for service by electronic means. At the same time, Fed. R. App. P. 26 was amended to include such electronic service among the types of service that give the recipient three additional days to act. At that time, there were two reasons for such inclusion: (a) concerns about delays in electronic transmission due (for example) to incompatible systems or the like; and (b) a desire to induce parties to consent to electronic service, which initially was authorized only with the consent of the person being served.

The Proposed Amendments recognize that both of these reasons no longer exist. Electronic communication is now the norm, and is considered reliable.[5] In most federal courts, electronic filing – the standard means of electronic service – is mandated in virtually all cases; any attorney wishing to practice before the court must "consent" to it. There is therefore little remaining reason to treat electronic service with the wariness that led to its initial inclusion among the types of service that extend a period to act by three days. As the Advisory Committee Notes to the Proposed Amendments point out, electronic service has become the norm.

[3] Additions are signified with red underlining; deletions are signified with ~~red strikethrough~~.

[4] Although the Proposed Amendments to the Criminal and Bankruptcy Rules are beyond the scope of these comments, we note that the Proposed Amendments would alter the "three days are added" rules in essentially the same manner in all federal courts.

[5] The rules separately address the possibility of any actual failure of electronic communication. Fed. R. App. P. 25(c)(2) authorizes electronic service only through the court's transmission of electronic filings – which, under Fed. R. App. P. 25(a)(2)(D), can be made only in accordance with the court's local rules. These local rules, in turn, generally include provisions respecting technical failures. *See, e.g.*, Second Circuit Rule 25.1(d)(3).

In addition, eliminating the extra three days for the mode of service that is now the most common greatly simplifies the computation of time. As the Advisory Committee Notes point out:

> 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 complications by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the Proposed Amendment would change the rule to provide for additional time *only* where a party's time to act is triggered by service on that party ("after being served"), not where a party's time to act is triggered by that party's own service of a document ("after service"). This is obviously a simple matter of logic; there is no reason to give a party an extra three days by virtue of that party's own choice to serve a document in a manner other than personal delivery or electronic service.

The Committee's Comments:

The Committee generally endorses the adoption of the Proposed Amendments to Fed. R. App. P. 26 for all of the reasons set forth above. We do, however, make one observation.[6]

Although the rules do not specify as much, as a practical matter an attorney can generally serve opposing counsel by hand only during the business hours of that counsel's office. The reason for this is because, unless the paper is handed directly to opposing counsel, the rules require that it be delivered "to a responsible person at the office of counsel" (Fed. R. App. P. 25(c)(1)(A)), which requires, at a minimum, opposing counsel's office be open and accessible.

Electronic service, in contrast, can be accomplished at any hour – regardless of whether the recipient's office is open. This is one reasons why some attorneys prefer to serve papers electronically. But it also means that electronic service may not be quite the same as hand delivery for purposes of reasonable notice. A paper can be served electronically on a given day any time until 11:59 p.m., whereas in practice most attorneys could not receive service by hand at such an hour. At first blush, it seems unfair to treat 11:59 p.m. electronic service the same as service by hand during business hours for the purpose of triggering a time to act that is measured in calendar days. That unfairness is magnified where the papers are voluminous: electronic

[6] A minority of the Committee's members dissented to the Committee endorsing the adoption of the Proposed Amendments to Fed. R. App. P. 26, principally for the reasons stated in the majority's "one observation." However, the dissenters disagree with the majority's statements in the "one observation," characterizing the reasons for opposing these amendments as a "small anomaly" and characterizing these amendments as "an efficient adjustment of the rules to comport with the realities of modern practice." The dissenters believe that the proposed changes will lead to "gamesmanship" with frequent service of papers electronically after the close of business, especially on Fridays, to reduce the adversary's effective response time by three days. Additionally, service electronically is not equivalent to hand delivery, because of the time imposed on the recipient for printing and compiling papers, which may include voluminous exhibits. For these reasons, the dissenters do not believe these changes to be "an efficient adjustment of the rules" and would not approve them.

service imposes on the recipient the burden of printing and organizing papers that, if served by any other means, would arrive bound and tabbed.

On balance, however, the Committee does not believe that this is a reason to reject these Proposed Amendments. In most instances, counsel work out briefing schedules among themselves, and can address such issues as the timing of electronic service in their agreements. Almost invariably, a party that needs an additional day because of late-night service should be able to obtain it either by agreement or from the court. We therefore do not see this small anomaly as a barrier to what we otherwise agree is an efficient adjustment of the rules to comport with the realities of modern practice.[7]

B. Tolling Motions

Proposed Amendment:

Fed. R. App. P. 4(a)(4) currently 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" (emphasis added). As the Advisory Committee explains, this rule has generated a split in the circuits concerning what happens if a district court has extended the deadline for such a post-judgment motion and no party has objected to that extension. The majority (including the Second Circuit) holds that compliance with such an extended deadline does *not* toll the time to file an appeal, but a minority (including the Sixth Circuit) holds that it does.

The Proposed Amendment would resolve this split by adopting the majority view: Fed. R. App. P. 4(a)(4) would now specify that in order to toll the time to file an appeal, a post-judgment motion would have to be made "within the time allowed by" the Federal Rules of Civil Procedure.

The Committee's Comments:

The Committee supports this amendment, which will create uniformity and clarity (and which, we note, will not change the practice in the Second Circuit).

[7] We note, moreover, that in the Second Circuit (a) the due dates for principal briefs are generally set by order based on the parties' requests (the deadlines for which are triggered by events other than service); and (b) the due date for any reply brief is triggered by the *filing* of the appellee's brief, not by its service. *See* Second Circuit Rule 31.2. As a result, in the Second Circuit the Proposed Amendment would impact the timing of papers only for motions (which are governed by Fed. R. App. P. 27). We also note 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.

C. Inmate Filings

Proposed Amendment:

Proposed amendments to the Fed. R. App. P. 4 and 25 and a new proposed Form 7, with accompanying revisions to Forms 1 and 5, would modify the requirements for litigants who are prison inmates to establish timely filing of notices of appeal and other papers in certain circumstances. Rule 4 relates to filing notices of appeal, which are initially filed in the district court from which the appeal is taken. Rule 25 relates to the filing of any paper in the court of appeals.

Under the current and amended version of those rules, inmates may file papers by mailing them to the courthouse, and their papers may be considered timely if deposited in the prison mailing system by the deadline for filing. The proposed amendments, which are substantively the same for Rule 4 and Rule 25, would alter the existing rules in three principal respects.

First, the current rules provide that "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The proposed amendments would eliminate this language, allowing inmates to take advantage of the timely-filing rule regardless of whether they use the institution's legal mail system (if it has one) or its general mail system.

Second, the proposed amendments address when an inmate can submit a declaration or affidavit to establish that the filing was deposited in the mail system as of the filing deadline. The amendments would clarify that, subject to the court's discretion, the inmate must include such a declaration or affidavit with the document being mailed. The current rule does not expressly require inclusion of such a declaration with the paper being filed, and courts have reached different conclusions as to whether an inmate can submit a declaration or affidavit of timely mailing after-the-fact.

Third, the proposed amendments modify the language required for such declarations or affidavits of timely filing. Among the amendments is a proposed Form 7, which is a sample inmate declaration of timely filing by mail.

The proposed revisions to Rule 25(a)(2)(C) and the accompanying proposed Advisory Committee Note are set forth below. (The revisions to Rule 4(c), which governs inmates filing a Notice of Appeal, are substantively the same.)

Proposed Revisions to Rule 25(a)(2)(C):

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate filing.** 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 second sentence of the former Rule—which had required the use of a "system designed for legal mail" when one existed—is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

As indicated above, the Advisory Committee proposes that a sample declaration be added to the Appellate Rules as a new Form 7. Form 7 is a sample court-captioned declaration. The body of the sample declaration reads as follows:

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

To alert inmates to the requirements that would be imposed under the amendments to Appellate Rule 4, the Advisory Committee proposes the addition of new language to the sample notices of appeal (Forms 1 and 5). The warning would appear in bracketed language at the bottom of those Forms, as follows (the proposed changes to Form 1 and Form 5 are identical):

> *[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the 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.]*

The Committee's Comments:

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.

The proposed amendments to the inmate filing provisions of Rules 4 and 25 would impose an additional procedural hurdle on a select class of pro se litigants, namely inmates of prisons or other institutions.[8] Non-inmate *pro se* parties can deposit filings directly into the U.S. mail or with a private courier (the rules allow filing by mail for all parties, so long as the clerk receives the papers by the last day for filing). Different considerations apply to prison inmates, who have no direct access to the U.S. mail system, and no control over delays within a prison mail system. The current provisions in Rule 4(c) and Rule 25(a)(2)(C) reflect these considerations.

The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by *pro se* prisoner litigants. In the Committee's experience, *pro se* litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly

[8] Prison inmates represented by counsel will generally file all papers electronically through counsel and are likely not affected by the proposed amendments.

from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require *pro se* prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The Committee endorses the amendments to include a sample declaration of timely filing (Form 7), and to include references to that sample in the current form notices of appeal. The Committee does not favor the language of the proposed new Form 7. The form declaration requires the inmate to swear under penalty of perjury that she "deposited" the paper for filing in the institution's mail system as of a particular date. An 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. Interestingly, the Advisory Committee acknowledges and corrects a similar problem under the existing rule, and proposes requiring that the inmate declare that first class postage 'is being prepaid," not (as directed by the existing Rule) that it "has been prepaid." *See* Advisory Committee Note to FRAP 4, 25 Amdts. ("This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system."). In addition, the past-tense language 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.

D. Length Limits

Proposed Amendment:

The proposed amendments to Fed. R. App. P. 32 and 28.1 would reduce the word count limits for appellate briefs, reducing the word limit for main briefs from 14,000 words to 12,500 words; for reply briefs from 7,000 words to 6,250 words. In cases involving cross-appeals, the proposed amendments would reduce the word count for the appellant's principal brief from 14,000 words to 12,500; the appellee/cross-appellant's brief from 16,500 words to 14,700 words; and the appellant's reply brief and the appellee/cross-appellant's reply brief from 14,000 to 12,500 words. The proposed amendments do not affect the existing limits as stated in lines of text, which remain an alternative basis for complying with the rules' length limits. The Advisory Committee explains that the reduction in word count limits is intended to correct an anomalous conversion rate that was used in 1998, when then-applicable page limits were converted into word and line limits:

> 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments

inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

(Advisory Committee Note to Rule 32 Proposed Amdt.)

Further amendments to Rule 32 would clarify the specific sections of briefs that are excluded from the word count, set forth in a new Rule 32(f).

Finally, Rule 32 is amended to include a global certification requirement for virtually all papers filed before the court of appeals, not just briefs, that the paper complies with applicable type-volume requirements.

The revisions to Rule 32 are copied below.

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2)—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.

Proposed amendments to Fed. R. App. P. 5, 21, 27, 32, 35, and 40 relate to filings other than parties' merits briefs. Each Rule would be amended to include length limits for computer-generated papers in terms of number of words or, alternatively, number of lines printed in monospaced font. The amended versions of these rules preserve page limits only for handwritten or typewritten papers. The proposed limits effectively convert the existing page limits under these rules into word and line limits, applying a conversion rate of one page equaling 250 words or 26 lines of text.[9]

The Advisory Committee proposes accompanying changes to Form 6, the sample certification that a party has complied with length limits for briefs. The revised Form 6 could be used for certifying compliance as to any "document" filed with the court of appeals, rather than merely briefs. The revised Form 6 reflects that, under the proposed amendments, a party can certify compliance with all computer-generated papers, not merely briefs, in terms of the document's word count or line count.

The Committee's Comments:

The Committee endorses these proposed amendments.

The Report of the Advisory Committee on Appellate Rules explains that the 1998 adoption of word limits inadvertently increased the permissible length of briefs before the courts of appeals. At that time, the Appellate Rules were amended to replace the 50-page limit for briefs with a 14,000 word limit, apparently employing a conversion rate of 280 words per page – a number of unknown origin. A study of briefs under the pre-1998 rules indicates that an average 250 words per page would have been a more accurate benchmark. The proposed amendments use this more accurate conversion rate, applying it to the 1998 page limits for briefs

[9] Thus, requests for permission to appeal (Rule 5), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text. Petitions for mandamus and other extraordinary writs (Rule 21), currently limited to 30 pages, would be limited to 7,500 words or 780 lines of text. Motions and responses to motions (Rule 27), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text; reply briefs on motions, currently limited to 10 pages, would be limited to 2,500 words or 260 lines of text. Petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), currently limited to 15 pages, would be limited to 3,750 words or 390 lines of text.

and the current limits (expressed in pages) for other filings. The Committee agrees with the Advisory Committee's rationale of adopting word limits that better achieve the intended result of maintaining the length limits in place in 1998. Notwithstanding these amendments, any circuit could adopt local rules to maintain the existing limits or otherwise permit longer limits.

The Committee also endorses the proposed amendments relating to papers other than briefs on the merits, as they provide greater uniformity in length limits across different types of appellate papers, and greater clarity in calculating a paper's length. Under the proposed amendments, the length limits for computer generated papers in support of petitions for Appeal by permission (Rule 5), mandamus and other extraordinary writs (Rule 21), motions (Rule 27), petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), all currently expressed in pages, would be governed by word or line counts. The proposed amendments to Rule 32 provide more clarity as to what items are excluded from the word or line count. The more comprehensive list makes clear that the word or line count should not include any cover page, signature block, or proof of service – components that are not expressly mentioned in Rule 32's current list of exclusions.

For the sake of fairness, the Committee notes that these 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.

E. Amicus Briefs on Petitions for Rehearing

Proposed Amendment:

No federal rule governs the timing and length of amicus briefs filed in connection with petitions for rehearing, and the Advisory Committee reports that most circuits have no local rule addressing such filings.[10] The Proposed Amendments seek to fill this void by re-numbering Fed. R. App. P. 29 (which is titled "Brief of an Amicus Curiae" and addresses amicus briefs generally) as Fed. R. App. P. 29(a), titling that subsection "During Initial Consideration of a Case on the Merits," adjusting the numbering of its sub-parts accordingly, and adding a new Fed. R. App. P. 29(b) entitled "During Consideration of Whether to Grant Rehearing." The provisions of the new subsection would apply only where no "local rule or order in a case provides otherwise." Thus, the rule would not require any circuit court to accept amicus briefs on such petitions or mandate any particular rules concerning the length or timing of such briefs; it would only establish default rules for timing and volume where such briefs are permitted.

The Proposed Rule sets a volume limit of 2,000 words, or 208 lines of text printed in a monospaced face – slightly more than half of the volume limit proposed for petitions for rehearing in the Proposed Amendments to Fed. R. Civ. P. 40. An amicus brief in support of a petition for rehearing (together with a motion for leave to file it if the amicus is not the United States, its officer or agency, or a state) would have to be filed no later than three days after the petition it supports. A brief in opposition to such a petition (together, again, with a motion for

[10] The Second Circuit has no such rule.

leave if required) would have to be filed no later than the date set by the court for any response to the petition.

The Committee's Comments:

The Committee generally supports this clarification, particularly in light of the room it leaves for courts to develop their own rules. Presumably any circuit that disagrees with the default approach will promulgate a local rule to address the issue; thus, in either case, there will be a rule that provides counsel with some guidance in this area. We agree with the general proposition that having no rule at all leads to confusion – and in all likelihood burdens clerks' offices with calls that would be unnecessary if there were a rule.

We do note, however, that the Advisory Committee has not explained why the deadline for an amicus brief opposing rehearing should presumptively be the same as the deadline for the opposing party's brief. A motion for leave to file an amicus brief must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). As a practical matter, this generally requires the amicus 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. It is difficult (if not impossible) for an amicus to do this until *after* the filing of the brief of the party whose ultimate position it is supporting.

We would therefore suggest that the default deadline for an amicus brief in opposition to a petition for rehearing be three days after the filing of the main brief in opposition. Although we recognize that this would require the court to wait three days to see if any amicus is filed, as a practical matter we do not believe that this will significantly lengthen the time it takes to resolve any motion for rehearing. We also note that opposition papers are permitted on such applications only where the court requests them. We respectfully submit that any application for rehearing that warrants such a request should also warrant the addition of three days to the briefing schedule to accommodate the interests of any amicus curiae.

We recognize that a three-day deadline is very short because (following the 2009 amendments) intermediate Saturdays, Sundays and holidays are no longer excluded from the counting. In some instances this could mean that a weekend represents all of the time an amicus has between the filing of the party's brief and the deadline for its own. We do not, however, suggest an expansion of that time because we recognize that as a practical matter an amicus will have to begin preparing its papers at the same time it would if it were a party; the additional time would primarily give the amicus an opportunity to see the final version of the party's brief and adjust its own accordingly. This opportunity should be available to an amicus on either side, but the default length of time need not (in our view) be any longer than what the Advisory Committee proposes.

Report prepared by:

Vincent T. Chang, Committee Co-Chair

Hon. Joseph Kevin McKay, Committee Co-Chair

Adrienne B. Koch, Committee Member

Kimo Peluso, Committee Member

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8f-x3ot
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0040
Comment from Pennsylvania Bar Association, Pennsylvania Bar Association

Submitter Information

Name: Pennsylvania Bar Association
Organization: Pennsylvania Bar Association

General Comment

The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the attached comments in response to the proposal by the Advisory Committee on Appellate Rules.

Attachments

Comments-Appellate-FedRules

February 16, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Sir or Madam:
The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the following comments in response to the proposal by the Advisory Committee on Appellate Rules.

Respectfully,
Francis X. O'Connor, President
Pennsylvania Bar Association

COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Pennsylvania Bar Association makes the following recommendations with respect to some of the proposed Appellate Rule changes:

Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7.

- 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.

- 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.

- The PBA opposes the proposed amendments to Rule 26(c), governing time limits to respond to filings.

RE: Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules

Introduction

The proposed changes to the Appellate Rules are divided into thematic groups. First are discussed the proposed amendments to rules and forms governing inmate filings: Rule 4(c)(1), Rule 25(a)(2)(C), Form 1, Form 5, and New Form 7. Second are discussed the proposed amendments to Rule 4(a)(4), governing the time to file a notice of appeal when a post-judgment motion is filed. Third are discussed the proposed amendments to the rules and forms governing the length of filings: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6. Fourth are discussed the proposed amendments to Rule 29, governing amicus filings in connection with a petition for rehearing. And finally are discussed the proposed amendments to Rule 26(c), governing the time to respond to an electronically-served filing.

Tolling the Time to File a Notice of Appeal: Rule 4(a)(4)

Proposed Amendments

Rule 4(a)(4) extends the time in which a party must file a notice of appeal when that party files a "timely" post-judgment motion. The Rules Advisory Committee felt that the Rule should be amended in light of a circuit split on whether a post-judgment motion filed outside the non-extendable deadlines count as "timely" when the district court mistakenly authorized an extension. The proposed amendments delete the word "timely" and add that the post-judgment motion be filed "within the time allowed by those rules."

Comments

The Committee recommends that the PBA oppose this change. This proposed amendment would adopt the position of the Third Circuit in Lizardo v. United States, 619 F.3d 273 (3d Cir. 2010), and three other circuits that the filing of a post-judgment motion beyond the deadlines permitted by the Civil Rules will not toll the time for filing an appeal even where a district court considers and decides the untimely post-judgment motion, thus effectively extending the time for such a post-judgment motion, as the district courts apparently have discretion to do. Although providing greater clarity to Rule 4(a)(4) is highly desirable in light of the consequences of filing a late appeal, the proposed new text may not go as far as it should in making clear that an order extending the time for filing a post-judgment motion will not extend the time for filing an appeal. It is also 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). The amendments as drafted should not be approved without greater clarification because they simply substitute a new trap for the unwary in place of the current trap for the unwary.

Length Limits: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6

Proposed Amendments

The Rules Advisory Committee believed that the current length limits have been overtaken by technological advances and invite gamesmanship by attorneys. Therefore, the Rules Advisory Committee has proposed amending the rules and forms governing the length of filings when those filings are prepared by computer. The proposed amendments do not change length limits for filings prepared without the aid of a computer. The proposed amendments assume that one page should contain approximately 250 words and 26 lines of text. The Rules Advisory Committee also amended Form 6 as part of a new length certification requirement. Additionally, the proposed amendments contain a list of items that can be excluded when computing a document's length. The proposed changes are as follows:

Rule 5 (Appeal by Permission):
- not more than 5,000 words or 520 lines of monospaced text
- previously 20 pages

Rule 21 (Writs):
- not more than 7,500 words or 780 lines of monospaced text
- previously 30 pages

Rule 27 (Motions):
- a motion or response must not exceed 5,000 words or 520 lines of monospaced text
- previously 20 pages
- a reply must not exceed 2,500 words or 260 lines of monospaced text
- previously 10 pages

Rule 28.1 (Cross-Appeals):
- appellant's principal brief and response and reply brief must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- appellee's principal and response brief must not exceed 14,700 words or 1,500 lines of monospaced text
- previously 16,500 words
- appellee's reply brief must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 32 (Form of Briefs):
- principal briefs must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- reply briefs must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 35 (En Banc):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Rule 40 (Panel Rehearing):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Comments

The Committee recommends seeking the views of the judges of the Third Circuit before deciding on a position. No one would dispute the goal of encouraging greater precision and brevity in appellate filings, but the current limits may work well and seem not to be a problem. In addition, shortening these limits is likely to result in a greater number of motions for enlargement. These amendments may fall into the category of fixing something that is not broken. However, the views of the judges of the Third Circuit would be helpful.

The Committee did not dispute the goal of encouraging greater precision and brevity in appellate filings. They felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement. It was suggested that the views of judges on the Third Circuit should be solicited and the Chair of the FPC did so. Judge Michael Chagares is a member of the Advisory Committee on Appellate Rules and 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.

Extension for Electronic Filings: Rule 26(c)

Proposed Amendments

As currently worded, Rule 26(c) allows a party who must respond to a filing that has been electronically served three more days in addition to the response time prescribed by the Rules. Under the current version of Rule 26(c), a document that is delivered on the date listed in the proof of service does not get the three-day additional period. However, the Rule assumes that documents that are electronically served are not delivered on the date listed in the proof of service, thereby entitling electronically-served documents to the additional three days. The proposed amendments remove that assumption. The Rules Advisory Committee suggests that the original wording of Rule 26(c) was due to fears that electronic service would be delayed, and that those concerns have abated.

Comments

The Committee recommends that this amendment be opposed. The Committee is concerned that electronic service may happen at any time of day or any day of the week. Therefore, 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.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9c-8s0y
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0058
Comment from Saul Bercovitch, The State Bar of Californias Committee on Appellate Courts

Submitter Information

Name: Saul Bercovitch
Organization: The State Bar of Californias Committee on Appellate Courts

General Comment

Please see the attached comments from the State Bar of Californias Committee on Appellate Courts.

Attachments

proposed FRAP amendments-02-2015-CAC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

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San Francisco, CA 94105-1639
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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment 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." The 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)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address 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. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(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 25(a)(2)(c)(ii), as further amended, would provide:

(ii) 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 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes 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. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports 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.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length 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. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that 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. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts

TAB 5B

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 07-AP-I (inmate-filing rules)

Among the items published for comment in summer 2014 were proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) that would clarify those provisions concerning timely filings by inmates. As published, 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, but that the use of an institution's legal mail system is not. The amendments would 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) would be revised to include a reference alerting inmate filers to the existence of Form 7. The amendments would 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.

Part I of this memo sets out the proposed amendments as published. Part II summarizes the public comments.[1] Part III discusses one commentator's objections to changing these Rules, and considers in particular the question of whether to retain the requirement that the inmate use a legal mail system when one exists. Part IV discusses other commentators' suggestions that the rules should authorize the later filing of the inmate's declaration and should authorize courts to excuse the prepayment of postage. Part V discusses proposals for improving Form 7. Part VI notes a question concerning the Rule's references to notarized statements. Part VII offers a sketch of revisions that would implement changes discussed in Parts III and V. Part VIII concludes.

I. Text of Rules and Committee Notes as published

Rule 4. Appeal as of Right – When Taken

* * * * *

[1] Copies of those comments are enclosed.

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

(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 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 second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. This change is designed to clarify that an inmate receives the benefit of the rule whether the inmate uses a prison's legal mail system or a prison's general mail system, and that an inmate is required to show timely deposit and prepayment of postage whether or not the inmate uses a prison's legal mail system.

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 subsequent to the deposit of 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.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) Filing: Method and Timeliness.

* * * * *

(C) Inmate filing. A paper filed by an inmate confined in an institution is timely if <u>it is</u> 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.~~ <u>and:</u>

<u>(i) it is accompanied by:</u>

- <u>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</u>

● 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 second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

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,[2] 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 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.]*

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

[2] See Rule 3(c) for permissible ways of identifying appellants.

_____, 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 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.]*

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. I deposited the _____ *[insert title of document, for example, "notice of appeal"]* in this case in the institution's internal mail system on _____ *[insert date]*, and 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 _____

Executed on _____ *[insert date]*

II. Summary of public comment

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)."

III. Objections to changing the Appellate Rules' inmate-filing provisions

Joshua R. Heller opposes the proposed amendments. His opposition focuses largely on the proposed deletion of the requirement that the inmate use any available "system designed for legal mail" in order to benefit from the inmate-filing rules. I will focus on that issue in Part III.B. First, however, I will briefly address in Part III.A a broader point to which Mr. Heller alludes – namely, that adoption of the proposed amendments would lead to disuniform treatment of inmate filings in the federal courts.

A. Uniform treatment of inmate filings

On the question of uniform treatment, Mr. Heller states: "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. Indeed, Rule 3(d) of the Rules Governing Section 2254 Cases was adopted at the same time and in conformity with Rule 4's inmate filing rule in 1998."[3]

I agree with Mr. Heller that it would be salutary if the rules governing the timeliness of inmate filings operated uniformly at all levels of the court system. However, that is not currently the case. As Mr. Heller observes, the inmate-filing rules governing habeas and Section 2255 proceedings track the inmate-filing rules in the current Appellate Rules. But all those rules differ somewhat from the Supreme Court's inmate-filing rule;[4] and any inmate-filing principles concerning district-court filings other than notices of appeal, habeas filings, and Section 2255 filings are set by caselaw rather than by national rule. Moreover, to the extent that Mr. Heller is concerned that deletion of the Appellate Rules' legal-mail-system requirement would cause the Appellate Rules to diverge from the habeas and Section 2255 Rules, it may be worth noting that the deletion of the legal-mail-system requirement would bring the Appellate Rules into closer conformity with Supreme Court Rule 29.2 (which has no such requirement).

Mr. Heller's observation does, however, highlight the value of coordination with the Criminal Rules Committee. If the Appellate Rules Committee votes to proceed with amendments to the Appellate Rules' inmate-filing provisions, it would be worthwhile to ask the Criminal Rules Committee to consider making similar changes to the inmate-filing rules governing habeas and Section 2255 proceedings.

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[3] Reporter's note: The substance of the provisions in Appellate Rules 4(c) and 25(a)(2)(C) was adopted in 1993. Rules 3(d) of the rules governing Section 2254 and Section 2255 proceedings were adopted in 2004.

[4] Supreme Court Rule 29.2 provides in relevant part:

> If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

B. Requiring the use of a system designed for legal mail

The Committee will recall that members did not see a reason to retain the Rule's requirement that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." An inquiry to Kenneth Hyle, the Deputy General Counsel of the U.S. Bureau of Prisons, disclosed that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons.[5] And an inquiry to Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, disclosed no reason to retain the legal-mail-system requirement.[6] One commentator specifically expressed support for the published amendments' deletion of the requirement that an inmate use a system designed for legal mail (when one is available) in order to benefit from the inmate-filing rules.[7]

Mr. Heller, however, points out that correctional institutions in the State of Florida log[8] the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and he argues that the proposed amendments will "encourage and facilitate chicanery by inmates," who could "impermissibly send[] a legal document through regular mail channels with a false declaration back-dating when it was provided to prison officials and receive the benefit of the date on that false declaration in a federal filing." Mr. Heller's assertion that the legal-mail-system requirement usefully ensures accurate date-logging in systems such as Florida's raised a further question – namely, whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail).

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[5] Douglas Letter's research revealed that the distinguishing feature of the legal mail system in BOP facilities had to do with privacy: Mr. Hyle explained to Mr. Letter that "the legal mail system is not normally monitored, while the system for regular mail is generally monitored for content or subject matter (or both)." This suggested that BOP was unlikely to care whether the Rule required use of the legal mail system. Because the legal mail system is designed to serve the privacy interests of inmates, we were informed by the Justice Department representatives that BOP probably would not object to deleting the requirement that an inmate use the legal mail system.

[6] Mr. Vasil saw no problem with the deletion of the legal-mail-system requirement, and indeed, he generally favored changes that bring Rule 4(c) into closer conformity with Supreme Court Rule 29.2. Mr. Letter reports that Mr. Vasil "thinks it would be good for the relevant FRAP provisions and Supreme Court 29.2 to match, and he sees no reason to amend the latter, and cannot think of any reason why the FRAP has the requirement about using the institution's legal mail system."

[7] *See* Comment AP-2014-0002-0036 (supporting the proposal "to eliminate the distinction between an institution's legal mail system and its general mail system"); *see also* Comment AP-2014-0002-0039 ("NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail.").

[8] In Florida, the practice is to use a date-stamp. For simplicity, throughout this memo (except when discussing proposed Rule and Note language) I use "log the date" (or variants thereof) to encompass date-stamping and/or entry of the date on a log.

I investigated that question with the assistance of Dan Schweitzer, Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy. Dan sent an inquiry to his civil amicus and corrections colleagues, asking them to respond to me with information concerning the practices with respect to date-logging of legal and non-legal mail in the institutions in their respective states.[9] We received responses from 21 states and the District of Columbia, as set forth in the Appendix to this memo.[10]

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[9] The text of his email read as follows:

> To: Civil Amicus Contacts and Corrections Contacts
>
> I have been contacted by the Committee of the Judicial Conference of the United States that studies and proposes changes to the Federal Rules of Appellate Procedure. The Committee recently published for public comment a proposed rule change that concerns timely filings in the federal appellate courts by prison inmates. A technical question about state prison practices has arisen that you may be in the best position to answer.
>
> Here are the details: The Committee has published for comment proposed amendments to Appellate Rules 4(c) and 25(a)(2)(C). Those rules provide that filings by inmates are timely if they are deposited in the institution's internal mailing system on or before the last day for filing. Currently, Rules 4(c) and 25(a)(2)(C) provide that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit" of this inmate-filing rule. One of the proposed changes would delete the requirement that the inmate use the institution's legal mail system in order to receive the benefit of the inmate-filing rule. As explained in the published materials, the Committee thought that the purposes of the rule are served whether an inmate uses a system designed for legal mail or a system designed for non-legal mail.
>
> It has come to the Committee's attention that in the correctional institutions of one State (Florida), outgoing legal mail is date-stamped but outgoing non-legal mail is not. The Committee is hoping to determine whether the same is true in other States, so that it can better evaluate whether to retain the provision that requires an inmate to use a system designed for legal mail to receive the benefit of the inmate-filing rule.
>
> Accordingly, the Committee would appreciate your providing it with the answer to the following question: Do correctional institutions in your State log the date (by date-stamping or otherwise) when an inmate deposits outgoing mail in an institution's internal mail system designed for legal mail, and whether there is any distinction in treatment between (1) mail deposited in an internal system designed for outgoing legal mail and (2) mail that is deposited in an internal system that is not specially designed for legal mail (i.e., "regular" or non-legal mail).
>
> Please send responses — by April 3, 2015, if possible — to Professor Catherine Struve, who is the reporter for the Committee. She can be reached at (215) 898-7068 or cstruve@law.upenn.edu.

[10] The Appendix includes the full text of the emailed responses but omits the senders' contact information.

For nine or ten of those jurisdictions, the deletion of the legal-mail-system requirement would make no difference, either because institutions in those states do not log the date of either legal or non-legal mail or (in one instance) because they may log the date of both.[11] For four to seven of the states, however, the requirement's deletion would make a difference. Four states – Colorado,[12] 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:

> [W]e have been discussing the possibility of date-stamping outgoing legal mail only. This practice provides a benefit to the court when it is attempting to determine if a legal document was timely filed via the mail box rule. As it currently stands in Pennsylvania it is at times difficult to prove the date of filing even when it is clear that the inmate has been less than truthful regarding the actual date that a legal document was placed in the outgoing mail. We believe that by date-stamping the outgoing legal mail, determining the date of mailing will be less problematic. If Pennsylvania were to move to a date-stamping system it would not likely include date-stamping of all outgoing mail as the volume of all outgoing mail is tremendous. By limiting the practice to legal mail only, the option becomes more viable.[13]

The remaining five states are more difficult to categorize – which illustrates an issue with the existing Rules' reference to a "system designed for legal mail." There is a real question whether that reference would capture the relevant distinction in the following states:

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[11] I say "nine or ten" because the response concerning Iowa was somewhat ambiguous. The nine jurisdictions for which there is clearly no distinction (in date-logging) between legal and non-legal mail are Connecticut, the District of Columbia, Kansas, Maine, Massachusetts, Missouri, North Dakota, Vermont, and Wisconsin.

In Kansas, "[a] record of outgoing legal mail would be kept only in the extraordinary circumstance of an authorization to open and read such mail when there is documentation of the inmate's abuse of such mail ...." The response concerning the District of Columbia might be read to indicate that the dates of all outgoing pieces of mail are logged; in any event, that response makes clear that there is no distinction, in terms of date-logging, between legal and other mail.

[12] The response from Colorado stated that legal mail is "logged"; I take this to mean that the date of the mail is logged.

[13] Reporter's note: In a similar vein, the response from a Tennessee official noted that "[t]he General Counsel for the Tennessee DOC has explained that it would be a real hardship for the DOC to be required to log all mail, given the high volume."

- Michigan, where "there are two different ways prisoners can send out legal mail" and only one of those measures results in date-logging.

- Montana, where "the only legal mail that is logged is state paid legal mail."

- Rhode Island, where no date-logging occurs if the postage is paid with stamps but where "inmates can have any mail, legal or otherwise, dated stamped and metered by putting in a 'mail transfer slip.'"

- Utah, where "[a]ll mail (privileged and non-privileged) is deposited in the same place by the inmates," after which legal (but not other) mail is date-logged when "the letters are actually mailed by the mail room."

- Mississippi, where mail sent out via the Inmate Legal Assistance Program is date-logged, but other mail is not.

If it is deemed useful to retain the legal-mail-system requirement in some form, it may be worthwhile to consider revising the Rules to provide a functional definition instead of the current reference to "a system designed for legal mail." For example, the Rules could include a new first sentence that reads: "If an institution offers a mail system that will document the date of a mailing, the inmate must use that system to receive the benefit of this rule." That would target the requirement directly at the feature that may be desirable – namely, providing evidence of the date of the mailing. "Document the date of a mailing" is designedly fuzzy; the phrase does not specify "document the date of deposit," because even where an institution has a date-logging system, it is not clear that all such systems document the date of deposit as opposed to some other date such as the date when a mailing passes through the mailroom.

Which term would be more understandable to inmates? On one hand, an inmate may not know whether there is a system that will document the date of a mailing. On the other hand, how is an inmate to know whether a system is "designed for legal mail"? At least the first of these questions (is there a system that will log the date of my mailing?) is a factual one that a corrections officer could answer.

IV. Non-contemporaneous declarations and excusing nonpayment of postage

Here I discuss two other proposals for modifying the amendments. Part IV.A discusses a suggestion to delete (from the published proposal) the directive that the inmate file the declaration contemporaneously with the document being filed. Part IV.B discusses a proposal to authorize the court to excuse an inmate's failure to prepay postage.

A. Delete requirement of contemporaneous filing of declaration

Current Rules 4(c)(1) and 25(a)(2)(C) are silent on whether the inmate must file his or her statement or declaration contemporaneously with the underlying filing or whether it can instead be filed later. The rules state merely that "[t]imely filing may be shown" by means of the declaration or statement, and the 1993 Committee Notes are likewise silent on this timing question.[14] Courts have taken differing approaches to this issue. As published, the amendments would clarify that the declaration must accompany the underlying filing unless (1) other evidence accompanying the filing shows the date of deposit and prepayment of postage or (2) the court exercises its discretion to permit the later filing of the declaration.

The Federal Courts Committee of the New York County Lawyers Association (NYCLA Committee) opposes this feature of the proposal:[15]

> The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by pro se prisoner litigants. In the Committee's experience, pro se litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require pro se prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The NYCLA Committee raises valid points. Unless the inmate-filing provisions in the habeas and Section 2255 rules are amended to track the newly-revised Appellate Rules, the habeas and Section 2255 rules will not make explicit the requirement that the declaration accompany the underlying filing; thus, an inmate familiar with those lower-court rules might overlook the distinct approach that would be taken in the new Appellate Rules. Assuming that an inmate does read the relevant Appellate Rule, it is key that the Rule be crystal clear. Arguably, the NYCLA Committee's concern provides a reason to retain the extra verbiage in the provision's last phrase ("the court exercises its discretion to permit the later filing ....").

Prior to the publication of the proposed amendments, Professor Kimble had objected to the draft's use of the phrase "exercises its discretion to permit," on the ground

[14] However, the minutes of the spring 1991 Advisory Committee meeting show that the Advisory Committee intended not to require the filing of the statement with the notice.

[15] Likewise, Mr. Baskauskas suggests that "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."

that the phrase was both unnecessary and inconsistent with the Committees' style conventions.[16] There was discussion of whether the rule could instead say simply "the court permits the later filing ...." One reason for retaining the longer phrase is that an unskilled reader might read the shorter phrase as a declarative statement (i.e., as a statement that the court *does* permit the later filing) rather than a conditional phrase (i.e., referring to *situations in which the court chooses to* permit the later filing). As the NYCLA Committee points out, Rules 4(c)(1) and 25(a)(2)(C) are distinctive in that their intended users are pro se litigants.[17]

Does the NYCLA Committee's concern also provide a reason to revise the Rules to *authorize* (instead of giving the court discretion to *permit*) a later-filed declaration? The counter-argument would be that the Rule should encourage inmates to provide the declaration contemporaneously, rather than inviting inmates to provide the declaration later, at a time when recollections are no longer fresh.

B. Authorize court to excuse nonpayment of postage

Two commentators – NACDL and the State Bar of California's Committee on Appellate Courts (California Bar Committee) – advocate authorizing the court to excuse inmates from the requirement of prepaying postage. NACDL explains:

> the Court of Appeals should have discretion not only to accept separate and subsequent proof of timely mailing, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage .... The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

The California Bar Committee, likewise, expresses "concerns ... as to whether the proposed rule amendments would address 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." The California Bar Committee proposes giving the court discretion to excuse failure to prepay the postage.

The Appellate Rules Committee has previously discussed both the possibility of eliminating the postage-prepayment requirement and the possibility of giving the court discretion to excuse that requirement. As to the former, Committee members have

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[16] On the latter point, I note that similar phrasing can be found in some of the restyled Rules. Civil Rule 72(b)(1) states in part: "A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings." And Criminal Rule 12(b)(4) uses the heading "At the Government's Discretion" to denote the subdivision concerning the government's discretion to "notify the defendant of its intent to use specified evidence at trial."

[17] As the NYCLA Committee points out, "[p]rison inmates represented by counsel will generally file all papers electronically through counsel ...."

questioned whether the Rules could appropriately impose on institutions a requirement of paying postage for inmates. Moreover, Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, was skeptical about eliminating the postage-prepayment requirement, and Kenneth Hyle, the Deputy General Counsel of the U.S. Bureau of Prisons, expressed an expectation that BOP would prefer that the requirement be retained. Additionally, members have noted that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge. As to the possibility of authorizing the court to excuse nonpayment of postage for good cause, my recollection is that participants in the Committee's discussions were concerned that such a provision would encourage satellite litigation.

V. Suggestions for improving Form 7

The commentators make a number of suggestions concerning the Forms. Most importantly, two commentators point out that new Form 7 uses the past tense ("I deposited") to describe an activity that will take place *after the execution of the declaration*. Suggested solutions are either to change to the present continuous tense ("I am today depositing") or to direct that an unsigned copy of the declaration accompany the filing, with the executed declaration to follow later. The former solution is simpler and easier to understand and avoids the imposition on inmates of an additional step and an additional mailing.

NACDL also suggests that, in the "notes to inmate filers" that are added to Forms 1 and 5, an explanatory parenthetical should follow the citation to Rule 4(c)(1). This is a useful suggestion. However, NACDL's suggested parenthetical ("allowing timely filing by mail") does not seem like a perfect fit; an inmate, like any other litigant, could make a timely filing by mail without recourse to the inmate-filing rule. The question is whether there is a parenthetical that would be accurate, specific, and readily understandable by inmates and that would not mislead them. I have not been able to think of one, but perhaps Committee members can supply one.

NACDL further suggests that, at the top of Form 7, the directive should be "Insert name of trial-level court" rather than "Insert name of court." I do not recommend adoption of this suggestion. The reason the Form uses the more generic directive is that Form 7 is designed not only for use with notices of appeal (which are to be filed in the district court) but also for use with appellate filings.

VI. Notarized statements

Prior to publication, a participant in the Standing Committee's discussion of the proposed amendments had asked whether the Rules' references to notarized statements should be deleted. Declarations, it was suggested, would be more convenient for inmates and inmates might lack access to notaries. However, none of the public comments suggested deleting the reference to notarized statements. Notaries are available in at least

some correctional institutions.[18] It may be worth noting that the inmate-filing rules applicable to habeas and Section 2255 proceedings and to filings in the U.S. Supreme Court all refer in the alternative to declarations and notarized statements. It would be helpful for the Committee to consider whether to maintain or delete the references to notarized statements.

VII. Sketch of changes discussed in Parts III and V

Based on the Committee's prior discussions, it seems to me that – if the Committee decides to modify the proposed amendments in response to the public comments – the Committee is more likely to adopt some version of the changes discussed in Parts III and/or V of this memo than to adopt the changes discussed in Part IV. Accordingly, I sketch here possible ways to adapt the published proposals as discussed in Parts III and V. The sketches include Rule text and Note language discussing the requirement that the inmate use a system (if available) that will document the date of mailing. The sketches show improvements to Form 7, including a new reference to the requirement of using the date-documenting system when available. Forms 1 and 5 are not set out in this section, because the amendments to those Forms as published would still be suitable. The blackline markings (strikeouts and underscoring) denote changes compared to the current Rules.[19] Yellow highlighting shows portions that differ from the proposed amendments as published for comment.

Rule 4. Appeal as of Right – When Taken

* * * * *

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

(1) If an institution offers a mail system that will document the date of a mailing, the inmate must use that system to receive the benefit of this rule. 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~~

[18] *See, e.g.*, California Department of Corrections and Rehabilitation, Office of the Ombudsman, General Information upon Arrival to Endorsed Institution, available at http://www.cdcr.ca.gov/Ombuds/Arrival.html ("All CDCR facilities have the means of providing the inmate with notary service.").

[19] Because Form 7 would be a new form, there is no blackline marking.

~~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:

(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 second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. A new first sentence is added, requiring instead that if an institution offers a mail system that will document the date of a mailing – for example, by date-stamping the document or by logging the date – the inmate must use that system to receive the benefit of the rule.

The inmate is required 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 subsequent to the deposit of 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.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) Filing: Method and Timeliness.

* * * * *

(C) Inmate filing. If an institution offers a mail system that will document the date of a mailing, the inmate must use that system to receive the benefit of this rule. 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 second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. A new first sentence is added, requiring instead that if an institution offers a mail system that will document the date of a mailing – for example, by date-stamping the document or by logging the date – the inmate must use that system to receive the benefit of the rule.

The inmate is required 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 subsequent to the deposit of 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.

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.

Case No. _____

C.D., Defendant

I am an inmate confined in an institution. I am today depositing the _____ *[insert title of document, for example, "notice of appeal"]* in this case in the institution's internal mail system,[20] and 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 _____

Executed on _____ *[[make sure to][21] insert date]*

*[**Note to inmate filers:** If your institution has a system that will document the date of this mailing – for example by stamping the date on it or by marking the date in a log book – you must use that system in order to qualify to use Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C) (as applicable).]*

VIII. Conclusion

The comments, overall, support adoption of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(c) and Forms 1 and 5 and adoption of new Form 7. Choices for the Committee include:

- Whether to re-insert (as a first sentence in each Rule) a requirement that an inmate use a system (if available) that will document the date of a mailing.
- Whether to give inmates a right to file the declaration later instead of contemporaneously.
- Whether to authorize courts to excuse nonpayment of postage.
- Whether to revise the tense of the verb "deposit" in Form 7.
- Whether to delete the Rules' references to notarized statements.

Assuming that the amendments are adopted, it would seem advisable for the Committee to suggest that the Criminal Rules Committee consider similar changes to the inmate-filing rules in the habeas and Section 2255 rules.

[20] Reporter's note: The use of "I am today depositing" makes it possible to delete from the form the blank for the date ("on _____ *[insert date]*).

[21] Reporter's note: If the suggestion discussed in the preceding footnote is implemented, it may be useful to add "make sure to" before "insert date."

Encls.

Appendix:
State (and D.C.) officials' responses concerning mail practices

State	Response
Alaska	Alaska has an inconsistent practice among its prison facilities. Many do log outgoing legal mail but some do not. There is no policy requiring this logging of mail. Personal mail is generally not logged. John Bodick, AAG
Colorado	In the CDOC Legal mail is logged incoming and outgoing. Non-legal mail is not logged. I believe the reason is that there is simply way too m8uch non legal mail to log it. There is some Tenth Circuit law on this. If the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule. Price v. Philpot, 420 F.3d 1158, 1165 (10th Cir 2005). See also United States v. Leonard, 937 F.2d 494, 495 (10th Cir.1991) (refusing to give prisoner the benefit of Houston's filing rule where inmate "posted a notice of appeal in the regular prison mail" because Houston relied on a "prison's legal mail procedures, by which mail is logged in at the time and date it is received [to] provide a 'bright line rule' for determining the date of a pro se prisoner's 'filing' "); United States v. Gray, 182 F.3d 762, 765 (10th Cir. 1999)(explaining that "legal mail systems automatically log in *all* legal mail through relatively simple, straightforward procedures"). "To summarize, an inmate must establish timely filing under the mailbox rule by either (1) alleging and proving that he or she made timely use of the prison's legal mail system if a satisfactory system is available, or (2) if a legal system is not available, then by timely use of the prison's regular mail system in combination with a notarized statement or a declaration under penalty of perjury of the date on which the documents were given to prison authorities and attesting that postage was prepaid." Price v. Philpot, 420 F.3d at 1166. James X. Quinn, First Assistant Attorney General Colorado Department of Law

Connecticut	Dear Attorney Schweitzer, The following describes CT DOC's handling of outgoing legal mail as reported to us by our DOC's staff counsel: The short answer to your question is no, we don't date stamp outgoing mail (either legal or social). In Connecticut legal mail is treated the same as social mail going out. It's put in the Unit mail boxes picked up by either mail staff or COs and brought to the mail room. No date stamp. From there it goes to the Post Office. Incoming legal mail is separated by the mail room and is delivered to the inmate by staff. Each facility does it differently but each piece of incoming legal mail is logged on a sheet and the inmate signs he received it. The log will list the date received. Please let me know if I can be of help. Terry O'Neill Terrence M. O'Neill Assistant Attorney General

Delaware	Hey Dan, we have 4 level 5 facilities. I have feedback on 3 (I don't on the women's prison). Let me know if you have any questions. JTVCC: makes written record (paper log) of outgoing legal mail; the mail is then handled by the USPS. We do not date stamp any outgoing mail legal or general. We do not log outgoing regular mail in any way. SCI: outgoing legal mail is date stamped in the Law Library. Incoming legal mail is recorded. There is no logging or record of standard incoming or outgoing mail. HRYCI The mail room does date stamp all incoming and outgoing legal mail. The process is as follows: • When Legal mail arrives to the mailroom is separated from all other mail whether it is incoming or outgoing. • Outgoing legal mail is date stamped, logged on the outgoing legal mail form with the offender's name, sbi# and who the legal mail is being sent to and then taken to the post office via the daily mail run. • Incoming legal mail is also date stamped, the housing location is identified, it is then logged on an incoming legal mail form and then delivered to the offender within 24hrs. excluding weekends and holidays. • Once the mail is delivered and checked in front of the offender for any contraband, the offender signs the Incoming legal mail form acknowledging that he has received his legal mail. • Regular mail is not date stamped. Joseph C. Handlon Defensive Litigation, Unit Head Department of Justice
District of Columbia	Dear Mr. Schweitzer, Response: District of Columbia DOC All out-going inmate correspondence (legal or regular) is logged in the agency's Offender Management System, JACCS, (Jail and Community Corrections System). We are able to accurately report the number of pieces that an inmate has sent out. There is no differentiation between legal or "regular" mail. Best, Maria Amato General Counsel District of Columbia Department of Corrections

Iowa	No real special process – an outgoing legal letter is scanned by staff to make sure it is legal, it is then placed in envelope/sealed, the staff member initials over seal of envelope, and then letter is placed in regular out-going mail.
Kansas	Dear Professor Struve: In regard to the above-referenced topic, the following responds to the question posed by the Committee, as transmitted by Dan Schweitzer of NAAG, in an e-mail earlier today: The Kansas Department of Corrections does not maintain a special legal mail system, although legal mail of course is handled differently than ordinary mail in some respects. In general, please see Kansas Administrative Regulation 44-12-601, Mail. Specifically, KDOC does not routinely log the date when an inmate deposits outgoing mail in a correctional facility's internal mail system, whether legal, official, privileged, or ordinary mail, as those terms are defined and used in said regulation. A record of outgoing legal mail would be kept only in the extraordinary circumstance of an authorization to open and read such mail when there is documentation of the inmate's abuse of such mail by using the mail to threaten or terrorize any person, at the request of such person. If you have any questions regarding anything stated above, or otherwise concerning this topic, please don't hesitate to contact me by reply to this e-mail, or by phone at [omitted]. Sincerely, Linden G. Appel Chief Legal Counsel Kansas Department of Corrections
Maine	Professor Struve: This is in response to Dan Schweitzer's inquiry below. The correctional facilities in Maine do not have separate systems for legal and non-legal mail. They do not date stamp outgoing mail, whether it is legal or non-legal. Mail is collected from mailboxes within the facility each day and is sent out from the mail room to the post office the same day. The only different treatment that outgoing legal mail receives is that the facility provides free postage for outgoing legal mail if the prisoner has no funds. I trust this answers the questions posed. If you require further information, please feel free to contact me. James E. Fortin, AAG

Massachusetts	Professor Struve, I am responding to your survey on behalf of the Massachusetts Department of Correction. Except in the extremely rare situation where the inmate is on a "mail monitor," our Department does not keep a log or date stamp his outgoing mail, whether it is legal or non-legal mail. Inmates deposit their outgoing mail into a locked letter box. No record is kept of the date on which it is deposited. For these purposes, there is no distinction in treatment between legal and non-legal mail. If the inmate requests a disbursement from his account to pay for postage, the prison's treasurer would have a record of that transaction. Please let me know if you have additional questions. David J. Rentsch Associate General Counsel Legal Division Department of Correction
Michigan	Professor Struve: In response to the inquiry below, the Michigan Department of Corrections reports that there are two different ways prisoners can send out legal mail. One is by putting their mail in to the “mailbox” in the housing unit with any other mail that the prisoner wants sent out. That mail is not logged. There also is a process by which prisoners may send expedited legal mail to the court, an attorney, or to a party to a new or pending lawsuit. That mail is logged. The logging process is described in the attached Operating Procedure – see in particular item # 6 on page 3 of the attached Operating Procedure. The attached Operating Procedure describes, in part, the process by which the Michigan Department of Corrections’ Policy Directive relating to Prisoner Mail is implemented. The Policy Directive (PD 05.03.118) is also attached. Other Michigan Department of Corrections Policy Directives are available on the Department’s website, which can be accessed at: http://www.michigan.gov/corrections/0,1607,7-119-1441_44369---,00.html. James E. Long Division Chief Corrections Division Michigan Department of Attorney General

Mississippi	In response to the attached email: I am the Director of the Inmate Legal Assistance Program for Mississippi Department of Corrections. We have a system whereby inmates provide the ILAP personnel their legal pleadings to be mailed. The ILAP office then maintains a log of the inmate's name, name of the receiving person/court, date the mail was received by ILAP personnel, the amount of postage and a brief description of what was mailed. If the inmate chooses not to utilize the ILAP office, then his mail is treated as regular mail is not kept on a log. I hope this provides the answer you were needing. If you have any other questions, please feel free to contact me anytime. Gia McLeod, Director Inmate Legal Assistance Program
Missouri	Dan Schweitzer at NNAG forwarded your inquiry. The Missouri Department of Corrections does not log mail as the inmates deposit it into the Department system. Jim Layton James R. Layton Solicitor General
Montana	Ms. Struve, Here at Montana State Prison the only legal mail that is logged is state paid legal mail. Our policy states that if an inmates does not have sufficient money at the time of mailing the state will pay for up to eight (8) legal mailings a month. If you have further questions [please let me know. Denise DeYott Administrative Services Supervisor Montana State Prison

North Carolina	Professor Struve, My understanding of North Carolina's policy on outgoing mail is similar to that of Florida's – i.e. that outgoing legal mail should be logged and that outgoing regular mail is not logged or date stamped. Thus, it is dependent upon the inmate to inform the officer to whom he gives his mail that it is legal mail or to somehow mark the correspondence envelope that the package is legal mail. Please let me know if you have further questions. I have linked NC's mail policy below: http://www.doc.state.nc.us/dop/policy_procedure_manual/d0300.pdf Kimberly Grande, Assistant Attorney General Public Safety Section North Carolina Department of Justice
North Dakota	Professor Struve Committee of the Judicial Conference of the United States This is in response to an e-mail from Dan Schweitzer at NAAG regarding the inmate-filing rule for outgoing legal mail. The North Dakota Department of Corrections and Rehabilitation (ND DOCR) does not have a prison legal mail box or prison legal mail system that logs or date-stamps when out-going inmate legal mail is deposited for mailing at a ND DOCR correctional facility . Outgoing inmate legal mail must be delivered to the inmate mail room by 10:00 am on business days. The mail room then delivers it to the USPS the same day for mailing. Outgoing inmate legal mail is not treated any differently than outgoing regular mail-all outgoing legal mail goes out at the same time as outgoing regular mail. Ken Sorenson Assistant Attorney General

Pennsylvania	Catherine – Currently Pennsylvania does not date-stamp or log outgoing mail. That being said, we have been discussing the possibility of date-stamping outgoing legal mail only. This practice provides a benefit to the court when it is attempting to determine if a legal document was timely filed via the mail box rule. As it currently stands in Pennsylvania it is at times difficult to prove the date of filing even when it is clear that the inmate has been less than truthful regarding the actual date that a legal document was placed in the outgoing mail. We believe that by date-stamping the outgoing legal mail, determining the date of mailing will be less problematic. If Pennsylvania were to move to a date-stamping system it would not likely include date-stamping of all outgoing mail as the volume of all outgoing mail is tremendous. By limiting the practice to legal mail only, the option becomes more viable. If you have any questions, please feel free to reach out to me. Many thanks, --Tim Timothy E. Gates | Deputy Chief Counsel for Litigation Department of Corrections | Office of Chief Counsel
Rhode Island	Here's the response I received from the Rhode Island Department of Corrections: If an inmate mails material to the outside using stamps we do not date stamp, whether it is regular mail or legal mail. However, inmates can have any mail, legal or otherwise, date stamped and metered by putting in a "mail transfer slip." If they do that the money for postage is taken from their inmate account and the mail is sent to our central mail facility where it is date stamped and our meter # placed on it. The cost to the inmate for mailing is the same whether he or she uses stamps (which means no date stamp) or the transfer slip which means it will be date stamped. Some inmates do the transfer slip and get the date stamp for legal mail, some do not. I suppose we could require that all legal mail be sent via the transfer slip method to ensure it is date stamped. But we would then only be consistently date stamping legal mail, not regular mail.

Tennessee	This comes in response to the technical question about state prison practices that has been posed in connection with the work of the Committee of the Judicial Conference of the United States, which is considering proposed changes to Fed. R. App. P. 4© and 25(a)(2)(C). The Committee has asked whether correctional institutions in our State log the date (by date-stamping or otherwise) when an inmate deposits outgoing mail in an institution's internal mail system designed for legal mail, and whether there is any distinction in treatment between (1) mail deposited in an internal system designed for outgoing legal mail and (2) mail that is deposited in an internal system that is not specially designed for legal mail (i.e., "regular" or non-legal mail)? The Tennessee Department of Correction has the same policy that Florida's prisons have apparently adopted: outgoing legal mail is date-stamped but outgoing non-legal mail is not date stamped. Tennessee's DOC logs only outgoing legal mail. Other mail is not logged. The General Counsel for the Tennessee DOC has explained that it would be a real hardship for the DOC to be required to log all mail, given the high volume. Andrée Sophia Blumstein, Solicitor General
Utah	Professor Struve, I am an Assistant Utah Attorney General representing the Utah Department of Corrections. I received the below email today and wanted to let you know how things are done at the Utah State Prison (USP) mail room. All mail (both privileged and non-privileged) is deposited in the same place by the inmates. USP doesn't have a separate system designed for outgoing legal mail at that point in the process. The mail room staff later separates the legal mail from the non-legal mail. Non-legal mail is not stamped or logged. Legal mail is both physically stamped and an electronic note is entered into USP's database, but not until the date that the letters are actually mailed by the mail room. They are not presently stamped upon being deposited by the inmate. I hope this is helpful. Please let me know if I can be of any assistance. Thanks. -- Sincerely, Matthew B. Anderson Utah Attorney General's Office Assistant Attorney General

Vermont	Professor Struve: I understand from Dan Schweitzer that the Committee of the Judicial Conference of the United States is seeking input regarding inmate mail systems, specifically: Do correctional institutions in your State log the date (by date-stamping or otherwise) when an inmate deposits outgoing mail in an institution's internal mail system designed for legal mail, and whether there is any distinction in treatment between (1) mail deposited in an internal system designed for outgoing legal mail and (2) mail that is deposited in an internal system that is not specially designed for legal mail (i.e., "regular" or non-legal mail). We inquired of the Vermont Department of Corrections. In Vermont, outgoing inmate legal mail is not distinguished in any way from regular inmate outgoing mail. All outgoing mail is dated by the postage meter. Best regards, Bridget Asay Assistant Attorney General Civil Appellate Director Vermont Attorney General's Office

Washington State	Hello Professor Struve: I am a Sr. AAG with the Washington State Attorney General's Office and Chief Counsel to the Washington State Department of Corrections. I am responding to Dan Schweitzer's request for information about correctional mail practices in our state. In answer to the specific question posed, our Department of Corrections does treat legal and non-legal mail differently. Legal mail is logged when deposited into the facility mail system; non-legal mail is not logged. Below is a more detailed explanation of the process from the WA DOC person in charge of the process. Mail that is marked "legal" per Policy 450.100 has a specific process apart from regular mail. Outgoing Legal Mail is processed by the living unit staff and in some cases the law librarian by scanning the content to ensure it meets policy definition of legal mail. They also verify the address is to a legal entity per DOC policy. The document is then sealed in front of the offender and the flap is initialed by staff, and logged with the time, date, and name of staff who processed the mail. It is placed in a designated bag for legal mail along with a copy of the log. The mail is then picked up by mailroom staff along with the regular mail from the living unit and or law library. While most outgoing mail is opened and randomly inspected (reviewed and or read), legal mail remains sealed and sent as received from the living unit. Some facility mailrooms also log it out as received and sent from the facility mailroom to the USPS. Regular outgoing mail is never logged with the exception of certified or registered mail. It too is logged like legal mail in a log. Please let me know if you have questions. Thank you. Tim Lang Senior Assistant Attorney General Chief, Corrections Division Washington State Attorney General's Office

Wisconsin	Professor Struve – Wisconsin prisons do not have separate internal mail systems for outgoing legal mail and outgoing regular mail. None of the outgoing mail is logged by date. Please feel free to contact me if you have any questions about this. Thank you, Karla Keckhaver Karla Z. Keckhaver Assistant Attorney General Wisconsin Department of Justice

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TAB 5B(1)

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Inmate-Filing Rules

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8e9x-3g4j
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0007
Comment from Edward Baskauskas, NA

Submitter Information

Name: Edward Baskauskas
Organization: NA

General Comment

I think theres a flaw in the procedure that would be set up by the proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. These amendments address the problem of how to establish the date on which a notice of appeal or other paper to be filed with a court was deposited in a prison mail system. The proposed amendments would allow an inmate to establish the mailing date (effectively, the filing date) if the notice of appeal or other paper is accompanied by a notarized statement or declaration under penalty of perjury stating the date on which it was deposited in the mail system.

The fundamental problem with these amendments is 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? This question is glossed over by the proposed amendments, by Supreme Court Rule 29.2 (which contains substantially the same accompanied by language as that of the current proposal), and by courts that have considered whether a declaration of mailing under current rules should accompany the document to be filed.

As proposed, the amendments would require an inmate either to do the impossible (by signing a declaration that a document has been mailed, and then somehow ensuring that the signed declaration accompanies the mailed document) or to commit perjury (by signing the declaration of mailing before actually placing the document and declaration in the mail).

In a slightly different contextproof of service as opposed to proof of filingthe California Legislature has recognized the illogic of requiring that a signed copy of proof of mailing accompany the document that is being mailed. California Code of Civil Procedure Section 1013(b), for example, provides that a document served by mail on a party may be accompanied by an unsigned copy of the affidavit or certificate of mailing. (The original of the affidavit or certificate of mailing, which of course can be signed once the relevant document has actually been deposited in the mail, may then be filed with the court as proof of service. See Cal. Civ. Proc. Code 1013a.)

This problem might be solved by changing the language of proposed new Form 7 to read I am today depositing instead of I deposited. (Thanks to Thomas D. Rowe, Jr., Elvin R. Latty Professor of Law Emeritus, Duke University, and former member of the Advisory Committee on Civil Rules, and to Brian Vaughn, member of the California bar, for suggesting this solution.) Changing to the present tense would be consistent with the Forms later statement that postage is being affixed and would avoid the paradox of speaking in the past tense about an event (deposit in the mail system) that has yet to be completed. It would also eliminate the need to specify more than one date in the declaration; the dateline at the bottom of the Form would establish a single date of mailing and of execution of the declaration.

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. The current proposal would allow separate filing of the declaration or notarized statement only with the permission of the court of appeals. And Supreme Court Rule 29.2s accompanied by language has been interpreted by a respected treatise as allowing separate filing of an inmates declaration of mailing. See Stephen M. Shapiro et al., Supreme Court Practice 385 (10th ed. 2013) (The prisoner should prepare such an affidavit or statement in every such instance, to be mailed simultaneously with the petition in the same or a separate envelope.); see also Grady v. United States, 269 F.3d 913, 91718 (8th Cir. 2001) (quoting identical passage from Robert L. Stern et al., Supreme Court Practice 277 (7th ed. 1993)). But for the reasons described above, 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.

Attachments

Comment on Appellate Rules September 18, 2014

Sept. 9, 2014
Comment by Edward Baskauskas:

I think there's a flaw in the procedure that would be set up by the proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. These amendments address the problem of how to establish the date on which a notice of appeal or other paper to be filed with a court was deposited in a prison mail system. The proposed amendments would allow an inmate to establish the mailing date (effectively, the filing date) if the notice of appeal or other paper is "accompanied by" a notarized statement or declaration under penalty of perjury stating the date on which it was deposited in the mail system.

The fundamental problem with these amendments is 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 institution's 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 signer's control? This question is glossed over by the proposed amendments, by Supreme Court Rule 29.2 (which contains substantially the same "accompanied by" language as that of the current proposal), and by courts that have considered whether a declaration of mailing under current rules should accompany the document to be filed.

As proposed, the amendments would require an inmate either to do the impossible (by signing a declaration that a document has been mailed, and then somehow ensuring that the signed declaration accompanies the mailed document) or to commit perjury (by signing the declaration of mailing before actually placing the document and declaration in the mail).

In a slightly different context—proof of service as opposed to proof of filing—the California Legislature has recognized the illogic of requiring that a signed copy of proof of mailing accompany the document that is being mailed. California Code of Civil Procedure Section 1013(b), for example, provides that a document served by mail on a party may be accompanied by "an unsigned copy of the affidavit or certificate of mailing." (The original of the affidavit or certificate of mailing, which of course can be signed once the relevant document has actually been deposited in the mail, may then be filed with the court as proof of service. *See* Cal. Civ. Proc. Code § 1013a.)

This problem might be solved by changing the language of proposed new Form 7 to read "I am today depositing" instead of "I deposited." (Thanks to Thomas D. Rowe, Jr., Elvin R. Latty Professor of Law Emeritus, Duke University, and former member of the Advisory Committee on Civil Rules, and to Brian Vaughn, member of the California bar, for suggesting this solution.) Changing to the present tense would be consistent with the Form's later statement that postage "is being affixed" and would avoid the paradox of speaking in the past tense about an event (deposit in the mail system) that has yet to be completed. It would also eliminate the need to specify more than one date in the declaration; the dateline at the bottom of the Form would establish a single date of mailing and of execution of the declaration.

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. The current proposal would allow separate filing of the declaration or notarized statement only with the permission of the court of appeals. And Supreme Court Rule 29.2's "accompanied by" language has been interpreted by a respected treatise as allowing separate filing of an inmate's declaration of mailing. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 385 (10th ed. 2013) ("The prisoner should prepare such an affidavit or statement in every such instance, to be mailed simultaneously with the petition in the same or a separate envelope."); *see also* Grady v. United States, 269 F.3d 913, 917–18 (8th Cir. 2001) (quoting identical passage from Robert L. Stern et al., *Supreme Court Practice* 277 (7th ed. 1993)). But for the reasons described above, 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.

PUBLIC SUBMISSION

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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0015
Position Paper of James C. Martin, on behalf of American Academy of Appellate Lawyers

Submitter Information

Name: James C. Martin
Organization: American Academy of Appellate Lawyers

General Comment

See Attached

Attachments

Academy Position Paper

AMERICAN ACADEMY OF APPELLATE LAWYERS

December 1, 2014

Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: Request to testify on proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Rose,

The American Academy of Appellate Lawyers requests the opportunity to testify at the public hearing on the proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, on January 9, 2015 in Phoenix, Arizona. The Academy is a professional association of nearly 300 members from across the country, whose membership is limited to lawyers, judges and educators dedicated to appellate practice and the administration of justice on appeal.

The Academy has submitted comments on the proposed amendments and a copy of its position paper is attached. The Academy's incoming president, Charles A. Bird, from San Diego, California, would be pleased to offer the Academy's views.

Very truly yours,

James C. Martin
President
American Academy of Appellate Lawyers

AMERICAN ACADEMY OF APPELLATE LAWYERS

JAMES C. MARTIN
PRESIDENT

CHARLES A. BIRD
PRESIDENT-ELECT

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ARTHUR J. ENGLAND, JR.

AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The American Academy of Appellate Lawyers submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35 and 40 of the Federal Rules of Appellate Procedure. When appropriate, the comment below addresses changes common to groups of rules, not each rule separately.

The Academy supports all of the proposed amendments except for the proposal to reduce the word limits on briefs and to apply a conversion rate of 250 words per page to documents being converted from a page limit to a word limit. The Academy believes that the Advisory Committee's rationale does not support the proposed reduction in the word limits and proposed conversion rate. It also believes that such a reduction will not improve appellate advocacy and may well increase the workload of the courts.

A. Statement of Interest

The Academy is an invitation-only professional association of nearly 300 members from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

B. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C).

The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of the documents covered by these rules. Under the proposed amendments, and assuming the other rule requirements are met (*i.e.* postage), the filing date would be 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.

The Academy believes that the proposed amendments are designed to clarify and improve inmate-filing rules, and would promote the fair administration of justice. The Academy supports these proposed changes.

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

The proposed amendment to appellate Rule 4(a)(4) addresses a circuit split over whether a motion under Civil Rules 50, 52, or 59 is "timely" when filed within a court-ordered "extension" of a non-extendable deadline under those rules. Adopting the majority view, the proposed amendment would make clear that post-judgment motions filed outside the deadline set by the Civil Rules are not "timely" under Rule 4(a)(4), even if the district court has erroneously granted an extension of the deadline, and therefore do not toll the time for filing a notice of appeal under Rule 4(a)(4).

The Academy supports this proposed amendment, because it is consistent with the understanding of Academy members that a district court lacks the authority to extend these specific deadlines and that a motion filed outside the time permitted under Rules 50, 52, or 59 does not toll the deadline for filing a notice of appeal.

D. Length Limits: Rules 5, 21, 27, 28.1, 32, 35 and 40

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the page limits currently applicable to documents filed under those rules. The type-volume limit would be based on a conversion ratio of 250 words per page. The change would apply to documents prepared on a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

The proposed amendments also would reduce from 14,000 words to 12,500 words the word limit for briefs on appeals under Rule 32 and for briefs on cross-appeals under Rule 28.1.

1. The Academy supports the principle of replacing other length limits with word-number limits.

The Academy supports the core concept of parts C and D that the permitted length of appellate filings produced on computers should be determined by word count. The Academy explains below why it opposes the proposed word numbers in parts C and D more strongly than it supports the underlying concept.

2. For all purposes in the proposed rules, the Academy opposes the 250-word-per-page conversion ratio.

The Academy respectfully opposes both the reduction in permitted word-count of briefs and the 250-word-per-page conversion ratio applied to other filings. The Academy believes the proposed conversion ratio, particularly in reducing the length of briefs, is not

supported by the published materials or the Advisory Committee's process, and is unwise.

3. The published background does not support the proposed conversion ratio.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000-word limit for principal briefs. The same amendments set the word limit for reply briefs derivatively and set the limit for appellees' combined briefs in cross-appeals by related reasoning. Rule 32 determines the length of briefs of amicus curiae derivatively under rule 29(d). The proposed amendments reduce the limit for principal briefs to 12,500 words, reduce the limit for reply briefs derivatively, and reduce the limit for appellees' combined briefs by related reasoning. According to the Advisory Committee, the 1998 change was based on an assumption that the appropriate conversion rate was 280 words per page applied to the 50-page limit for briefs then in effect. The Advisory Committee states that the proposed reduction is based on a study of D.C. Circuit briefs filed under the pre-1998 rules, which showed that the average in those briefs was closer to 250 words per page.

Our research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken. The genesis of that comment appears to be oral discussion reported in the minutes of the Spring 2014 meeting of the Advisory Committee on

Appellate Rules. The May 8, 2014 Report of Advisory Committee on Appellate Rules to the Committee on Rules of Practice and Procedure states that the word limit "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)." That quotation appears at page 18 of the materials for public comment. The proposed committee-notes to the proposed amendments to rules 28.1 and 32 now unequivocally state that the 1998 Advisory Committee used the 280-word assumption. But those notes also acknowledge: (i) that the current Advisory Committee does not know the basis for that assumption, and (ii) that the 1998 amendments intentionally superseded "at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs."

In contrast, Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, has posted a public comment stating that the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. To the extent we have been able to trace the history of the 1998 amendments, including through Fellows of the Academy who participated, we believe the assertion that the 1998 Advisory Committee incorrectly "assumed" a word ratio in appellate briefs is inaccurate. The record suggests that, regardless of the data on the table, the Advisory Committee selected the 14,000-word limit because it appeared wise and reasonable.

The Academy does not believe that a rule amendment should be adopted without a clear, articulated guiding rationale. That articulated rationale also should be supported with a detailed analysis of why the change is necessary to the administration of justice. The proposed reduction of word limits for briefs, and the parallel adoption of the 250-word conversion ratio for other appellate filings, do not adhere to these principles, and the Academy opposes them for that reason.

4. The Advisory Committee record does not support the proposed conversion ratio.

The Academy also is concerned that the Advisory Committee's record does not support the suggestion that the 250-word conversion ratio is intended or necessary to correct historical error. The minutes of the Advisory Committee's April 2014 meeting do not reflect a shared concern among its voting members about correcting error. Rather, the reported comments of the voting members focus on a desire of appellate judges for shorter briefs, the unwillingness of some circuits to allow longer briefs, and "whether the bar would be shocked by a proposal to reduce length limits to 12,500 words. . .." The minutes also reflect that the committee's professional support staff had received no complaints about the actual length of appellate filings.

The minutes of the Advisory Committee's discussion do not suggest that the committee received any analysis of how the length limits for briefing work in the courts of appeals. The publicly available

history of the proposed amendment supports an inference that changing the word limits—and adopting the 250-word ratio for new limits—arose late in the process without debate or analysis. *See, e.g.*, Minutes of the Advisory Committee on Appellate Rules, Sept. 27, 2012; Memo, Catherine T. Struve, Reporter, to Advisory Committee on Appellate Rules (Mar. 25, 2013) (using 280-word conversion ratio).

The Advisory Committee voted 6–4 to move the proposal forward. This vote appears to rest on six members' individual preferences, perhaps supplemented by unreported anecdotal information. In any event, the record does not support making the proposed material change in appellate due process for litigants and appellate lawyers. The amendments are not supported by a factual record and reasoned analysis appropriate for the federal judiciary.

5. *The proposal to reduce briefing length-limits is not beneficial.*

The proposed amendment to rules 28.1 and 32 would adversely affect developing issues in complex appeals. In the Academy's experience, the current word limits enable counsel in complex cases to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal. Reducing the word limit would impair fair recitation of the facts after all but short trials. Even when the statement of facts can be compact, reducing the word limit would impair appropriate development of difficult and

controversial legal issues. The inevitable results include more motions to file briefs exceeding the limits and inappropriately constricted presentation of complex appeals when counsel fears requesting additional words or a circuit has a practice of denying exceptions.

The proposal also would impair parties' access to court. While lawyers primarily control how briefs are drafted, a client has the right to control which (nonfrivolous) issues are argued. Criminal defense counsel lack discretion to omit a weak but non-frivolous issue.

In the Academy's anecdotal experience, fewer civil cases go through trial and appeal after the beginning of the Great Recession. But the tried cases tend to be the most complex and to involve the highest stakes. If the average civil-case brief is longer today than in 1998, the reason could be that appeals in civil cases are more complex. Many judges who participate in our seminars report that this is so, and that the increasing volume of white-collar crime prosecutions pushes a similar trend in criminal appeals.

In simpler cases, generally the briefs are shorter and the 14,000-word limit is not implicated. Consequently, the proposed amendments will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.

To the extent that verbose or unnecessarily long briefs are being filed—which is not the Advisory Committee's stated justification for the proposed amendments—that problem is far better addressed through meaningful training by and guidance from judges and lawyers experienced in effective appellate practice The Advisory Committee can find some of the Academy's views on such initiatives in its Statement on the Functions and Future of Appellate Lawyers, prepared for the 2005 National Conference on Appellate Justice and reprinted at 8 J. App. Prac. & Process 1 (2006).

6. The 250-word conversion ratio should not be applied to other rules.

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the current page limits. Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits. The deleterious effect of the 250-word conversion rate would likely be even more pronounced on documents currently subject to shorter page limits – writs, rehearing petitions, petitions for leave to appeal – which often warrant greater development than the current page limits allow. The Academy requests that the length limits under all of those rules be converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.

As to proposed Rule 29(b), 2,000 words for a brief of an amicus curiae on rehearing is too short. At this stage, the great majority of AC briefs are filed in support of en banc review. That is, they tend to be filed in some of a court's most difficult cases. The proposed word length is barely sufficient for a party other than the government to explain its case-specific interest. The length for these briefs should be the same as the allowed length for the party's petition.

7. Conclusion

The record indicates that proposal 12-AP-E was an excellent idea that made a wrong turn. The good parts of it should be preserved, and the unjustifiably low conversion ratio should be revised. No amendment is needed to rules 28.1 and 32. The other rules should be amended, but the word limits should be based on a conversion ratio of 280 or more. Finally, briefs of amicus curiae on rehearing, which have no current limit, should have a 4,200-word limit.

E. Amicus filings in connection with rehearing: Rule 29

The proposed amendment would renumber the existing rule 29 as 29(a) and would add a new Rule 29(b). The new 29(b) would set a default for the treatment of amicus filings in connection with petitions for rehearing. While the proposed rule would continue to allow the United States, its officer or agency, or a state to file, without seeking leave, an amicus brief in support of rehearing, any other amicus brief regarding rehearing could be filed only by leave of court. In addition to

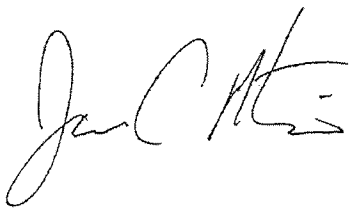
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

With the exception of a word limit based on a conversion rate of 250 words per page, discussed above, the Academy supports this proposed amendment.

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

The Advisory Committee proposes to amend Rule 26(c) to eliminate the three-day grace period when a brief is served electronically. Under the proposed amendment, 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. This proposed change would be accomplished by amending the rule to state that a paper served electronically is deemed to have been delivered on the date of service stated in the proof of service.

Although the Academy notes that electronic filing allows parties to file briefs late in the evening on the due date, the date of service is not counted in determining the deadline for filing and courts generally grant reasonable extensions of time for filing briefs. The Academy supports this proposed change to Rule 26(c).



James C. Martin
President, American Academy of Appellate Lawyers
November 24, 2014

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gwi-nnyd
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0020
Comment from Dorothy Easley, Easley Appellate Practice

Submitter Information

Name: Dorothy Easley
Organization: Easley Appellate Practice

General Comment

Please see attached article in The Florida Bar Appellate Practice Section that details the concerns, but an abstract of that articles is:
The concern among many appellate practitioners is this reduction in word count and its impact on the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived. The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are deemed most certainly waived. Further reducing word count could have a significant adverse impact on appellate briefing and preservation.
Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients. But consider this-- twenty-five percent of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. These statistics and judicial observations that appellate briefs are increasingly THE most important tool in understanding the issues on appeal indicate that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.
Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. Increased work load to further research and understand the appellate issues, to make well-informed decisions, in both civil and criminal appeals that are fact-intensive (e.g. employment law cases, Section 1983 cases, criminal law cases concerning intent etc.). 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. In other words, word count reductions may actually increase the appellate courts labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex. Insufficient room to explain those complexities coupled with appellate issue preservation restrictions and reductions in oral argument do not aid the appellate process that labors to make decisions that are correct, not decisions that are the most expedient.

Attachments

APP-winter2014 EASLEY ARTICLE

Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

By Dorothy F. Easley[1]

D. EASLEY

With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "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."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

continued on page 9

Proposed Amendments
from page 2

(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "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".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

1 Dorothy F. Easley earned her J.D., with honors, in 1994 from the University of Miami School of Law and her M.S., with highest honors, in 1986 from SUNY/CESF. She is board certified in appellate practice, managing partner of Easley Appellate Practice, PLLC, and is admitted to practice in all Circuit Courts of Appeals and the Supreme Court. Ms. Easley is a past chair of the Appellate Practice Section, 2009-2010.

2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) Bar Ass'n Third Cir. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h54-e4qo
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0030
Comment from Joshua Heller, NA

Submitter Information

Name: Joshua Heller
Organization: NA

General Comment

Please see the attached pdf document.

Attachments

Proposed Changes to Federal Rules on Inmate Filing

February 11, 2014

Hon. Jeffery Sutton, Chair
Committee on Rules of Practice and Procedure
Washington, D.C. 20544

Re: FRAP 4 and 26, Federal Inmate Filing Rule Amendment Proposal

Dear Judge Sutton and Committee:

The purpose of this comment is to indicate that the committee's suggested change to the various iterations of the inmate filing rules in the Federal Rules of Procedure not be adopted. I appreciate that the intended purpose of the change is "clarify and improve the inmate-filing rules." However, the Committee's proposal, which eliminates the requirement that an inmate use an institution's legal mail system that establishes the date of filing when one is available, significantly harms the inmate filing systems that many states, including Florida, have created to establish the date documents are provided to prison officials in federal cases. By substituting the declaration of an inmate---who in the context of much inmate litigation, particularly corrections litigation and federal habeas proceedings governed by the AEDPA, have every motivation to lie about the date of filing---for the institution's legal mail system, the committee is proposing a system that will

permit and encourage the type of chicanery and uncertainty that the present rule avoids.

Generally, under the "mailbox rule," an inmate's filing is deemed "filed" on the date that the inmate delivers the document to prison authorities for filing. *See Houston v. Lack*, 487 U.S. 266, 276 (1988). The rationale of the "mailbox rule" is based on the notion that a prisoner "has no choice but to entrust the forwarding of his [court filing] to prison authorities whom he cannot control or supervise and who may have every incentive to delay." *Houston*, 487 U.S. at 271.

It is well recognized that "*Houston*'s narrow holding . . . apparently was designed to protect *pro se* prisoners in the absence of a clear statutory or regulatory scheme." *See Longenette v. Krusing*, 322 F.3d 758, 763 (3d Cir. 2003). And an inmate does not and should not receive the benefit of the rule if he has failed to meet his responsibility of doing all he reasonably can to ensure documents are received for filing in a timely manner.

Even before the adoption of the present rule in 1998, the federal circuits recognized that inmates who do not use legal mail systems that establish the date the document was provided to prison officials for mailing (and thus, the date of filing), facilitate chicanery and uncertainty by prison inmates. In *United States v. Leonard*, 937 F.2d 494, 495 (10th Cir. 1991),

the Tenth Circuit recognized that, where the prisoner used regular mail rather than legal mail, which would have established the date of filing under the mailbox rule, "We see no reason to afford [the prisoner] further opportunities to satisfy the timely filing requirement. Additionally, the 'bright line' safeguard against 'chicanery and uncertainty' is lacking when regular prison mail is used. A *pro se* prisoner who fails to take advantage of the special filing rule applicable to notices of appeal posted through the legal mail system forgoes the benefit of that system." *Id.* at 495 (underline added).

In *Oliver v. Commissioner*, 30 F.3d 270, 272 (1st Cir. 1994), the First Circuit similarly recognized, "Oliver concedes that he was aware that only mail sent via certified, registered, insured, COD, or express mail was officially recorded by the prison staff. He nevertheless chose to send his notice of appeal via regular mail. By failing to take advantage of the prison mail log system, Oliver undermined the 'bright-line rule' rationale on which the Supreme Court in *Houston* relied and made it more difficult for this court to 'avoid uncertainty and chicanery.' Other courts have held that a *pro se* prisoner who fails to avail himself of the prison log system forgoes the advantage of the special filing rule." *Id.* at 272 (underline added).

These limitations on the prison mailbox rule are what let to the adoption of the present inmate filing rules: Rule 4(c)(1), 25(a)(2)(C), and Rule 3(d) of the Rules Governing 2254 Cases. They properly were amended to reflect the Supreme Court's holding in *Houston* to state, "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." FED. R. APP. P. 4(c)(1); Rule 3(d), RULES GOV. 2254 CASES.

In the commentary to the federal appellate rules, this Committee made the point of the amendment clear, effectuating internal mail systems that establish the date the document was provided to prison officials, establishing the date of filing:

> Substantive amendments are made to this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day of filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to **require** an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

ADVISORY COMM. NOTE, FED. R. APP. P. 4(c)(1) (1998) (bold and underline added).

Since codification of this principle from *Houston*, the Circuits have properly indicate that a prisoner does not avail himself of a system to establish the date of filing, when one is available, the prisoner is not entitled to the benefit of the

mailbox rule. For example, in *Price v. Philpot*, 420 F.3d 1158, 1164 n.5 (10th Cir. 2005), the Tenth Circuit recognized that the Third Circuit had collected cases recognizing that compliance with a statutory or regulatory regime for legal mail is necessary for application of the prison mailbox rule, stating:

> However, where the 'service' or 'filing' language in any applicable statute or rules establishing a specific regime to the contrary, *Houston* may not apply. *See Longenette v. Krushing*, 322 F.3d 758, 762-63 (3d Cir. 2003) (collecting cases where appellate courts limited '*Houston*'s narrow holding' to question of service decided in the 'absence of a clear statutory or regulatory scheme.')"

Id. at 1164 n.5

Price further recognized: "**First, 'if the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule** . . . . The second mechanism for establishing a filing date for purposes of the mailbox rule must be used if the inmate does not have access to a legal mail system or if the legal mail system is inadequate to satisfy the mailbox rule." *Id.* at 1165 (bold and underline added).

Even more significant, States, who regularly litigate matters in federal court against *pro se* inmates, have implemented systems in their institutions that establish the date an inmate provides a document to prison officials to establish the date of filing, so long as the inmate complies

with the system. For example, the State of Florida's Department of Corrections procedure provides, in relevant part:

> (8) Processing of Legal Mail.
>
> . . .
>
> (g) Inmates shall present all outgoing legal mail unsealed to the mail collection representative to determine, in the presence of the inmate, that the correspondence is legal mail, bears the inmate's return address and signature, and that it contains no unauthorized items. Only the address may be read to determine whether it is properly addressed to a person or entity identified [in the Rule as a proper recipient of legal mail]. If the outgoing mail contains unauthorized items or is not legal mail, the inmate shall be subject to disciplinary action. If the outgoing mail is legal mail and it contains no unauthorized items, the mail collection representative shall stamp the document(s) to be mailed and the inmates copy, if provided by the inmate. The date stamp shall be in the following format: "Provided to (name of institution) on (day, month and year blank to insert date) for mailing, by (officer's initials)." The mail collection representative shall then have the inmate initial the document(s) next to the stamp and have the inmate seal the envelope in the mail collection representative's presence. For confinement areas, the staff member who picks up the legal mail each day shall stamp the documents, have the inmate place his or her initials next to the stamp, and have the inmate seal the envelope in the staff member's presence. The use of mail drop boxes for outgoing legal mail is prohibited.
>
> . . .

FLA. ADMIN. CODE R. 33-210.102(8) (2012). The Rule also allots postage for inmates who cannot afford postage and requires the logging of all <u>incoming</u> legal mail. Fla. Admin. Code R. 33-210.102 (10) & (15)(a) (2010).

Thus, pursuant to the Florida Administrative Code, an inmate must present legal mail to the collection representative

and, if the mail does not contain anything unauthorized, the collection representative must stamp the mail with a date stamp stating when it was provided to the correctional institution for mailing, which is then initialed by the inmate. When an inmate complies with the procedures, his filing will have a date stamp that states, "Provided to (name of institution) on (day, month and year blank to insert date) for mailing, by (officer's initials)." FLA. ADMIN. CODE R. 33-210.102(8) (2012). This procedure permits—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. This procedure also protects the inmate, who can retain a stamped copy of his document, to demonstrate the date of filing if his document is not received by the clerk.

However, if the proposed inmate-filing rules are adopted, an inmate can subvert this and other reasonable institutional procedure for legal mail by impermissibly sending a legal document through regular mail channels with a false declaration back-dating when it was provided to prison officials and receive the benefit of the date on that false declaration in a federal filing. Such a procedure can be used to avoid, among other things, the statute of limitations in prisoner litigation and

the AEDPA's one-year statute of limitations to file a federal habeas petition. Stated another way, the proposal will permit an inmate, who has everything to gain by lying about the date of his filing, to gain the benefit of such back-dating chicanery and undercut the ability of States, who often have institutions with limited budgets, to disprove it.

Nor is the fact that such amendments are only applicable to appellate filings a reason to justify their adoption. 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. Indeed, Rule 3(d) of the Rules Governing Section 2254 Cases was adopted at the same time and in conformity with Rule 4's inmate filing rule in 1998.

The proposed rules, while aimed at clarifying and improving the inmate-filing rules, do the opposite. They will encourage and facilitate chicanery by inmates and uncertainty in filing dates of federal filings, often with significant impacts on litigation and the jurisdiction of appellate courts. By eliminating the requirement to use an institution's legal mail system, if one exists, to obtain the benefit of the prison mailbox rule, the proposed rules wrongly and dangerously put the filing date solely into the hands of the inmate and eliminate the ability of a State or institution to establish otherwise through reasonable administrative procedures. I respectfully

request they be rejected and the present inmate-filing rules remain in force so that an inmate that chooses not to use a legal mail system that establishes the date of filing is not able to easily obtain the benefit of the inmate-filing rule to which they are not entitled.

Respectfully submitted,

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PUBLIC SUBMISSION

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Comment from Federal Courts Committee NYCLA, Federal Courts Committee of the New York County Lawyers Associaton

Submitter Information

Name: Federal Courts Committee NYCLA
Organization: Federal Courts Committee of the New York County Lawyers Associaton

General Comment

Please see the attached Report by the Federal Courts Committee of the New York County Lawyers Association.

Attachments

Report on Federal Rules of Appellate Procedure FINAL 2-12-15

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Vincent T. Chang
Co-Chair
Hon. Joseph Kevin McKay
Co-Chair
Federal Courts Committee

February 12, 2015

FEDERAL COURTS COMMITTEE OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Courts Committee (the "Committee")[1] of the New York County Lawyers Association ("NYCLA") has approved the following comments concerning the proposed amendments to the Federal Rules of Appellate Procedure (the "Proposed Amendments") proposed by the Judicial Conference Advisory Committee on Appellate, Bankruptcy, Civil and Criminal Rules (the "Advisory Committee") and published for public comment on August 15, 2014.[2] If enacted, the amendments will become effective December 1, 2016.

NYCLA is an organization of nearly 9,000 lawyers. Its Federal Courts Committee comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA and its Federal Courts Committee issue reports and position papers on matters of interest to our membership, including proposed changes in law and procedure that we believe impact the public interest.

As further detailed below, the Committee generally supports the Proposed Amendments, but opposes certain of the proposed amendments and suggestions with respect to other items. In particular, the Committee opposes certain changes to the requirements for inmate filings. In the sections below, we first comment on a proposed amendment to the so-called "three days are added" rule, which we also address in our separate comments on the Federal Rules of Civil Procedure, and then offer comments on the proposed amendments to other rules in the Federal Rules of Appellate Procedure, including rules on inmate filings and changes in word count limits and amicus briefs.

PROPOSED AMENDMENTS AND COMMITTEE COMMENTS

A. "Three Days Are Added" Rule

Proposed Amendment:

The Federal Rules of Appellate Procedure provide that where a party's time to act is measured from the service of a paper, three days are added to that time if the paper is served other than by hand delivery. *See* Fed. R. App. P. 26(c). The Proposed Amendments would

[1] The views expressed are those of the Federal Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

[2] The Advisory Committee simultaneously published proposed amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure; however, the comments contained herein are limited to the proposed amendments to the Federal Rules of Appellate Procedure. The Committee has issued separate comments on the proposed amendments to the Federal Rules of Civil Procedure.

eliminate electronic service from the types of service that add three days to the other party's time to act. In other words, for purposes of the "three days are added" rules, electronic service would be the functional equivalent of service by hand and would no longer trigger the rule.

The Proposed Amendment to the Federal Rules of Appellate Procedure is as follows[3]:

Rule 26. Computing and Extending Time

****

(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.

The Proposed Amendments – and parallel Proposed Amendments to Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Criminal Procedure[4] – are based on the same underlying rationale. Fed. R. App. P. 25 was amended in 2001 to provide for service by electronic means. At the same time, Fed. R. App. P. 26 was amended to include such electronic service among the types of service that give the recipient three additional days to act. At that time, there were two reasons for such inclusion: (a) concerns about delays in electronic transmission due (for example) to incompatible systems or the like; and (b) a desire to induce parties to consent to electronic service, which initially was authorized only with the consent of the person being served.

The Proposed Amendments recognize that both of these reasons no longer exist. Electronic communication is now the norm, and is considered reliable.[5] In most federal courts, electronic filing – the standard means of electronic service – is mandated in virtually all cases; any attorney wishing to practice before the court must "consent" to it. There is therefore little remaining reason to treat electronic service with the wariness that led to its initial inclusion among the types of service that extend a period to act by three days. As the Advisory Committee Notes to the Proposed Amendments point out, electronic service has become the norm.

[3] Additions are signified with red underlining; deletions are signified with ~~red strikethrough~~.

[4] Although the Proposed Amendments to the Criminal and Bankruptcy Rules are beyond the scope of these comments, we note that the Proposed Amendments would alter the "three days are added" rules in essentially the same manner in all federal courts.

[5] The rules separately address the possibility of any actual failure of electronic communication. Fed. R. App. P. 25(c)(2) authorizes electronic service only through the court's transmission of electronic filings – which, under Fed. R. App. P. 25(a)(2)(D), can be made only in accordance with the court's local rules. These local rules, in turn, generally include provisions respecting technical failures. *See, e.g.*, Second Circuit Rule 25.1(d)(3).

In addition, eliminating the extra three days for the mode of service that is now the most common greatly simplifies the computation of time. As the Advisory Committee Notes point out:

> 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 complications by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the Proposed Amendment would change the rule to provide for additional time *only* where a party's time to act is triggered by service on that party ("after being served"), not where a party's time to act is triggered by that party's own service of a document ("after service"). This is obviously a simple matter of logic; there is no reason to give a party an extra three days by virtue of that party's own choice to serve a document in a manner other than personal delivery or electronic service.

The Committee's Comments:

The Committee generally endorses the adoption of the Proposed Amendments to Fed. R. App. P. 26 for all of the reasons set forth above. We do, however, make one observation.[6]

Although the rules do not specify as much, as a practical matter an attorney can generally serve opposing counsel by hand only during the business hours of that counsel's office. The reason for this is because, unless the paper is handed directly to opposing counsel, the rules require that it be delivered "to a responsible person at the office of counsel" (Fed. R. App. P. 25(c)(1)(A)), which requires, at a minimum, opposing counsel's office be open and accessible.

Electronic service, in contrast, can be accomplished at any hour – regardless of whether the recipient's office is open. This is one reasons why some attorneys prefer to serve papers electronically. But it also means that electronic service may not be quite the same as hand delivery for purposes of reasonable notice. A paper can be served electronically on a given day any time until 11:59 p.m., whereas in practice most attorneys could not receive service by hand at such an hour. At first blush, it seems unfair to treat 11:59 p.m. electronic service the same as service by hand during business hours for the purpose of triggering a time to act that is measured in calendar days. That unfairness is magnified where the papers are voluminous: electronic

[6] A minority of the Committee's members dissented to the Committee endorsing the adoption of the Proposed Amendments to Fed. R. App. P. 26, principally for the reasons stated in the majority's "one observation." However, the dissenters disagree with the majority's statements in the "one observation," characterizing the reasons for opposing these amendments as a "small anomaly" and characterizing these amendments as "an efficient adjustment of the rules to comport with the realities of modern practice." The dissenters believe that the proposed changes will lead to "gamesmanship" with frequent service of papers electronically after the close of business, especially on Fridays, to reduce the adversary's effective response time by three days. Additionally, service electronically is not equivalent to hand delivery, because of the time imposed on the recipient for printing and compiling papers, which may include voluminous exhibits. For these reasons, the dissenters do not believe these changes to be "an efficient adjustment of the rules" and would not approve them.

service imposes on the recipient the burden of printing and organizing papers that, if served by any other means, would arrive bound and tabbed.

On balance, however, the Committee does not believe that this is a reason to reject these Proposed Amendments. In most instances, counsel work out briefing schedules among themselves, and can address such issues as the timing of electronic service in their agreements. Almost invariably, a party that needs an additional day because of late-night service should be able to obtain it either by agreement or from the court. We therefore do not see this small anomaly as a barrier to what we otherwise agree is an efficient adjustment of the rules to comport with the realities of modern practice.[7]

B. Tolling Motions

Proposed Amendment:

Fed. R. App. P. 4(a)(4) currently 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" (emphasis added). As the Advisory Committee explains, this rule has generated a split in the circuits concerning what happens if a district court has extended the deadline for such a post-judgment motion and no party has objected to that extension. The majority (including the Second Circuit) holds that compliance with such an extended deadline does *not* toll the time to file an appeal, but a minority (including the Sixth Circuit) holds that it does.

The Proposed Amendment would resolve this split by adopting the majority view: Fed. R. App. P. 4(a)(4) would now specify that in order to toll the time to file an appeal, a post-judgment motion would have to be made "within the time allowed by" the Federal Rules of Civil Procedure.

The Committee's Comments:

The Committee supports this amendment, which will create uniformity and clarity (and which, we note, will not change the practice in the Second Circuit).

[7] We note, moreover, that in the Second Circuit (a) the due dates for principal briefs are generally set by order based on the parties' requests (the deadlines for which are triggered by events other than service); and (b) the due date for any reply brief is triggered by the *filing* of the appellee's brief, not by its service. *See* Second Circuit Rule 31.2. As a result, in the Second Circuit the Proposed Amendment would impact the timing of papers only for motions (which are governed by Fed. R. App. P. 27). We also note 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.

C. Inmate Filings

Proposed Amendment:

Proposed amendments to the Fed. R. App. P. 4 and 25 and a new proposed Form 7, with accompanying revisions to Forms 1 and 5, would modify the requirements for litigants who are prison inmates to establish timely filing of notices of appeal and other papers in certain circumstances. Rule 4 relates to filing notices of appeal, which are initially filed in the district court from which the appeal is taken. Rule 25 relates to the filing of any paper in the court of appeals.

Under the current and amended version of those rules, inmates may file papers by mailing them to the courthouse, and their papers may be considered timely if deposited in the prison mailing system by the deadline for filing. The proposed amendments, which are substantively the same for Rule 4 and Rule 25, would alter the existing rules in three principal respects.

First, the current rules provide that "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The proposed amendments would eliminate this language, allowing inmates to take advantage of the timely-filing rule regardless of whether they use the institution's legal mail system (if it has one) or its general mail system.

Second, the proposed amendments address when an inmate can submit a declaration or affidavit to establish that the filing was deposited in the mail system as of the filing deadline. The amendments would clarify that, subject to the court's discretion, the inmate must include such a declaration or affidavit with the document being mailed. The current rule does not expressly require inclusion of such a declaration with the paper being filed, and courts have reached different conclusions as to whether an inmate can submit a declaration or affidavit of timely mailing after-the-fact.

Third, the proposed amendments modify the language required for such declarations or affidavits of timely filing. Among the amendments is a proposed Form 7, which is a sample inmate declaration of timely filing by mail.

The proposed revisions to Rule 25(a)(2)(C) and the accompanying proposed Advisory Committee Note are set forth below. (The revisions to Rule 4(c), which governs inmates filing a Notice of Appeal, are substantively the same.)

Proposed Revisions to Rule 25(a)(2)(C):

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate filing.** 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 second sentence of the former Rule—which had required the use of a "system designed for legal mail" when one existed—is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

As indicated above, the Advisory Committee proposes that a sample declaration be added to the Appellate Rules as a new Form 7. Form 7 is a sample court-captioned declaration. The body of the sample declaration reads as follows:

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

To alert inmates to the requirements that would be imposed under the amendments to Appellate Rule 4, the Advisory Committee proposes the addition of new language to the sample notices of appeal (Forms 1 and 5). The warning would appear in bracketed language at the bottom of those Forms, as follows (the proposed changes to Form 1 and Form 5 are identical):

> *[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the 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.]*

The Committee's Comments:

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.

The proposed amendments to the inmate filing provisions of Rules 4 and 25 would impose an additional procedural hurdle on a select class of pro se litigants, namely inmates of prisons or other institutions.[8] Non-inmate *pro se* parties can deposit filings directly into the U.S. mail or with a private courier (the rules allow filing by mail for all parties, so long as the clerk receives the papers by the last day for filing). Different considerations apply to prison inmates, who have no direct access to the U.S. mail system, and no control over delays within a prison mail system. The current provisions in Rule 4(c) and Rule 25(a)(2)(C) reflect these considerations.

The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by *pro se* prisoner litigants. In the Committee's experience, *pro se* litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly

[8] Prison inmates represented by counsel will generally file all papers electronically through counsel and are likely not affected by the proposed amendments.

from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require *pro se* prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The Committee endorses the amendments to include a sample declaration of timely filing (Form 7), and to include references to that sample in the current form notices of appeal. The Committee does not favor the language of the proposed new Form 7. The form declaration requires the inmate to swear under penalty of perjury that she "deposited" the paper for filing in the institution's mail system as of a particular date. An 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. Interestingly, the Advisory Committee acknowledges and corrects a similar problem under the existing rule, and proposes requiring that the inmate declare that first class postage 'is being prepaid," not (as directed by the existing Rule) that it "has been prepaid." *See* Advisory Committee Note to FRAP 4, 25 Amdts. ("This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system."). In addition, the past-tense language 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.

D. Length Limits

Proposed Amendment:

The proposed amendments to Fed. R. App. P. 32 and 28.1 would reduce the word count limits for appellate briefs, reducing the word limit for main briefs from 14,000 words to 12,500 words; for reply briefs from 7,000 words to 6,250 words. In cases involving cross-appeals, the proposed amendments would reduce the word count for the appellant's principal brief from 14,000 words to 12,500; the appellee/cross-appellant's brief from 16,500 words to 14,700 words; and the appellant's reply brief and the appellee/cross-appellant's reply brief from 14,000 to 12,500 words. The proposed amendments do not affect the existing limits as stated in lines of text, which remain an alternative basis for complying with the rules' length limits. The Advisory Committee explains that the reduction in word count limits is intended to correct an anomalous conversion rate that was used in 1998, when then-applicable page limits were converted into word and line limits:

> 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments

inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

(Advisory Committee Note to Rule 32 Proposed Amdt.)

Further amendments to Rule 32 would clarify the specific sections of briefs that are excluded from the word count, set forth in a new Rule 32(f).

Finally, Rule 32 is amended to include a global certification requirement for virtually all papers filed before the court of appeals, not just briefs, that the paper complies with applicable type-volume requirements.

The revisions to Rule 32 are copied below.

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2)—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.

Proposed amendments to Fed. R. App. P. 5, 21, 27, 32, 35, and 40 relate to filings other than parties' merits briefs. Each Rule would be amended to include length limits for computer-generated papers in terms of number of words or, alternatively, number of lines printed in monospaced font. The amended versions of these rules preserve page limits only for handwritten or typewritten papers. The proposed limits effectively convert the existing page limits under these rules into word and line limits, applying a conversion rate of one page equaling 250 words or 26 lines of text.[9]

The Advisory Committee proposes accompanying changes to Form 6, the sample certification that a party has complied with length limits for briefs. The revised Form 6 could be used for certifying compliance as to any "document" filed with the court of appeals, rather than merely briefs. The revised Form 6 reflects that, under the proposed amendments, a party can certify compliance with all computer-generated papers, not merely briefs, in terms of the document's word count or line count.

The Committee's Comments:

The Committee endorses these proposed amendments.

The Report of the Advisory Committee on Appellate Rules explains that the 1998 adoption of word limits inadvertently increased the permissible length of briefs before the courts of appeals. At that time, the Appellate Rules were amended to replace the 50-page limit for briefs with a 14,000 word limit, apparently employing a conversion rate of 280 words per page – a number of unknown origin. A study of briefs under the pre-1998 rules indicates that an average 250 words per page would have been a more accurate benchmark. The proposed amendments use this more accurate conversion rate, applying it to the 1998 page limits for briefs

[9] Thus, requests for permission to appeal (Rule 5), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text. Petitions for mandamus and other extraordinary writs (Rule 21), currently limited to 30 pages, would be limited to 7,500 words or 780 lines of text. Motions and responses to motions (Rule 27), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text; reply briefs on motions, currently limited to 10 pages, would be limited to 2,500 words or 260 lines of text. Petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), currently limited to 15 pages, would be limited to 3,750 words or 390 lines of text.

and the current limits (expressed in pages) for other filings. The Committee agrees with the Advisory Committee's rationale of adopting word limits that better achieve the intended result of maintaining the length limits in place in 1998. Notwithstanding these amendments, any circuit could adopt local rules to maintain the existing limits or otherwise permit longer limits.

The Committee also endorses the proposed amendments relating to papers other than briefs on the merits, as they provide greater uniformity in length limits across different types of appellate papers, and greater clarity in calculating a paper's length. Under the proposed amendments, the length limits for computer generated papers in support of petitions for Appeal by permission (Rule 5), mandamus and other extraordinary writs (Rule 21), motions (Rule 27), petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), all currently expressed in pages, would be governed by word or line counts. The proposed amendments to Rule 32 provide more clarity as to what items are excluded from the word or line count. The more comprehensive list makes clear that the word or line count should not include any cover page, signature block, or proof of service – components that are not expressly mentioned in Rule 32's current list of exclusions.

For the sake of fairness, the Committee notes that these 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.

E. Amicus Briefs on Petitions for Rehearing

Proposed Amendment:

No federal rule governs the timing and length of amicus briefs filed in connection with petitions for rehearing, and the Advisory Committee reports that most circuits have no local rule addressing such filings.[10] The Proposed Amendments seek to fill this void by re-numbering Fed. R. App. P. 29 (which is titled "Brief of an Amicus Curiae" and addresses amicus briefs generally) as Fed. R. App. P. 29(a), titling that subsection "During Initial Consideration of a Case on the Merits," adjusting the numbering of its sub-parts accordingly, and adding a new Fed. R. App. P. 29(b) entitled "During Consideration of Whether to Grant Rehearing." The provisions of the new subsection would apply only where no "local rule or order in a case provides otherwise." Thus, the rule would not require any circuit court to accept amicus briefs on such petitions or mandate any particular rules concerning the length or timing of such briefs; it would only establish default rules for timing and volume where such briefs are permitted.

The Proposed Rule sets a volume limit of 2,000 words, or 208 lines of text printed in a monospaced face – slightly more than half of the volume limit proposed for petitions for rehearing in the Proposed Amendments to Fed. R. Civ. P. 40. An amicus brief in support of a petition for rehearing (together with a motion for leave to file it if the amicus is not the United States, its officer or agency, or a state) would have to be filed no later than three days after the petition it supports. A brief in opposition to such a petition (together, again, with a motion for

[10] The Second Circuit has no such rule.

leave if required) would have to be filed no later than the date set by the court for any response to the petition.

The Committee's Comments:

The Committee generally supports this clarification, particularly in light of the room it leaves for courts to develop their own rules. Presumably any circuit that disagrees with the default approach will promulgate a local rule to address the issue; thus, in either case, there will be a rule that provides counsel with some guidance in this area. We agree with the general proposition that having no rule at all leads to confusion – and in all likelihood burdens clerks' offices with calls that would be unnecessary if there were a rule.

We do note, however, that the Advisory Committee has not explained why the deadline for an amicus brief opposing rehearing should presumptively be the same as the deadline for the opposing party's brief. A motion for leave to file an amicus brief must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). As a practical matter, this generally requires the amicus 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. It is difficult (if not impossible) for an amicus to do this until *after* the filing of the brief of the party whose ultimate position it is supporting.

We would therefore suggest that the default deadline for an amicus brief in opposition to a petition for rehearing be three days after the filing of the main brief in opposition. Although we recognize that this would require the court to wait three days to see if any amicus is filed, as a practical matter we do not believe that this will significantly lengthen the time it takes to resolve any motion for rehearing. We also note that opposition papers are permitted on such applications only where the court requests them. We respectfully submit that any application for rehearing that warrants such a request should also warrant the addition of three days to the briefing schedule to accommodate the interests of any amicus curiae.

We recognize that a three-day deadline is very short because (following the 2009 amendments) intermediate Saturdays, Sundays and holidays are no longer excluded from the counting. In some instances this could mean that a weekend represents all of the time an amicus has between the filing of the party's brief and the deadline for its own. We do not, however, suggest an expansion of that time because we recognize that as a practical matter an amicus will have to begin preparing its papers at the same time it would if it were a party; the additional time would primarily give the amicus an opportunity to see the final version of the party's brief and adjust its own accordingly. This opportunity should be available to an amicus on either side, but the default length of time need not (in our view) be any longer than what the Advisory Committee proposes.

Report prepared by:

Vincent T. Chang, Committee Co-Chair

Hon. Joseph Kevin McKay, Committee Co-Chair

Adrienne B. Koch, Committee Member

Kimo Peluso, Committee Member

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8j-agbc
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0039
Comment from Peter Goldberger, National Association of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger
Organization: National Association of Criminal Defense Lawyers

General Comment

The attached comments are submitted on behalf of the National Association of Criminal Defense Lawyers.

Attachments

NACDL comment App Rules 021615

NACDL
1660 L St., NW, 12th Fl.
Washington, DC 20036

February 16, 2015

To the Members of the Advisory Committee:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 4(c), 26(c), and 29, as well as the type-volume provisions of Rules 21, 27, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure.

Our organization has approximately 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public criminal defense attorneys and interested academics. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. As you know, we have a long and consistent record of submitting comments. On the basis of that history, we appreciate the close and respectful attention that our comments have always received.

APPELLATE RULES 4(c) and 25(a)(2)(C) – TIMELINESS OF INMATE-FILED NOTICES OF APPEAL

NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail. We have one suggestion, consistent with the spirit and purpose of the Rule, as explained in the proposed Advisory Committee Note. 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, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage, as otherwise required by subparagraphs 4(c)(1)(A)(i) & (ii) and 25(a)(2)(C)(i). The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

As for the related proposed amendment to Form 1 and creation of a new Form 7, we also have a suggestion. 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."

APPELLATE RULE 26(c) – COMPUTING AND EXTENDING TIME: ADDITIONAL 3 DAYS AFTER ELECTRONIC SERVICE

NACDL opposes the proposed package of amendments – including the proposed amendment to Appellate Rule 26(c) – to remove from the list of circumstances in which three days are added to otherwise stated time limits those (many) occasions when a document is due under a Rule or court order to be filed a certain number of days "after service" of another paper, and service has been made by electronic filing. Regardless of the arid logic behind the proposal, the fact is that the amendment would reduce by three days the time available to counsel to respond to an adversary's motion or brief. This small increase in the speediness of proceedings would provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners. This is particularly so as to criminal defense lawyers, whose clients may be incarcerated but who may have to be consulted before responses can be prepared. Many defense lawyers practice solo or in very small firms. Many are in court for much or all of normal working hours on most days. Many have little if any clerical or paralegal support, particularly in the digital age with its decreased demand for secretaries. For this reason, many criminal defense lawyers 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. The burdens thus placed on defense counsel (and thus indirectly on defendants) by the proposal – as well as the increased burden on appellate courts, which will be confronted with many more motions for short extensions of time, or for leave to file documents out of time – far outweigh any perceived benefit in simplicity or abstract elegance in the rules.

Relatedly, if the 3-day addition is to be retained, as we recommend, this Rule has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by 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.

APPELLATE RULES 21, 27, 28.1, 32, 35, and 40 – ACROSS-THE-BOARD 11% REDUCTION IN TYPE-VOLUME LIMITS

NACDL opposes the proposed reduction of type-volume limits and pages lengths throughout the appellate rules. The proposed reduction is based on a recalculation of the presumed type-volume per page from 280 words to 250, relative to the number of pages that was allowed for certain documents prior to 1998. We are aware that many other comments have been submitted criticizing this change for a variety of different reasons, with many of which we concur. In our view, however, the question of what was in the Committee's mind in 1998, one way or the other, when the page limit for briefs was changed to a type-volume rule, should not be given significant weight. The real question is whether there is any good reason to believe that the quality of appellate justice today would be enhanced by forcing an across-the-board 11% reduction in the maximum allowable length of briefs, motions, and other submissions from what is now permitted. We cannot imagine that it would.

We speak from the perspective of criminal defense lawyers who handle appeals for accused or convicted persons. The indictments our clients face often contain numerous counts brought under a variety of federal criminal statutes. These statutes continue to proliferate in number and in complexity. Federal criminal trials can last for weeks, generating potentially more, not fewer errors plausibly providing grounds for appeal. Moreover, error will not result in reversal if it is harmless, but we cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial. This requires more, not less space in even the best-written briefs. Federal sentencing law has also become increasingly complex since 1998, both under the Guidelines and under developing constitutional rules, as well as post-*Booker,* judge-made jurisprudence. The same is true of the law governing federal habeas corpus. Moreover, the number of potentially-applicable judicial precedents grows endlessly, multiplying each year the number of cases that might reasonably be cited, either as supportive precedent or as necessary to be distinguished. All the federal court decisions from our Nation's first hundred years (including many opinions from the bench) were published in 30 volumes of the Federal Cases. The first series of the Federal Reporter, which began approximately when the federal appellate courts were established in 1891, covered the next 44 years in 300 volumes. The Second Series ("F.2d") covered 70 years in 999 volumes. The Third Series ("F.3d") is now in its 774th volume (containing many more pages per volume, as well) after less than another 22 years. About 615 of those volumes

have appeared since 1998. Indeed, the number of precedential opinions *required* by rules of professional responsibility to be cited is ever-growing.

In this context of a burgeoning body of statutes and case law, defense lawyers are sworn to protect our clients' constitutionally-guaranteed right to effective assistance on appeal. We are committed to fulfilling this duty, but we cannot do so with one hand tied behind our back by pressure to drop potentially viable issues or to develop issues less fully. When we file amicus briefs (as NACDL often does) and are limited to one half the allowable party maximum, the significance of the proposed reduction becomes even more acute, as our opportunity to provide helpful information to the court would be severely hampered. For these particular reasons, as well as those proffered by other commenters, NACDL strongly opposes the suggested changes.

Based on the 280-words formula (and without regard to its typographical accuracy), the allowable maximum type-volume under Rule 21 for a mandamus petition should be 8400 words. For a motion under Rule 27, it should be 5600 words. For briefs under Rules 28.1 and 32(a)(7) the volume should remain at 14,000. For a rehearing petition under Rules 35 and/or 40, the maximum should be 4200.

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.

APPELLATE RULE 29(b) – TIME FOR FILING AN AMICUS BRIEF IN CONNECTION WITH A PETITION FOR REHARING

NACDL applauds the Committee for addressing this long-overlooked issue. We have two points of difference with the proposal, however. First, for the reasons discussed in the preceding section of these comments, the allowable type-volume for an amicus submission in connection with a petition for rehearing should be 2250 words under proposed Rule 29(b)(4), not 2000. Also, we strongly urge the Committee to consider allowing a more realistic five days, not just three, under proposed Rule 29(b)(5), to file a memorandum of amicus curiae in support of a petition for rehearing. This is still less than the seven days allowed for an amicus brief on the merits. But based on our experience in filing such memoranda, 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, all while producing the most useful and informative submission for the Court's consideration.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

William J. Genego
Santa Monica, CA

Co-Chairs, Committee on Rules of Procedure

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0058
Comment from Saul Bercovitch, The State Bar of Californias Committee on Appellate Courts

Submitter Information

Name: Saul Bercovitch
Organization: The State Bar of Californias Committee on Appellate Courts

General Comment

Please see the attached comments from the State Bar of Californias Committee on Appellate Courts.

Attachments

proposed FRAP amendments-02-2015-CAC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment 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." The 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)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address 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. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(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 25(a)(2)(c)(ii), as further amended, would provide:

(ii) 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 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes 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. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports 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.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length 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. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that 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. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-C: the "three-day rule"

Appellate Rule 26(c) sets out the "three-day rule" for purposes of deadlines set in the Appellate Rules. It provides:

> **(c) Additional Time after Service.** When a party may or must act within a specified time after service, 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.

Under this Rule, the three additional days apply not only to service by commercial carrier (when delivery is not same-day) and service by mail, but also to electronic service.

In 2007, then-Chief Judge Frank H. Easterbrook proposed that Appellate Rule 26(c)'s three-day rule be abolished. Last summer, the Appellate Rules Committee – in coordination with the other advisory committees – published for comment a proposed amendment that would render the three-day rule unavailable when service is electronic.

Part I.A of this memo summarizes the background to the proposal, while Part I.B sets out the proposal as published. Part II summarizes the public comments (copies of which are enclosed). Part III.A discusses concerns raised in the comments, and Part III.B assesses commentators' suggestions for modifying the proposal. Part IV concludes by suggesting that the Committee adopt the proposed change as published, with language added to the Committee Note along the lines suggested by the Department of Justice (DOJ).

I. The proposal to exclude electronic service from the three-day rule

Proposals to narrow or abolish the three-day rule have been discussed, on and off, for years.[1] Part I.A summarizes the most recent discussions, while Part I.B sets out the published proposal that resulted from those discussions.

[1] The rules committees have discussed the question periodically since at least the spring of 1999.

A. Background of the current proposal

In his 2007 comment on the time-computation project, Chief Judge Easterbrook suggested abolishing the three-day rule contained in Appellate Rule 26(c). He argued that the three-day rule is particularly incongruous for electronic service,[2] and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days.

Though Chief Judge Easterbrook's suggestion related only to the Appellate Rules, the criticism of the three-day rule was relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). In 2013, the CM/ECF Subcommittee concluded that the time had come to amend the three-day rule (in each set of rules) to exclude electronic service.

Participants in the discussion of the proposed change felt that the reasons given for including electronic service appear less persuasive now than they were a decade ago. Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form seem less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. And in districts or circuits where CM/ECF is mandatory for counsel, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. There remains a lingering concern that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. But a litigant whose opponent uses such a tactic can seek an extension of time to respond. *See* Appellate Rule 26(b) (providing, subject to exceptions that would not be relevant in this context, that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires").

B. Text of Rule and Committee Note as published

Rule 26. Computing and Extending Time

* * * * *

[2] Chief Judge Easterbrook favored eliminating the three-day rule entirely, in part because its application interferes with the Rules' preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee's spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the DOJ belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

(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.

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.

II. 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."

III. Commentators' concerns and suggestions

A number of commentators support the proposal. Others concede its appeal, but propose changes to offset its anticipated downsides. Still others oppose the proposal altogether. Part III.A discusses commentators' concerns, while Part III.B evaluates commentators' suggested revisions.

A. Commentators' concerns

The concerns stated by those who oppose the proposal (or request modification) 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. One additional set of concerns appears to stem from a misunderstanding of prior timing rules that affected motion practice.

Unfair behavior by opponents. Electronic service may be made late at night on a Friday before a holiday weekend. Moreover, if the recipient is located in a time zone that lies east of the time zone containing the circuit clerk's principal office, then electronic service through the court's transmission facilities might occur as late as 2:59 a.m. the next morning (by the recipient's time).[3] Some commentators warn that lawyers will choose such inconvenient times intentionally in order to disadvantage their opponent. Other commentators focus simply on the inconvenience (intended or not) that will result; the latter concern shades into the general topic of hardship.

[3] *See* Appellate Rule 26(a)(4)(B) ("Unless a different time is set by a statute, local rule, or court order, the last day ends ... for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office.").

Hardship for the recipient. Some commentators worry that electronically served papers are more likely to be overlooked. If the papers are lengthy and the lawyer is out of the office, review of the papers may need to await access to a printer. Electronic service, unlike personal service, can occur outside of business hours. The hardships will be worse for criminal defense lawyers and other lawyers who operate in small offices or as solo practitioners. The problem will also be more acute the more complex the response paper must be.

The need for time to draft reply briefs and motion papers. Commentators state 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. Commentators point in particular to motions that could dispose of the appeal (for example, a motion for summary disposition or a motion to dismiss for lack of jurisdiction) and motions that seek momentous interim relief (such as a motion to stay the effectiveness of a government regulation). The DOJ notes that government lawyers need time to confer with relevant personnel. And other commentators note that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated.

Inefficiency caused by motions for extensions. Acknowledging that an extension of time could address the problems noted above, commentators argue that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A misunderstanding of previous time-counting regimes. Earthjustice, Sierra Club, Defenders of Wildlife, and the Western Environmental Law Center (collectively, Earthjustice) argue that "although the proposed rule change appears to be intended to restore the actual times that were provided for [motion] 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." The argument is that, during periods when mail rather than electronic service was the norm, the deadlines for motions were effectively lengthened for a different reason, namely, the exclusion of intervening weekends and holidays:

> As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus, intermediate Saturdays, Sundays, and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule 27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4).

The problem with this argument is that the method of time-counting was not the only thing that changed in 2009; so did the deadlines for motion responses and replies. From 1968 to 1998, the deadline for motion responses was 7 days after service of the motion, computed without skipping

intermediate weekends and holidays.[4] In 1998, amendments to Rule 27 extended the motion-response deadline to 10 days and set the motion-reply deadline at 7 days after service of the response; both those periods were calculated without skipping intermediate weekends and holidays. Between 2002 and 2009, a different time-counting approach provided for the omission of weekends and holidays when computing these periods[5] – but to offset that different approach, the relevant deadlines were pared down. From 2002 to 2009, the motion-response deadline was 8 days and the motion-reply deadline was 5 days.

Assessment of the concerns. Leaving aside Earthjustice's concern about prior time computation regimes, the other four categories of concern warrant further consideration.

Gamesmanship may occur, and the three-day rule does soften the impact of such gamesmanship by affording the recipient extra time. However, it is to be hoped that such gamesmanship is the exception rather than the rule; and it might be questioned why three extra days should *always* be afforded in order to forestall unfairness in the subset of instances where gamesmanship has occurred. Service late on a Friday night before a holiday weekend is an easily demonstrable indicator of gamesmanship, and thus should be a good basis for an extension motion. And if the Committee adopts the DOJ's suggested Note language, discussed below, that should assist parties in advocating for needed extensions. Admittedly, such motions do come at a cost – to parties, in drafting the motions and to the court, in resolving them – and the question for the Committee is whether those costs would outweigh the overall gains from the amendment. The gains would come in the form of easier calculation (especially of periods stated in multiples of 7 days) and streamlined process (because time periods would apply as stated rather than subject to the addition of three extra days). The costs of a motion would likely not be all that great, given that the relevant facts and law would be very straightforward.

Extension motions could also address other hardships identified by the commentators. Admittedly, though, those hardships might be less likely to persuade a court. A lawyer who overlooked an electronic notice of docket activity, or who was out of the office on a weekday without access to a printer, or who is a solo practitioner, might not be as likely to win an extension of time on that basis as one who was served at 11:59 p.m. on a Friday night. If the Committee were concerned that such circumstances might also warrant extensions, perhaps the DOJ's proposed additional language for the Committee Note could be modified accordingly.

As for the concerns about particular types of papers that require additional drafting time,

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[4] Before 1998, the Appellate Rules did not set a time limit for replies.

[5] From 1968 to 2002, Rule 26(a) directed that intermediate weekends and holidays be omitted when computing a time period "less than 7 days." From 2002 to 2009, Rule 26(a) instead directed that intermediate weekends and holidays be omitted if the time period was "less than 11 days." From 2009 on, Rule 26(a)(1) has directed that periods stated in days be computed on a 'days-are-days' basis, without omitting intermediate weekends and holidays.

it seems to me that those concerns really focus on the deadline for the relevant type of filing and not on the three-day rule as such. If more time is needed for reply briefs or for motion responses and/or replies, that can be addressed in the rules setting the deadlines for those types of filings. I address that possibility, below, in discussing suggested modifications to the proposal.

B. Suggested revisions to the proposal

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

Those suggestions that are common to all four sets of Rules should, ideally, be treated the same for all sets. As of this writing, it seems likely that the other Advisory Committees will reject all the commonly-applicable suggestions, with the possible exception of the DOJ's suggested language for the Committee Notes.

Note language encouraging extensions. The DOJ proposes the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. It suggests the following:

> 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.

Presumably, this language would be added to the Note as its penultimate paragraph, so that it immediately followed the discussion of the elimination of electronic service from the three-day rule. In the interests of parallel syntax, it might be useful to amend the second sentence of the paragraph slightly, thus: "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 just before an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response."

The initial discussions of this proposed Note language did not produce a consensus among the reporters. As Professor Cooper noted, "[s]ome believe it would be useful to add the language. Others – including the Civil Rules Reporter – believe that the general principle of economy in Committee Notes should prevail because courts will readily understand and accommodate the needs of a party who has been put at a disadvantage by the circumstances of

e-service." On the other hand, Professor Beale has reported that the Criminal Rules Committee

> unanimously approved adding the DOJ language to the committee note. The Committee favored adding similar language to the parallel committee notes, and asked us to transmit its views and encourage other committees to add the language. However, members also emphasized that it is especially important to encourage judicial flexibility and allow the resolution of issues on the merits in criminal cases. This can avoid later collateral attacks based on claims of ineffective assistance of counsel.

Most recently, Professor Cooper formulated an alternative, shorter, addition to the Note:

> The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. [alternative 1: It is expected that courts will allow appropriate extensions when warranted.] [alternative 2: Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances.]

As Professor Cooper points out, this proposed alternative is shorter and "less directive."

Although I propose, above, that the Committee reject the argument that concerns over gamesmanship justify retaining the three-day rule for electronic service, I think that the DOJ's proposed addition to the Committee Note could provide a useful way to encourage appropriate extensions on a case-by-case basis. (The more that such encouragement is deemed advisable, the more that the longer and more directive Note language might be seen as useful; if members do not feel strongly that such encouragement is needed, then Professor Cooper's shorter alternative might be preferred.) In addition, to the extent that the Committee Note to Criminal Rule 45(c) will include the proposed addition, that weighs in favor of including the same language in the Committee Note to Rule 26(c).[6] Of course, by the time of the Committee's spring meeting, the Committee will be in a position to take into account, as well, the decisions taken by the Civil and Bankruptcy Rules Committees.

A less-than-three-day-rule for electronic service. Two commentators suggest that though electronic service should not give rise to an automatic three-day extension, a more

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[6] Admittedly, if the same language will not be added to the Committee Notes to Civil Rule 6(d) and Bankruptcy Rule 9006(f), then one could argue that considerations of uniformity across the four sets of Rules do not weigh in favor of including the DOJ's addition in the Committee Note to Appellate Rule 26(c). On the other hand, if participants are convinced that the additional Note language is particularly worthwhile in criminal cases for the reasons summarized by Professor Beale, that could weigh in favor of including the additional Note language in the Committee Note to Rule 26(c), given that Rules 26(b) and (c) will of course come into play in criminal as well as civil appeals.

limited automatic extension would be appropriate. Washington Legal Foundation proposes that rule text be added to specify that electronic service after 6 p.m. in the recipient's time zone is deemed delivered on the next following business day. The State Bar of California's Committee on Appellate Courts (commenting only on the Appellate Rules proposal) states that the rule should add one or two days (rather than three) when electronic service is used.

Adding such a feature could mitigate some of the anticipated hardships noted above, by affording an extra day or two as a matter of course, and might thereby reduce the number of additional motions for extensions of time that might otherwise result. On the other hand, such a feature would add further complexity to the computation of time periods.

A separate rule where a filing is not immediately accepted. NACDL states that the three-day rule

> has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by 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.

This suggestion does not seem to me to relate to the three-day rule itself, except in the sense that the suggestion, like the three-day rule, would pertain only to time periods measured from the date of service. That is to say, if this suggestion is worth addressing, it would seem equally so whether or not a three-day rule exists. (I suppose that there might be a practical connection between the two issues, in the sense that the provision of an extra three days might suffice in some instances to allow the recipient to see whether the court accepts the document for filing; but that would not be so in all instances.) I therefore propose that the Committee consider adding this suggestion to its study agenda as a separate item.

Extending the deadline for reply briefs. Two sets of comments – from the appellate and constitutional law practice group at Gibson, Dunn & Crutcher LLP (the "Gibson Dunn comments") and from Seth Waxman on behalf of appellate and Supreme Court litigation practice groups at eleven firms (the "Waxman comments") – suggest lengthening the deadline for reply

briefs. The Gibson Dunn comments argue that the "*de facto*" deadline is now 17 days (14 under Rule 31(a)(1), plus three under Rule 26(c)) and that 17 days is an appropriate length of time. The Waxman comments make a similar argument about the current "de facto" deadline, and suggest that the rulemakers "set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting."

It has not always been possible to argue that the rules set a de facto deadline of 17 days. Ever since the original adoption of the Appellate Rules, Rule 31(a) (now Rule 31(a)(1)) has set the deadline for reply briefs at 14 days after service of the appellee's brief. 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 the more widespread electronic service has become, the stronger the argument that the de facto deadline is 17 days.

Of course, some might dispute whether this de facto deadline should be set in stone. During a 2008 discussion of the three-day rule, the following exchange occurred:

> A judge member queried whether a decision to maintain the three-day rule, for the present time, even in cases of electronic service might result in a situation – a few years hence – in which the availability of the extra three days has come to be viewed by practitioners as an entitlement. An attorney member stated that she did not think so, because the extra three days are currently viewed more as a gift than as a right.

Minutes of November 13-14, 2008, Appellate Rules Committee Meeting.

Even if the extra three days are not viewed as a matter of right, the commentators argue that a 17-day or 21-day period better reflects the increased complexity of appeals. They maintain that a longer deadline will help to reduce the number of extension requests. They assert that setting the deadline at 21 days after service will help to simplify time computation. And they note that Supreme Court Rule 25.3 sets a 30 day deadline for reply briefs on the merits.

It does not seem advisable to adopt this proposal as part of the current round of amendments. For one thing, altering Rule 31(a)(1)'s deadline for reply briefs would seem to be a change that requires publication; the current proposals gave no indication that such a change was under contemplation. For another, further consideration of the merits of the proposal seems worthwhile. As to a choice between 17 days and 21 days, although I admit that the Committee Note to the current proposal invokes the idea that time periods stated in multiples of seven are desirable because they minimize the instances when end points of a period fall on a weekend, it is not difficult to figure out what to do when the end-point of a 17-day period falls on a weekend;

in such instances the period becomes an 18-day or 19-day period.[7] The more important questions would seem to include whether a time period longer than 14 days is routinely necessary; if the necessity for additional time is not routine, whether the courts of appeals are willing to grant extensions when necessary;[8] whether any circuits routinely set the argument date close enough to the reply due date that a longer deadline would throw off the schedule;[9] and whether the Supreme Court's briefing schedule provides an appropriate benchmark for practice in the courts of appeals.

Rather than addressing these questions in the context of the current proposal, I suggest that the Committee consider whether to add this issue to its agenda as a separate item. I realize that the downside of separate treatment of this suggestion is that – if the Committee ultimately does decide to increase the time limit for reply briefs – there may be an interim period when the three-day rule is largely unavailable but the reply-brief deadline has not yet been extended. However, the availability of extensions should help to alleviate any hardships that arise during that interim period.

Extending the deadline for motion responses and replies. Rule 27(a)(3)(A) sets a 10-day deadline for responses to motions; Rule 27(a)(4) sets a 7-day deadline for replies to such responses. The DOJ's comments point out that those deadlines can be very tight when they span a holiday weekend and involve "substantive or complicated jurisdictional motions." The comments by Earthjustice go further, asserting that without the three-day extension provided by Rule 26(c), the 10-day and 7-day deadlines would be too short (for dispositive motions or stay motions) even when they did not span a holiday weekend.

Neither set of comments actually suggests changing the Rule 27(a) deadlines. DOJ suggests language for the Committee Note encouraging extensions where appropriate. Earthjustice urges retention of the three-day rule for electronic service. Further investigation would be needed in order to determine whether Rule 27(a)'s deadlines require adjustment.

As noted above, Earthjustice's argument based on prior time computation mechanisms in

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[7] *See* Rule 26(a)(1)(C) ("[I]nclude the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.").

[8] The relevant circuits, for purposes of this inquiry, would be those that employ Rule 31(a)(1)'s timing rules rather than setting briefing schedules with dates certain.

[9] A three-day extension of Rule 31(a)(1)'s deadline seems unlikely to cause problems in instances where electronic service is employed; such a change would merely offset the new inapplicability of the three-day rule. But it would be worth investigating whether lengthening the period by three days would cause any undue delay in cases where the three-day rule would still apply – that is to say, in cases where service is by mail (as seems likely to be the case with many pro se litigants).

the Appellate Rules rests on a misunderstanding of the deadlines applicable in prior years. In fact, for the first 30 years of the Appellate Rules' existence, the deadline for motion responses was 7 days (computed without skipping intermediate weekends and holidays), and service would likely have been by mail – resulting in a net effective deadline of 7 calendar days if one assumes that the mail took roughly three days. From 1998 to 2002, the deadline for motion responses was 10 days (computed without skipping intermediate weekends and holidays) and service would likely have been by mail, resulting in a net effective deadline of 10 calendar days (based on the same assumption about the mail). In 1998, Rule 27 was amended to set a 7-day deadline for motion replies (computed without skipping intermediate weekends and holidays); until 2002, service would likely have been by mail, resulting in a net effective deadline of 7 calendar days.

As noted above, in 2002 Rule 25 was amended to permit electronic service. As electronic service became more common, the deadlines for motion responses and replies underwent the same sort of de facto expansion noted above with respect to the deadline for reply briefs. During the period from 2002 to 2009, where electronic service was employed, the de facto deadline for responses typically varied from 13 to 15 calendar days,[10] while the de facto deadline for replies typically was 10 calendar days.[11] From 2009 to the present, when electronic service is employed the de facto deadline for a response has been 13 calendar days and the de facto deadline for a reply has been 10 calendar days.

Does the entrenchment of the longer "de facto" deadlines post-2002 justify an extension of Rule 27(a)'s deadlines if the three-day rule is eliminated for electronic service? Or has motion practice become more elaborate, complex, or high-stakes since 1998,[12] justifying such a

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[10] The variation arose from the fact that, under the then-applicable version of Rule 26(a), intermediate weekends and holidays were not counted when computing periods "less than 11 days." A nominally 8-day period would last 10 calendar days if it spanned one weekend and 12 calendar days if it spanned two. Then, under the three-day rule, an additional three days would be added to the 10- or 12-day period.

[11] *I.e.*, seven calendar days (because the nominally-five-day period would span a weekend) plus three additional days.

[12] It was as recently as 1998 that the motion-response deadline was lengthened from 7 days to 10 days to better reflect the realities of motion practice. The 1998 Committee Note to Rule 27(a)(3) states in part:

> Paragraph (3) retains the provisions of the current rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion.

change? Would extensions of these periods cause undesirable delays?[13] The Committee has not yet investigated those questions.

In any event, even if the Committee is concerned that eliminating the three-day rule for electronic service might undesirably shorten the deadlines for motion responses and replies, I suggest that it consider lengthening Rule 27(a)'s deadlines rather than retaining the three-day rule for electronic service. A change targeted at the deadlines for motions in particular seems like a better way to address the issue.

I therefore suggest that the Committee consider whether to add as a new agenda item the question of whether to lengthen Rule 27(a)'s deadlines for motion responses and replies.

IV. Conclusion

I propose that the Committee adopt the proposed amendment to Rule 26(c) as published, with language added to the Committee Note along the lines suggested by the DOJ.[14]

Encl.

[13] As noted above with respect to reply briefs, the question of delay would focus on those instances where service is made by mail or third-party commercial carrier, because it would be in those instances that the three-day rule would continue to apply.

[14] As noted above, the Committee may also wish to consider whether to add to its agenda, as new items, proposals to specify the computation of time periods measured after service of a filing that is not immediately accepted by the court; to enlarge Rule 31(a)(1)'s time limit for reply briefs; and to enlarge Rule 27(a)'s time limits for motion responses and replies.

TAB 5C(1)

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The “Three-Day Rule”

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ftu-2gxf
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0015
Position Paper of James C. Martin, on behalf of American Academy of Appellate Lawyers

Submitter Information

Name: James C. Martin
Organization: American Academy of Appellate Lawyers

General Comment

See Attached

Attachments

Academy Position Paper

AMERICAN ACADEMY OF APPELLATE LAWYERS

December 1, 2014

Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: Request to testify on proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Rose,

The American Academy of Appellate Lawyers requests the opportunity to testify at the public hearing on the proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, on January 9, 2015 in Phoenix, Arizona. The Academy is a professional association of nearly 300 members from across the country, whose membership is limited to lawyers, judges and educators dedicated to appellate practice and the administration of justice on appeal.

The Academy has submitted comments on the proposed amendments and a copy of its position paper is attached. The Academy's incoming president, Charles A. Bird, from San Diego, California, would be pleased to offer the Academy's views.

Very truly yours,

James C. Martin
President
American Academy of Appellate Lawyers

AMERICAN ACADEMY OF APPELLATE LAWYERS

AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The American Academy of Appellate Lawyers submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35 and 40 of the Federal Rules of Appellate Procedure. When appropriate, the comment below addresses changes common to groups of rules, not each rule separately.

The Academy supports all of the proposed amendments except for the proposal to reduce the word limits on briefs and to apply a conversion rate of 250 words per page to documents being converted from a page limit to a word limit. The Academy believes that the Advisory Committee's rationale does not support the proposed reduction in the word limits and proposed conversion rate. It also believes that such a reduction will not improve appellate advocacy and may well increase the workload of the courts.

A. Statement of Interest

The Academy is an invitation-only professional association of nearly 300 members from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

B. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C).

The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of the documents covered by these rules. Under the proposed amendments, and assuming the other rule requirements are met (*i.e.* postage), the filing date would be 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.

The Academy believes that the proposed amendments are designed to clarify and improve inmate-filing rules, and would promote the fair administration of justice. The Academy supports these proposed changes.

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

The proposed amendment to appellate Rule 4(a)(4) addresses a circuit split over whether a motion under Civil Rules 50, 52, or 59 is "timely" when filed within a court-ordered "extension" of a non-extendable deadline under those rules. Adopting the majority view, the proposed amendment would make clear that post-judgment motions filed outside the deadline set by the Civil Rules are not "timely" under Rule 4(a)(4), even if the district court has erroneously granted an extension of the deadline, and therefore do not toll the time for filing a notice of appeal under Rule 4(a)(4).

The Academy supports this proposed amendment, because it is consistent with the understanding of Academy members that a district court lacks the authority to extend these specific deadlines and that a motion filed outside the time permitted under Rules 50, 52, or 59 does not toll the deadline for filing a notice of appeal.

D. Length Limits: Rules 5, 21, 27, 28.1, 32, 35 and 40

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the page limits currently applicable to documents filed under those rules. The type-volume limit would be based on a conversion ratio of 250 words per page. The change would apply to documents prepared on a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

The proposed amendments also would reduce from 14,000 words to 12,500 words the word limit for briefs on appeals under Rule 32 and for briefs on cross-appeals under Rule 28.1.

1. The Academy supports the principle of replacing other length limits with word-number limits.

The Academy supports the core concept of parts C and D that the permitted length of appellate filings produced on computers should be determined by word count. The Academy explains below why it opposes the proposed word numbers in parts C and D more strongly than it supports the underlying concept.

2. For all purposes in the proposed rules, the Academy opposes the 250-word-per-page conversion ratio.

The Academy respectfully opposes both the reduction in permitted word-count of briefs and the 250-word-per-page conversion ratio applied to other filings. The Academy believes the proposed conversion ratio, particularly in reducing the length of briefs, is not

supported by the published materials or the Advisory Committee's process, and is unwise.

3. The published background does not support the proposed conversion ratio.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000-word limit for principal briefs. The same amendments set the word limit for reply briefs derivatively and set the limit for appellees' combined briefs in cross-appeals by related reasoning. Rule 32 determines the length of briefs of amicus curiae derivatively under rule 29(d). The proposed amendments reduce the limit for principal briefs to 12,500 words, reduce the limit for reply briefs derivatively, and reduce the limit for appellees' combined briefs by related reasoning. According to the Advisory Committee, the 1998 change was based on an assumption that the appropriate conversion rate was 280 words per page applied to the 50-page limit for briefs then in effect. The Advisory Committee states that the proposed reduction is based on a study of D.C. Circuit briefs filed under the pre-1998 rules, which showed that the average in those briefs was closer to 250 words per page.

Our research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken. The genesis of that comment appears to be oral discussion reported in the minutes of the Spring 2014 meeting of the Advisory Committee on

Appellate Rules. The May 8, 2014 Report of Advisory Committee on Appellate Rules to the Committee on Rules of Practice and Procedure states that the word limit "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)." That quotation appears at page 18 of the materials for public comment. The proposed committee-notes to the proposed amendments to rules 28.1 and 32 now unequivocally state that the 1998 Advisory Committee used the 280-word assumption. But those notes also acknowledge: (i) that the current Advisory Committee does not know the basis for that assumption, and (ii) that the 1998 amendments intentionally superseded "at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs."

In contrast, Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, has posted a public comment stating that the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. To the extent we have been able to trace the history of the 1998 amendments, including through Fellows of the Academy who participated, we believe the assertion that the 1998 Advisory Committee incorrectly "assumed" a word ratio in appellate briefs is inaccurate. The record suggests that, regardless of the data on the table, the Advisory Committee selected the 14,000-word limit because it appeared wise and reasonable.

The Academy does not believe that a rule amendment should be adopted without a clear, articulated guiding rationale. That articulated rationale also should be supported with a detailed analysis of why the change is necessary to the administration of justice. The proposed reduction of word limits for briefs, and the parallel adoption of the 250-word conversion ratio for other appellate filings, do not adhere to these principles, and the Academy opposes them for that reason.

4. The Advisory Committee record does not support the proposed conversion ratio.

The Academy also is concerned that the Advisory Committee's record does not support the suggestion that the 250-word conversion ratio is intended or necessary to correct historical error. The minutes of the Advisory Committee's April 2014 meeting do not reflect a shared concern among its voting members about correcting error. Rather, the reported comments of the voting members focus on a desire of appellate judges for shorter briefs, the unwillingness of some circuits to allow longer briefs, and "whether the bar would be shocked by a proposal to reduce length limits to 12,500 words. . .." The minutes also reflect that the committee's professional support staff had received no complaints about the actual length of appellate filings.

The minutes of the Advisory Committee's discussion do not suggest that the committee received any analysis of how the length limits for briefing work in the courts of appeals. The publicly available

history of the proposed amendment supports an inference that changing the word limits—and adopting the 250-word ratio for new limits—arose late in the process without debate or analysis. *See, e.g.*, Minutes of the Advisory Committee on Appellate Rules, Sept. 27, 2012; Memo, Catherine T. Struve, Reporter, to Advisory Committee on Appellate Rules (Mar. 25, 2013) (using 280-word conversion ratio).

The Advisory Committee voted 6–4 to move the proposal forward. This vote appears to rest on six members' individual preferences, perhaps supplemented by unreported anecdotal information. In any event, the record does not support making the proposed material change in appellate due process for litigants and appellate lawyers. The amendments are not supported by a factual record and reasoned analysis appropriate for the federal judiciary.

5. *The proposal to reduce briefing length-limits is not beneficial.*

The proposed amendment to rules 28.1 and 32 would adversely affect developing issues in complex appeals. In the Academy's experience, the current word limits enable counsel in complex cases to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal. Reducing the word limit would impair fair recitation of the facts after all but short trials. Even when the statement of facts can be compact, reducing the word limit would impair appropriate development of difficult and

controversial legal issues. The inevitable results include more motions to file briefs exceeding the limits and inappropriately constricted presentation of complex appeals when counsel fears requesting additional words or a circuit has a practice of denying exceptions.

The proposal also would impair parties' access to court. While lawyers primarily control how briefs are drafted, a client has the right to control which (nonfrivolous) issues are argued. Criminal defense counsel lack discretion to omit a weak but non-frivolous issue.

In the Academy's anecdotal experience, fewer civil cases go through trial and appeal after the beginning of the Great Recession. But the tried cases tend to be the most complex and to involve the highest stakes. If the average civil-case brief is longer today than in 1998, the reason could be that appeals in civil cases are more complex. Many judges who participate in our seminars report that this is so, and that the increasing volume of white-collar crime prosecutions pushes a similar trend in criminal appeals.

In simpler cases, generally the briefs are shorter and the 14,000-word limit is not implicated. Consequently, the proposed amendments will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.

To the extent that verbose or unnecessarily long briefs are being filed—which is not the Advisory Committee's stated justification for the proposed amendments—that problem is far better addressed through meaningful training by and guidance from judges and lawyers experienced in effective appellate practice The Advisory Committee can find some of the Academy's views on such initiatives in its Statement on the Functions and Future of Appellate Lawyers, prepared for the 2005 National Conference on Appellate Justice and reprinted at 8 J. App. Prac. & Process 1 (2006).

6. The 250-word conversion ratio should not be applied to other rules.

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the current page limits. Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits. The deleterious effect of the 250-word conversion rate would likely be even more pronounced on documents currently subject to shorter page limits – writs, rehearing petitions, petitions for leave to appeal – which often warrant greater development than the current page limits allow. The Academy requests that the length limits under all of those rules be converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.

As to proposed Rule 29(b), 2,000 words for a brief of an amicus curiae on rehearing is too short. At this stage, the great majority of AC briefs are filed in support of en banc review. That is, they tend to be filed in some of a court's most difficult cases. The proposed word length is barely sufficient for a party other than the government to explain its case-specific interest. The length for these briefs should be the same as the allowed length for the party's petition.

7. Conclusion

The record indicates that proposal 12-AP-E was an excellent idea that made a wrong turn. The good parts of it should be preserved, and the unjustifiably low conversion ratio should be revised. No amendment is needed to rules 28.1 and 32. The other rules should be amended, but the word limits should be based on a conversion ratio of 280 or more. Finally, briefs of amicus curiae on rehearing, which have no current limit, should have a 4,200-word limit.

E. Amicus filings in connection with rehearing: Rule 29

The proposed amendment would renumber the existing rule 29 as 29(a) and would add a new Rule 29(b). The new 29(b) would set a default for the treatment of amicus filings in connection with petitions for rehearing. While the proposed rule would continue to allow the United States, its officer or agency, or a state to file, without seeking leave, an amicus brief in support of rehearing, any other amicus brief regarding rehearing could be filed only by leave of court. In addition to

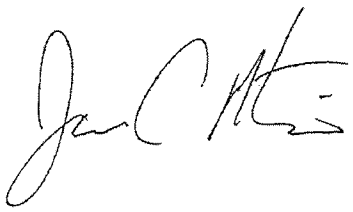
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

With the exception of a word limit based on a conversion rate of 250 words per page, discussed above, the Academy supports this proposed amendment.

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

The Advisory Committee proposes to amend Rule 26(c) to eliminate the three-day grace period when a brief is served electronically. Under the proposed amendment, 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. This proposed change would be accomplished by amending the rule to state that a paper served electronically is deemed to have been delivered on the date of service stated in the proof of service.

Although the Academy notes that electronic filing allows parties to file briefs late in the evening on the due date, the date of service is not counted in determining the deadline for filing and courts generally grant reasonable extensions of time for filing briefs. The Academy supports this proposed change to Rule 26(c).



James C. Martin
President, American Academy of Appellate Lawyers
November 24, 2014

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gw0-6ilx
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0019
Comment from Association of the Bar of the City of New York

Submitter Information

Name: Association of the Bar of the City of New York
Organization: Association of the Bar of the City of New York

General Comment

Please see the attached Report of the Committee on Federal Courts of the Association of the Bar of the City of New York

Attachments

City Bar comment - Appellate Rules

NEW YORK CITY BAR

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January 28, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E., Suite 7-240
Washington, DC 20544

RE: Proposed Amendments to the
Federal Rules of Appellate Procedure

At the request of Ira Feinberg, Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, I am submitting for consideration by the Advisory Committee on Appellate Rules a copy of the Association's report on certain of the proposed amendments to the Federal Rules of Appellate Procedure. A copy of this report has been submitted electronically using the "Submit a Comment" link made available on the United States Courts website.

Sincerely,

Peter C. Hein, Member
Committee on Federal Courts

cc: Ira Feinberg, Chair, Committee on Federal Courts
Alan Rothstein, General Counsel, Association of the Bar of the City of New York

REPORT OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK ON
PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE

The Association of the Bar of the City of New York, through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure proposed by the Advisory Committee on Appellate Rules. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for reviewing and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. LENGTH LIMITS

A. Rule 32: Word limits on Principal Briefs and Reply Briefs

The Federal Courts Committee respectfully opposes the reduction in the word count limits for principal briefs from 14,000 to 12,500 words, and the corresponding reduction in the word count limit for reply briefs.[1]

The Federal Courts Committee believes strongly that the current 14,000 word limit is often necessary in complex cases to permit each party to present its statement of the case, summary of argument and argument on the legal issues. While meeting the 14,000 word limit in complex

[1] We likewise oppose reducing the current word limit for cross appeals (Rule 28.1).

cases typically requires significant editing, counsel do generally seek to edit their briefs to meet the 14,000 word limit rather than submitting an application for permission to file a brief in excess of the limit. A reduction in the word count limit would often compel counsel in complex cases either to unduly truncate their presentation of the factual record relevant to the issues on appeal and their legal arguments or, alternatively, to seek permission to file a brief in excess of the proposed new (lower) word limits. Either course is likely to increase the burden on the Courts of Appeals, and creates the risk of unfairness to litigants in some cases where they simply may not have sufficient space to clearly articulate the relevant facts and legal arguments.

The Federal Courts Committee believes that such a significant change in established practice should not be made without a compelling justification. Yet the Report of the Advisory Committee on the Appellate Rules does not identify any basis in experience since the current word counts were adopted in 1998 that demonstrates a need to modify the existing word limits. Moreover, members of our committee are not aware, from their own experience, of any practical problems flowing from the existing word limits, and do not believe that the current word limits encourage unnecessarily lengthy briefs in cases where that length is not warranted.

The sole rationale provided by the Advisory Committee for the proposed change in the word limits is the assertion that the 14,000-word limit "appears to have been based" on the "assumption" that one page of a brief was (prior to the 1998 amendments) equivalent to 280 words. The Advisory Committee takes the position that this "assumption" was incorrect, and that – based on a 1993 study prepared by an advisory committee in the D.C. Circuit – "250 words per page is closer to the mark." Report of Advisory Committee on Appellate Rules, dated May 8, 2014 (revised June 6, 2014), at 18 of 372.[2] We respectfully submit that this rationale does not provide a sufficient basis for upsetting the word limits that have been in place for principal briefs and reply briefs for over 15 years. In addition to the points made above, several additional considerations reinforce our concern

[2] Page references are to the Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure, August 2014.

about the Advisory Committee's reliance on one over-20-year-old study, which was conducted over five years before the 1998 amendments that established the current word limits:

(1) The Advisory Committee Notes to the 1998 amendments reflect a comprehensive analysis of form, typeface and type-volume limitation issues. The discussion of type-volume limitations reflects a recognition that the use of a proportional typeface can increase the amount of material per page as compared to the use of a monospaced typeface, as well as other technical considerations that may influence the length of a brief. Thus, the word limits adopted in the 1998 amendments appear to be the product of careful focus and consideration, and there is insufficient basis for the Advisory Committee's view that the word limits adopted were the product of inadvertence.

(2) The July 1993 study that is referenced in the Report of the Advisory Committee (see *id.* at 20-24 of 372, and 54 of 372) is hardly a comprehensive study of issues relating to brief length. It relies upon a very limited selection of briefs from only three sources: ten principal briefs and ten reply briefs from a Department of Justice Civil Division archive of appellate briefs, plus five appellate briefs filed by the FCC and three appellate briefs filed by the law firm of Wilmer Cutler and Pickering. According to the 1993 study, these briefs were not randomly selected; rather, briefs that the authors subjectively viewed as containing an excessive number of single-space footnotes and block quotes were avoided. Overall, the average word count is said to have approximated 250 words per page. But the 28 briefs considered ranged in word count up to 288 words per page, and five of the 28 briefs had 270 or more words per page. And the fact that differences in the formatting of particular briefs could account for different per page word counts – as is evident from the fact that one of the 28 briefs considered had over 288 words per page – also underscores the inappropriateness of relying upon this over-20-year-old study to change the word limits in place since 1998.[3]

[3] As noted, the study considered only 28 non-randomly selected briefs from three sources. The format used in those briefs could have impacted the per page word count. Among other things, the 1993 study suggests the briefs studied included the captions and signature blocks. See page 21 of

In any event, the July 1993 study, as well as the local circuit rule based on an estimate of 250 words per page also referred to in the Report of the Advisory Committee on Appellate Rules (see p. 54 of 372), were presumably part of the body of material available to those working on the 1998 amendments. Yet the 1998 amendments adopted the current word limits and chose not to incorporate a word limit based on 250 words per page. One may infer that the 14,000 word limit adopted for principal briefs was not the result of "inadvertent" error, but rather was deemed appropriate when one took into consideration potential differences in word count for briefs based on different formats and typefaces utilized at the time of the 1998 amendments as well as other considerations.

Members of our committee have anecdotally checked the word count per page in recent appellate briefs (which now reflect the 14 point or larger typeface required by Rule 32(a)(5), also a product of the 1998 amendments) as well as district court papers that comply with district court margin requirements and use 12 point typeface (larger than the 11 point typeface permitted prior to the 1998 amendments). Typical appellate briefs using 14 point typeface average 240 words per page (use of 11 point typeface, as permitted before the 1998 amendments, would yield significantly more words per page). Typical district court papers using 12 point typeface (larger than the 11 point typeface permitted by FRAP 32 before 1998), and margins consistent with pre-1998 FRAP Rule 32, can significantly exceed 280 words per page. We point to this admittedly anecdotal information not in an effort to establish the "correct" word count per page that might have been expected in a pre-1998 brief, but rather simply to make the point that the limited number of briefs considered in one over-20-year-old study may not have been representative, and that it does not make sense, in 2014, to be modifying a long-established and accepted word count limit based on a count of words in 28 briefs from 3 sources in an over 20 year-old study.

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372. If one makes adjustments for the space used for the case caption (which could take up 1/3, or more, of the first page of a brief) and the signature block – neither of which need to be considered in a word count – the briefs studied would have averaged a greater number of words per page of actual text. In addition, the lines of text used per page and the typeface used could both have impacted the word count.

B. Word Limits for Other Papers

We agree with the proposal to provide for a volume limitation based on a word count (or lines of text printed in a monospace typeface), for papers produced using computers, for petitions for permission to appeal (Rule 5), writs of mandamus (Rule 21), motions (Rule 27), petitions for hearing or rehearing en banc (Rule 35), and petitions for panel rehearing (Rule 40). However, we believe the page-to-word conversion should be based on the convention of 280 words per page, utilized in connection with the 1998 amendments, for principal briefs and reply briefs. Since the current rules that utilize page limits have been in place even as filings have gravitated to the use of proportional type, utilizing a conversion of pages to words lower than the 280 words per page assumed at the time of the 1998 amendments would effect a significant reduction in length versus current practice, as well as a reduction in length compared to the practice that existed in 1998 when word limits were first adopted for principal briefs.

Petitions for permission to appeal, writs of mandamus, motions and petitions for rehearing can entail important issues and it benefits both the parties and the Courts of Appeals to allow counsel adequate latitude to present their positions.

Moreover, there is no indication in the Report of the Advisory Committee on Appellate Rules that the current page limits – even with the use of proportional type – result in excessively long papers not warranted by the complexity of the issues being addressed.

II. BRIEFS OF AN AMICUS CURIAE DURING CONSIDERATION OF WHETHER TO GRANT RE-HEARING

The proposed amendments to FRAP 29 would establish specific rules governing the time in which an amicus curiae must file its brief, accompanied by a motion for filing when necessary, in support of a petition for rehearing. For some unexplained reason, the proposed rule requires such an amicus brief to be filed no later than three days after the petition is filed (for amicus curiae supporting the petition or supporting neither party), rather than the seven days permitted by Rule 29 for amicus briefs filed during briefing of the appeal; the proposed amendments also require an amicus curiae opposing a petition to file on the same date set for responses by the parties, instead of seven days later. The current Rule, by permitting an amicus curiae to file no later than seven days after the principal brief of the party being supported, allows an amicus curiae to take into account the arguments of the party it supports when finalizing its own brief. No reason is given in the Report of the Advisory Committee on Appellate Rules for shortening the time for filing amicus briefs in the case of petitions for panel rehearing or rehearing en banc, and it is not clear why allowing the seven-day period of time currently permitted presents a practical problem in the case of petitions for panel rehearing or rehearing en banc. In the experience of the members of the Federal Courts Committee, there is rarely an extraordinary need for urgency with respect to the filing of briefs on rehearing, nor do the Courts of Appeals typically address petitions for rehearing with the urgency that the proposed rule seems to assume. And in cases where there is a need for urgency in the disposition of a petition for rehearing, the Court of Appeals can issue an order modifying the usual schedule for the filing of amicus briefs.

Finally, we believe the applicable word limit for petitions for rehearing should be based on the 280 words per page convention, for the reasons expressed above.[4]

Dated: January 28, 2015
New York, New York

Respectfully submitted,

Committee on Federal Courts
Association of the Bar of the City of New York

Ira M. Feinberg, *Chair*
Benjamin A. Fleming, *Secretary*
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Glen G. McGorty, Esq.

[4] The Advisory Committee also proposes to amend FRAP 26(c) to remove service by electronic means from the modes of service that allow three added days to act after being served. This proposal parallels a similar proposal to modify the Federal Rules of Civil Procedure. The Federal Courts Committee supports this proposal, for the reasons outlined in a separate report of the Association of the Bar of the City of New York on the proposed amendments to the Federal Rules of Civil Procedure.

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PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gwi-nnyd
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0020
Comment from Dorothy Easley, Easley Appellate Practice

Submitter Information

Name: Dorothy Easley
Organization: Easley Appellate Practice

General Comment

Please see attached article in The Florida Bar Appellate Practice Section that details the concerns, but an abstract of that articles is:
The concern among many appellate practitioners is this reduction in word count and its impact on the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived. The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are deemed most certainly waived. Further reducing word count could have a significant adverse impact on appellate briefing and preservation.
Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients. But consider this-- twenty-five percent of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. These statistics and judicial observations that appellate briefs are increasingly THE most important tool in understanding the issues on appeal indicate that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.
Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. Increased work load to further research and understand the appellate issues, to make well-informed decisions, in both civil and criminal appeals that are fact-intensive (e.g. employment law cases, Section 1983 cases, criminal law cases concerning intent etc.). 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. In other words, word count reductions may actually increase the appellate courts labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex. Insufficient room to explain those complexities coupled with appellate issue preservation restrictions and reductions in oral argument do not aid the appellate process that labors to make decisions that are correct, not decisions that are the most expedient.

Attachments

APP-winter2014 EASLEY ARTICLE

Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

By Dorothy F. Easley[1]

D. EASLEY

With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "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."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

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(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "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".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

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court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

1 Dorothy F. Easley earned her J.D., with honors, in 1994 from the University of Miami School of Law and her M.S., with highest honors, in 1986 from SUNY/CESF. She is board certified in appellate practice, managing partner of Easley Appellate Practice, PLLC, and is admitted to practice in all Circuit Courts of Appeals and the Supreme Court. Ms. Easley is a past chair of the Appellate Practice Section, 2009-2010.

2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) Bar Ass'n Third Cir. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.

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PUBLIC SUBMISSION

As of: February 19, 2015
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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0036
Comment from Federal Courts Committee NYCLA, Federal Courts Committee of the New York County Lawyers Associaton

Submitter Information

Name: Federal Courts Committee NYCLA
Organization: Federal Courts Committee of the New York County Lawyers Associaton

General Comment

Please see the attached Report by the Federal Courts Committee of the New York County Lawyers Association.

Attachments

Report on Federal Rules of Appellate Procedure FINAL 2-12-15

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Vincent T. Chang
Co-Chair
Hon. Joseph Kevin McKay
Co-Chair
Federal Courts Committee

February 12, 2015

FEDERAL COURTS COMMITTEE OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Courts Committee (the "Committee")[1] of the New York County Lawyers Association ("NYCLA") has approved the following comments concerning the proposed amendments to the Federal Rules of Appellate Procedure (the "Proposed Amendments") proposed by the Judicial Conference Advisory Committee on Appellate, Bankruptcy, Civil and Criminal Rules (the "Advisory Committee") and published for public comment on August 15, 2014.[2] If enacted, the amendments will become effective December 1, 2016.

NYCLA is an organization of nearly 9,000 lawyers. Its Federal Courts Committee comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA and its Federal Courts Committee issue reports and position papers on matters of interest to our membership, including proposed changes in law and procedure that we believe impact the public interest.

As further detailed below, the Committee generally supports the Proposed Amendments, but opposes certain of the proposed amendments and suggestions with respect to other items. In particular, the Committee opposes certain changes to the requirements for inmate filings. In the sections below, we first comment on a proposed amendment to the so-called "three days are added" rule, which we also address in our separate comments on the Federal Rules of Civil Procedure, and then offer comments on the proposed amendments to other rules in the Federal Rules of Appellate Procedure, including rules on inmate filings and changes in word count limits and amicus briefs.

PROPOSED AMENDMENTS AND COMMITTEE COMMENTS

A. "Three Days Are Added" Rule

Proposed Amendment:

The Federal Rules of Appellate Procedure provide that where a party's time to act is measured from the service of a paper, three days are added to that time if the paper is served other than by hand delivery. *See* Fed. R. App. P. 26(c). The Proposed Amendments would

[1] The views expressed are those of the Federal Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

[2] The Advisory Committee simultaneously published proposed amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure; however, the comments contained herein are limited to the proposed amendments to the Federal Rules of Appellate Procedure. The Committee has issued separate comments on the proposed amendments to the Federal Rules of Civil Procedure.

eliminate electronic service from the types of service that add three days to the other party's time to act. In other words, for purposes of the "three days are added" rules, electronic service would be the functional equivalent of service by hand and would no longer trigger the rule.

The Proposed Amendment to the Federal Rules of Appellate Procedure is as follows[3]:

Rule 26. Computing and Extending Time

****

(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.

The Proposed Amendments – and parallel Proposed Amendments to Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Criminal Procedure[4] – are based on the same underlying rationale. Fed. R. App. P. 25 was amended in 2001 to provide for service by electronic means. At the same time, Fed. R. App. P. 26 was amended to include such electronic service among the types of service that give the recipient three additional days to act. At that time, there were two reasons for such inclusion: (a) concerns about delays in electronic transmission due (for example) to incompatible systems or the like; and (b) a desire to induce parties to consent to electronic service, which initially was authorized only with the consent of the person being served.

The Proposed Amendments recognize that both of these reasons no longer exist. Electronic communication is now the norm, and is considered reliable.[5] In most federal courts, electronic filing – the standard means of electronic service – is mandated in virtually all cases; any attorney wishing to practice before the court must "consent" to it. There is therefore little remaining reason to treat electronic service with the wariness that led to its initial inclusion among the types of service that extend a period to act by three days. As the Advisory Committee Notes to the Proposed Amendments point out, electronic service has become the norm.

[3] Additions are signified with red underlining; deletions are signified with ~~red strikethrough~~.

[4] Although the Proposed Amendments to the Criminal and Bankruptcy Rules are beyond the scope of these comments, we note that the Proposed Amendments would alter the "three days are added" rules in essentially the same manner in all federal courts.

[5] The rules separately address the possibility of any actual failure of electronic communication. Fed. R. App. P. 25(c)(2) authorizes electronic service only through the court's transmission of electronic filings – which, under Fed. R. App. P. 25(a)(2)(D), can be made only in accordance with the court's local rules. These local rules, in turn, generally include provisions respecting technical failures. *See, e.g.*, Second Circuit Rule 25.1(d)(3).

In addition, eliminating the extra three days for the mode of service that is now the most common greatly simplifies the computation of time. As the Advisory Committee Notes point out:

> 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 complications by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the Proposed Amendment would change the rule to provide for additional time *only* where a party's time to act is triggered by service on that party ("after being served"), not where a party's time to act is triggered by that party's own service of a document ("after service"). This is obviously a simple matter of logic; there is no reason to give a party an extra three days by virtue of that party's own choice to serve a document in a manner other than personal delivery or electronic service.

The Committee's Comments:

The Committee generally endorses the adoption of the Proposed Amendments to Fed. R. App. P. 26 for all of the reasons set forth above. We do, however, make one observation.[6]

Although the rules do not specify as much, as a practical matter an attorney can generally serve opposing counsel by hand only during the business hours of that counsel's office. The reason for this is because, unless the paper is handed directly to opposing counsel, the rules require that it be delivered "to a responsible person at the office of counsel" (Fed. R. App. P. 25(c)(1)(A)), which requires, at a minimum, opposing counsel's office be open and accessible.

Electronic service, in contrast, can be accomplished at any hour – regardless of whether the recipient's office is open. This is one reasons why some attorneys prefer to serve papers electronically. But it also means that electronic service may not be quite the same as hand delivery for purposes of reasonable notice. A paper can be served electronically on a given day any time until 11:59 p.m., whereas in practice most attorneys could not receive service by hand at such an hour. At first blush, it seems unfair to treat 11:59 p.m. electronic service the same as service by hand during business hours for the purpose of triggering a time to act that is measured in calendar days. That unfairness is magnified where the papers are voluminous: electronic

[6] A minority of the Committee's members dissented to the Committee endorsing the adoption of the Proposed Amendments to Fed. R. App. P. 26, principally for the reasons stated in the majority's "one observation." However, the dissenters disagree with the majority's statements in the "one observation," characterizing the reasons for opposing these amendments as a "small anomaly" and characterizing these amendments as "an efficient adjustment of the rules to comport with the realities of modern practice." The dissenters believe that the proposed changes will lead to "gamesmanship" with frequent service of papers electronically after the close of business, especially on Fridays, to reduce the adversary's effective response time by three days. Additionally, service electronically is not equivalent to hand delivery, because of the time imposed on the recipient for printing and compiling papers, which may include voluminous exhibits. For these reasons, the dissenters do not believe these changes to be "an efficient adjustment of the rules" and would not approve them.

service imposes on the recipient the burden of printing and organizing papers that, if served by any other means, would arrive bound and tabbed.

On balance, however, the Committee does not believe that this is a reason to reject these Proposed Amendments. In most instances, counsel work out briefing schedules among themselves, and can address such issues as the timing of electronic service in their agreements. Almost invariably, a party that needs an additional day because of late-night service should be able to obtain it either by agreement or from the court. We therefore do not see this small anomaly as a barrier to what we otherwise agree is an efficient adjustment of the rules to comport with the realities of modern practice.[7]

B. Tolling Motions

Proposed Amendment:

Fed. R. App. P. 4(a)(4) currently 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" (emphasis added). As the Advisory Committee explains, this rule has generated a split in the circuits concerning what happens if a district court has extended the deadline for such a post-judgment motion and no party has objected to that extension. The majority (including the Second Circuit) holds that compliance with such an extended deadline does *not* toll the time to file an appeal, but a minority (including the Sixth Circuit) holds that it does.

The Proposed Amendment would resolve this split by adopting the majority view: Fed. R. App. P. 4(a)(4) would now specify that in order to toll the time to file an appeal, a post-judgment motion would have to be made "within the time allowed by" the Federal Rules of Civil Procedure.

The Committee's Comments:

The Committee supports this amendment, which will create uniformity and clarity (and which, we note, will not change the practice in the Second Circuit).

[7] We note, moreover, that in the Second Circuit (a) the due dates for principal briefs are generally set by order based on the parties' requests (the deadlines for which are triggered by events other than service); and (b) the due date for any reply brief is triggered by the *filing* of the appellee's brief, not by its service. *See* Second Circuit Rule 31.2. As a result, in the Second Circuit the Proposed Amendment would impact the timing of papers only for motions (which are governed by Fed. R. App. P. 27). We also note 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.

C. Inmate Filings

Proposed Amendment:

Proposed amendments to the Fed. R. App. P. 4 and 25 and a new proposed Form 7, with accompanying revisions to Forms 1 and 5, would modify the requirements for litigants who are prison inmates to establish timely filing of notices of appeal and other papers in certain circumstances. Rule 4 relates to filing notices of appeal, which are initially filed in the district court from which the appeal is taken. Rule 25 relates to the filing of any paper in the court of appeals.

Under the current and amended version of those rules, inmates may file papers by mailing them to the courthouse, and their papers may be considered timely if deposited in the prison mailing system by the deadline for filing. The proposed amendments, which are substantively the same for Rule 4 and Rule 25, would alter the existing rules in three principal respects.

First, the current rules provide that "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The proposed amendments would eliminate this language, allowing inmates to take advantage of the timely-filing rule regardless of whether they use the institution's legal mail system (if it has one) or its general mail system.

Second, the proposed amendments address when an inmate can submit a declaration or affidavit to establish that the filing was deposited in the mail system as of the filing deadline. The amendments would clarify that, subject to the court's discretion, the inmate must include such a declaration or affidavit with the document being mailed. The current rule does not expressly require inclusion of such a declaration with the paper being filed, and courts have reached different conclusions as to whether an inmate can submit a declaration or affidavit of timely mailing after-the-fact.

Third, the proposed amendments modify the language required for such declarations or affidavits of timely filing. Among the amendments is a proposed Form 7, which is a sample inmate declaration of timely filing by mail.

The proposed revisions to Rule 25(a)(2)(C) and the accompanying proposed Advisory Committee Note are set forth below. (The revisions to Rule 4(c), which governs inmates filing a Notice of Appeal, are substantively the same.)

Proposed Revisions to Rule 25(a)(2)(C):

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate filing.** 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 second sentence of the former Rule—which had required the use of a "system designed for legal mail" when one existed—is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

As indicated above, the Advisory Committee proposes that a sample declaration be added to the Appellate Rules as a new Form 7. Form 7 is a sample court-captioned declaration. The body of the sample declaration reads as follows:

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

To alert inmates to the requirements that would be imposed under the amendments to Appellate Rule 4, the Advisory Committee proposes the addition of new language to the sample notices of appeal (Forms 1 and 5). The warning would appear in bracketed language at the bottom of those Forms, as follows (the proposed changes to Form 1 and Form 5 are identical):

> *[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the 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.]*

The Committee's Comments:

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.

The proposed amendments to the inmate filing provisions of Rules 4 and 25 would impose an additional procedural hurdle on a select class of pro se litigants, namely inmates of prisons or other institutions.[8] Non-inmate *pro se* parties can deposit filings directly into the U.S. mail or with a private courier (the rules allow filing by mail for all parties, so long as the clerk receives the papers by the last day for filing). Different considerations apply to prison inmates, who have no direct access to the U.S. mail system, and no control over delays within a prison mail system. The current provisions in Rule 4(c) and Rule 25(a)(2)(C) reflect these considerations.

The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by *pro se* prisoner litigants. In the Committee's experience, *pro se* litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly

[8] Prison inmates represented by counsel will generally file all papers electronically through counsel and are likely not affected by the proposed amendments.

from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require *pro se* prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The Committee endorses the amendments to include a sample declaration of timely filing (Form 7), and to include references to that sample in the current form notices of appeal. The Committee does not favor the language of the proposed new Form 7. The form declaration requires the inmate to swear under penalty of perjury that she "deposited" the paper for filing in the institution's mail system as of a particular date. An 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. Interestingly, the Advisory Committee acknowledges and corrects a similar problem under the existing rule, and proposes requiring that the inmate declare that first class postage 'is being prepaid," not (as directed by the existing Rule) that it "has been prepaid." *See* Advisory Committee Note to FRAP 4, 25 Amdts. ("This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system."). In addition, the past-tense language 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.

D. Length Limits

Proposed Amendment:

The proposed amendments to Fed. R. App. P. 32 and 28.1 would reduce the word count limits for appellate briefs, reducing the word limit for main briefs from 14,000 words to 12,500 words; for reply briefs from 7,000 words to 6,250 words. In cases involving cross-appeals, the proposed amendments would reduce the word count for the appellant's principal brief from 14,000 words to 12,500; the appellee/cross-appellant's brief from 16,500 words to 14,700 words; and the appellant's reply brief and the appellee/cross-appellant's reply brief from 14,000 to 12,500 words. The proposed amendments do not affect the existing limits as stated in lines of text, which remain an alternative basis for complying with the rules' length limits. The Advisory Committee explains that the reduction in word count limits is intended to correct an anomalous conversion rate that was used in 1998, when then-applicable page limits were converted into word and line limits:

> 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments

inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

(Advisory Committee Note to Rule 32 Proposed Amdt.)

Further amendments to Rule 32 would clarify the specific sections of briefs that are excluded from the word count, set forth in a new Rule 32(f).

Finally, Rule 32 is amended to include a global certification requirement for virtually all papers filed before the court of appeals, not just briefs, that the paper complies with applicable type-volume requirements.

The revisions to Rule 32 are copied below.

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2)—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.

Proposed amendments to Fed. R. App. P. 5, 21, 27, 32, 35, and 40 relate to filings other than parties' merits briefs. Each Rule would be amended to include length limits for computer-generated papers in terms of number of words or, alternatively, number of lines printed in monospaced font. The amended versions of these rules preserve page limits only for handwritten or typewritten papers. The proposed limits effectively convert the existing page limits under these rules into word and line limits, applying a conversion rate of one page equaling 250 words or 26 lines of text.[9]

The Advisory Committee proposes accompanying changes to Form 6, the sample certification that a party has complied with length limits for briefs. The revised Form 6 could be used for certifying compliance as to any "document" filed with the court of appeals, rather than merely briefs. The revised Form 6 reflects that, under the proposed amendments, a party can certify compliance with all computer-generated papers, not merely briefs, in terms of the document's word count or line count.

The Committee's Comments:

The Committee endorses these proposed amendments.

The Report of the Advisory Committee on Appellate Rules explains that the 1998 adoption of word limits inadvertently increased the permissible length of briefs before the courts of appeals. At that time, the Appellate Rules were amended to replace the 50-page limit for briefs with a 14,000 word limit, apparently employing a conversion rate of 280 words per page – a number of unknown origin. A study of briefs under the pre-1998 rules indicates that an average 250 words per page would have been a more accurate benchmark. The proposed amendments use this more accurate conversion rate, applying it to the 1998 page limits for briefs

[9] Thus, requests for permission to appeal (Rule 5), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text. Petitions for mandamus and other extraordinary writs (Rule 21), currently limited to 30 pages, would be limited to 7,500 words or 780 lines of text. Motions and responses to motions (Rule 27), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text; reply briefs on motions, currently limited to 10 pages, would be limited to 2,500 words or 260 lines of text. Petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), currently limited to 15 pages, would be limited to 3,750 words or 390 lines of text.

and the current limits (expressed in pages) for other filings. The Committee agrees with the Advisory Committee's rationale of adopting word limits that better achieve the intended result of maintaining the length limits in place in 1998. Notwithstanding these amendments, any circuit could adopt local rules to maintain the existing limits or otherwise permit longer limits.

The Committee also endorses the proposed amendments relating to papers other than briefs on the merits, as they provide greater uniformity in length limits across different types of appellate papers, and greater clarity in calculating a paper's length. Under the proposed amendments, the length limits for computer generated papers in support of petitions for Appeal by permission (Rule 5), mandamus and other extraordinary writs (Rule 21), motions (Rule 27), petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), all currently expressed in pages, would be governed by word or line counts. The proposed amendments to Rule 32 provide more clarity as to what items are excluded from the word or line count. The more comprehensive list makes clear that the word or line count should not include any cover page, signature block, or proof of service – components that are not expressly mentioned in Rule 32's current list of exclusions.

For the sake of fairness, the Committee notes that these 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.

E. Amicus Briefs on Petitions for Rehearing

Proposed Amendment:

No federal rule governs the timing and length of amicus briefs filed in connection with petitions for rehearing, and the Advisory Committee reports that most circuits have no local rule addressing such filings.[10] The Proposed Amendments seek to fill this void by re-numbering Fed. R. App. P. 29 (which is titled "Brief of an Amicus Curiae" and addresses amicus briefs generally) as Fed. R. App. P. 29(a), titling that subsection "During Initial Consideration of a Case on the Merits," adjusting the numbering of its sub-parts accordingly, and adding a new Fed. R. App. P. 29(b) entitled "During Consideration of Whether to Grant Rehearing." The provisions of the new subsection would apply only where no "local rule or order in a case provides otherwise." Thus, the rule would not require any circuit court to accept amicus briefs on such petitions or mandate any particular rules concerning the length or timing of such briefs; it would only establish default rules for timing and volume where such briefs are permitted.

The Proposed Rule sets a volume limit of 2,000 words, or 208 lines of text printed in a monospaced face – slightly more than half of the volume limit proposed for petitions for rehearing in the Proposed Amendments to Fed. R. Civ. P. 40. An amicus brief in support of a petition for rehearing (together with a motion for leave to file it if the amicus is not the United States, its officer or agency, or a state) would have to be filed no later than three days after the petition it supports. A brief in opposition to such a petition (together, again, with a motion for

[10] The Second Circuit has no such rule.

leave if required) would have to be filed no later than the date set by the court for any response to the petition.

The Committee's Comments:

The Committee generally supports this clarification, particularly in light of the room it leaves for courts to develop their own rules. Presumably any circuit that disagrees with the default approach will promulgate a local rule to address the issue; thus, in either case, there will be a rule that provides counsel with some guidance in this area. We agree with the general proposition that having no rule at all leads to confusion – and in all likelihood burdens clerks' offices with calls that would be unnecessary if there were a rule.

We do note, however, that the Advisory Committee has not explained why the deadline for an amicus brief opposing rehearing should presumptively be the same as the deadline for the opposing party's brief. A motion for leave to file an amicus brief must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). As a practical matter, this generally requires the amicus 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. It is difficult (if not impossible) for an amicus to do this until *after* the filing of the brief of the party whose ultimate position it is supporting.

We would therefore suggest that the default deadline for an amicus brief in opposition to a petition for rehearing be three days after the filing of the main brief in opposition. Although we recognize that this would require the court to wait three days to see if any amicus is filed, as a practical matter we do not believe that this will significantly lengthen the time it takes to resolve any motion for rehearing. We also note that opposition papers are permitted on such applications only where the court requests them. We respectfully submit that any application for rehearing that warrants such a request should also warrant the addition of three days to the briefing schedule to accommodate the interests of any amicus curiae.

We recognize that a three-day deadline is very short because (following the 2009 amendments) intermediate Saturdays, Sundays and holidays are no longer excluded from the counting. In some instances this could mean that a weekend represents all of the time an amicus has between the filing of the party's brief and the deadline for its own. We do not, however, suggest an expansion of that time because we recognize that as a practical matter an amicus will have to begin preparing its papers at the same time it would if it were a party; the additional time would primarily give the amicus an opportunity to see the final version of the party's brief and adjust its own accordingly. This opportunity should be available to an amicus on either side, but the default length of time need not (in our view) be any longer than what the Advisory Committee proposes.

Report prepared by:

Vincent T. Chang, Committee Co-Chair

Hon. Joseph Kevin McKay, Committee Co-Chair

Adrienne B. Koch, Committee Member

Kimo Peluso, Committee Member

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8m-sbc1
Comments Due: February 17, 2015

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0038
Comment from WALTER K. PYLE, NA

Submitter Information

Name: WALTER K. PYLE
Organization: NA

General Comment

COMMENT BY WALTER K. PYLE, APPELLATE PRACTITIONER, BERKELEY, CALIFORNIA

I have been writing appellate briefs since 1969. I oppose the proposed 12,500 word limit on briefs (and similar reductions for other papers) as well as the elimination of the 3-day-grace rule for papers served electronically.

THE PROPOSED NEW WORD LIMIT

[Increased Complexity of Cases] Since 1998 the law has become increasingly complexsometimes really complex. For example, Supreme Court caselaw interpreting the Antiterrorism and Effective Death Penalty Act often makes it necessary to burn several thousand words just addressing the correct standard of review in a habeas corpus appeal, before even getting to the merits of the case. I do not know any field of law that is less complex now than it was 17 years ago.

[Invalid Assumption] Second, the premise for reduction of the word limit is invalid. There is no evidence that the number 14,000 was chosen by utilizing a words-per-page formula. Judge Easterbrook, who should know, says 14,000 was chosen because it was thought to be a good number. It is. The word limits for other papers is working well, too.

[Shorter Briefs Do Not Make Better Writers] Third, while arbitrarily reducing the word limit may at first blush seem a good way to make lawyers pay more attention to how they write briefs, that is an overly-simplified view of how lawyers actually write briefs. A good brief-writer will economize on his or her words regardless of the word limit, while the less-attentive lawyer will not. As a practical matter a lawyer who uses too many words with the 14,000 word limit will use too many words with a lower limit, and the brief will likely be less readable. More important, a lower limit will penalize the efficient lawyer with a complex case who actually needs those 14,000 words.

[A Comparison] 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. The study that resulted in the proposed reduction did not take into account the nature of the case or the complexity of the issues.

In short, the proposed Amendment is based on a faulty premise, lacks justification, and should be disapproved.

THE PROPOSAL TO ELIMINATE THE 3-DAY GRACE PERIOD

I also oppose eliminating the additional 3 days for responding to papers served electronically.

The reason given for eliminating the grace period is that since 2002 any concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission. I dont agree. It doesnt take much technology or skill (whatever that may include) to transmit a paper electronically; certainly nothing dramatically different from what was around in 2002. And the same concern exists todayparticularly for the small law officethat an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not.

I currently have a civil case pending where counsel for certain defendants invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve complex motion papers electronically. The proposed Amendment lends itself to game-playing like that.

I also do not buy the argument that the new rule will make it easier to compute time limits. Adding 3 shouldnt flummox anyone who works in a law office.

I believe the current 3-day rule works well and should be retained.

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0039
Comment from Peter Goldberger, National Association of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger
Organization: National Association of Criminal Defense Lawyers

General Comment

The attached comments are submitted on behalf of the National Association of Criminal Defense Lawyers.

Attachments

NACDL comment App Rules 021615

NACDL
1660 L St., NW, 12th Fl.
Washington, DC 20036

February 16, 2015

To the Members of the Advisory Committee:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 4(c), 26(c), and 29, as well as the type-volume provisions of Rules 21, 27, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure.

Our organization has approximately 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public criminal defense attorneys and interested academics. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. As you know, we have a long and consistent record of submitting comments. On the basis of that history, we appreciate the close and respectful attention that our comments have always received.

APPELLATE RULES 4(c) and 25(a)(2)(C) – TIMELINESS OF INMATE-FILED NOTICES OF APPEAL

NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail. We have one suggestion, consistent with the spirit and purpose of the Rule, as explained in the proposed Advisory Committee Note. 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, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage, as otherwise required by subparagraphs 4(c)(1)(A)(i) & (ii) and 25(a)(2)(C)(i). The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

As for the related proposed amendment to Form 1 and creation of a new Form 7, we also have a suggestion. 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."

APPELLATE RULE 26(c) – COMPUTING AND EXTENDING TIME: ADDITIONAL 3 DAYS AFTER ELECTRONIC SERVICE

NACDL opposes the proposed package of amendments – including the proposed amendment to Appellate Rule 26(c) – to remove from the list of circumstances in which three days are added to otherwise stated time limits those (many) occasions when a document is due under a Rule or court order to be filed a certain number of days "after service" of another paper, and service has been made by electronic filing. Regardless of the arid logic behind the proposal, the fact is that the amendment would reduce by three days the time available to counsel to respond to an adversary's motion or brief. This small increase in the speediness of proceedings would provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners. This is particularly so as to criminal defense lawyers, whose clients may be incarcerated but who may have to be consulted before responses can be prepared. Many defense lawyers practice solo or in very small firms. Many are in court for much or all of normal working hours on most days. Many have little if any clerical or paralegal support, particularly in the digital age with its decreased demand for secretaries. For this reason, many criminal defense lawyers 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. The burdens thus placed on defense counsel (and thus indirectly on defendants) by the proposal – as well as the increased burden on appellate courts, which will be confronted with many more motions for short extensions of time, or for leave to file documents out of time – far outweigh any perceived benefit in simplicity or abstract elegance in the rules.

Relatedly, if the 3-day addition is to be retained, as we recommend, this Rule has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by 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.

APPELLATE RULES 21, 27, 28.1, 32, 35, and 40 – ACROSS-THE-BOARD 11% REDUCTION IN TYPE-VOLUME LIMITS

NACDL opposes the proposed reduction of type-volume limits and pages lengths throughout the appellate rules. The proposed reduction is based on a recalculation of the presumed type-volume per page from 280 words to 250, relative to the number of pages that was allowed for certain documents prior to 1998. We are aware that many other comments have been submitted criticizing this change for a variety of different reasons, with many of which we concur. In our view, however, the question of what was in the Committee's mind in 1998, one way or the other, when the page limit for briefs was changed to a type-volume rule, should not be given significant weight. The real question is whether there is any good reason to believe that the quality of appellate justice today would be enhanced by forcing an across-the-board 11% reduction in the maximum allowable length of briefs, motions, and other submissions from what is now permitted. We cannot imagine that it would.

We speak from the perspective of criminal defense lawyers who handle appeals for accused or convicted persons. The indictments our clients face often contain numerous counts brought under a variety of federal criminal statutes. These statutes continue to proliferate in number and in complexity. Federal criminal trials can last for weeks, generating potentially more, not fewer errors plausibly providing grounds for appeal. Moreover, error will not result in reversal if it is harmless, but we cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial. This requires more, not less space in even the best-written briefs. Federal sentencing law has also become increasingly complex since 1998, both under the Guidelines and under developing constitutional rules, as well as post-*Booker,* judge-made jurisprudence. The same is true of the law governing federal habeas corpus. Moreover, the number of potentially-applicable judicial precedents grows endlessly, multiplying each year the number of cases that might reasonably be cited, either as supportive precedent or as necessary to be distinguished. All the federal court decisions from our Nation's first hundred years (including many opinions from the bench) were published in 30 volumes of the Federal Cases. The first series of the Federal Reporter, which began approximately when the federal appellate courts were established in 1891, covered the next 44 years in 300 volumes. The Second Series ("F.2d") covered 70 years in 999 volumes. The Third Series ("F.3d") is now in its 774th volume (containing many more pages per volume, as well) after less than another 22 years. About 615 of those volumes

have appeared since 1998. Indeed, the number of precedential opinions *required* by rules of professional responsibility to be cited is ever-growing.

In this context of a burgeoning body of statutes and case law, defense lawyers are sworn to protect our clients' constitutionally-guaranteed right to effective assistance on appeal. We are committed to fulfilling this duty, but we cannot do so with one hand tied behind our back by pressure to drop potentially viable issues or to develop issues less fully. When we file amicus briefs (as NACDL often does) and are limited to one half the allowable party maximum, the significance of the proposed reduction becomes even more acute, as our opportunity to provide helpful information to the court would be severely hampered. For these particular reasons, as well as those proffered by other commenters, NACDL strongly opposes the suggested changes.

Based on the 280-words formula (and without regard to its typographical accuracy), the allowable maximum type-volume under Rule 21 for a mandamus petition should be 8400 words. For a motion under Rule 27, it should be 5600 words. For briefs under Rules 28.1 and 32(a)(7) the volume should remain at 14,000. For a rehearing petition under Rules 35 and/or 40, the maximum should be 4200.

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.

APPELLATE RULE 29(b) – TIME FOR FILING AN AMICUS BRIEF IN CONNECTION WITH A PETITION FOR REHARING

NACDL applauds the Committee for addressing this long-overlooked issue. We have two points of difference with the proposal, however. First, for the reasons discussed in the preceding section of these comments, the allowable type-volume for an amicus submission in connection with a petition for rehearing should be 2250 words under proposed Rule 29(b)(4), not 2000. Also, we strongly urge the Committee to consider allowing a more realistic five days, not just three, under proposed Rule 29(b)(5), to file a memorandum of amicus curiae in support of a petition for rehearing. This is still less than the seven days allowed for an amicus brief on the merits. But based on our experience in filing such memoranda, 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, all while producing the most useful and informative submission for the Court's consideration.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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Comment from Pennsylvania Bar Association, Pennsylvania Bar Association

Submitter Information

Name: Pennsylvania Bar Association
Organization: Pennsylvania Bar Association

General Comment

The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the attached comments in response to the proposal by the Advisory Committee on Appellate Rules.

Attachments

Comments-Appellate-FedRules

February 16, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Sir or Madam:
The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the following comments in response to the proposal by the Advisory Committee on Appellate Rules.

Respectfully,
Francis X. O'Connor, President
Pennsylvania Bar Association

COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Pennsylvania Bar Association makes the following recommendations with respect to some of the proposed Appellate Rule changes:

Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7.

- 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.

- 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.

- The PBA opposes the proposed amendments to Rule 26(c), governing time limits to respond to filings.

RE: Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules

Introduction

The proposed changes to the Appellate Rules are divided into thematic groups. First are discussed the proposed amendments to rules and forms governing inmate filings: Rule 4(c)(1), Rule 25(a)(2)(C), Form 1, Form 5, and New Form 7. Second are discussed the proposed amendments to Rule 4(a)(4), governing the time to file a notice of appeal when a post-judgment motion is filed. Third are discussed the proposed amendments to the rules and forms governing the length of filings: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6. Fourth are discussed the proposed amendments to Rule 29, governing amicus filings in connection with a petition for rehearing. And finally are discussed the proposed amendments to Rule 26(c), governing the time to respond to an electronically-served filing.

Tolling the Time to File a Notice of Appeal: Rule 4(a)(4)

Proposed Amendments

Rule 4(a)(4) extends the time in which a party must file a notice of appeal when that party files a "timely" post-judgment motion. The Rules Advisory Committee felt that the Rule should be amended in light of a circuit split on whether a post-judgment motion filed outside the non-extendable deadlines count as "timely" when the district court mistakenly authorized an extension. The proposed amendments delete the word "timely" and add that the post-judgment motion be filed "within the time allowed by those rules."

Comments

The Committee recommends that the PBA oppose this change. This proposed amendment would adopt the position of the Third Circuit in Lizardo v. United States, 619 F.3d 273 (3d Cir. 2010), and three other circuits that the filing of a post-judgment motion beyond the deadlines permitted by the Civil Rules will not toll the time for filing an appeal even where a district court considers and decides the untimely post-judgment motion, thus effectively extending the time for such a post-judgment motion, as the district courts apparently have discretion to do. Although providing greater clarity to Rule 4(a)(4) is highly desirable in light of the consequences of filing a late appeal, the proposed new text may not go as far as it should in making clear that an order extending the time for filing a post-judgment motion will not extend the time for filing an appeal. It is also 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). The amendments as drafted should not be approved without greater clarification because they simply substitute a new trap for the unwary in place of the current trap for the unwary.

Length Limits: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6

Proposed Amendments

The Rules Advisory Committee believed that the current length limits have been overtaken by technological advances and invite gamesmanship by attorneys. Therefore, the Rules Advisory Committee has proposed amending the rules and forms governing the length of filings when those filings are prepared by computer. The proposed amendments do not change length limits for filings prepared without the aid of a computer. The proposed amendments assume that one page should contain approximately 250 words and 26 lines of text. The Rules Advisory Committee also amended Form 6 as part of a new length certification requirement. Additionally, the proposed amendments contain a list of items that can be excluded when computing a document's length. The proposed changes are as follows:

Rule 5 (Appeal by Permission):
- not more than 5,000 words or 520 lines of monospaced text
- previously 20 pages

Rule 21 (Writs):
- not more than 7,500 words or 780 lines of monospaced text
- previously 30 pages

Rule 27 (Motions):
- a motion or response must not exceed 5,000 words or 520 lines of monospaced text
- previously 20 pages
- a reply must not exceed 2,500 words or 260 lines of monospaced text
- previously 10 pages

Rule 28.1 (Cross-Appeals):
- appellant's principal brief and response and reply brief must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- appellee's principal and response brief must not exceed 14,700 words or 1,500 lines of monospaced text
- previously 16,500 words
- appellee's reply brief must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 32 (Form of Briefs):
- principal briefs must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- reply briefs must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 35 (En Banc):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Rule 40 (Panel Rehearing):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Comments

The Committee recommends seeking the views of the judges of the Third Circuit before deciding on a position. No one would dispute the goal of encouraging greater precision and brevity in appellate filings, but the current limits may work well and seem not to be a problem. In addition, shortening these limits is likely to result in a greater number of motions for enlargement. These amendments may fall into the category of fixing something that is not broken. However, the views of the judges of the Third Circuit would be helpful.

The Committee did not dispute the goal of encouraging greater precision and brevity in appellate filings. They felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement. It was suggested that the views of judges on the Third Circuit should be solicited and the Chair of the FPC did so. Judge Michael Chagares is a member of the Advisory Committee on Appellate Rules and 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.

Extension for Electronic Filings: Rule 26(c)

Proposed Amendments

As currently worded, Rule 26(c) allows a party who must respond to a filing that has been electronically served three more days in addition to the response time prescribed by the Rules. Under the current version of Rule 26(c), a document that is delivered on the date listed in the proof of service does not get the three-day additional period. However, the Rule assumes that documents that are electronically served are not delivered on the date listed in the proof of service, thereby entitling electronically-served documents to the additional three days. The proposed amendments remove that assumption. The Rules Advisory Committee suggests that the original wording of Rule 26(c) was due to fears that electronic service would be delayed, and that those concerns have abated.

Comments

The Committee recommends that this amendment be opposed. The Committee is concerned that electronic service may happen at any time of day or any day of the week. Therefore, 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.

PUBLIC SUBMISSION

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0044
Comment from Caitlin Halligan, Gibson, Dunn & Crutcher LLP

Submitter Information

Name: Caitlin Halligan
Organization: Gibson, Dunn & Crutcher LLP

General Comment

See attached file(s)

Attachments

Comment Letter_GDC

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Los Angeles, CA 90071-3197
Tel 213.229.7000
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February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP appreciates this opportunity to comment on the pending proposal of the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). As one of the leading appellate practices in the United States, we have broad experience in all manner of cases, particularly complex civil litigation, before the federal courts of appeals. Based on this experience, we respectfully oppose the proposed amendment to reduce the word limits on appellate briefs under Rule 32. We do not oppose the proposal to eliminate the "three-additional-days" rule for electronic service under Rule 26(c); in the event the Committee repeals that rule, however, we urge the Committee to adopt an accompanying amendment to preserve the existing *de facto* seventeen-day deadline for filing a reply brief.

Rule 32: Word Limits

We respectfully submit that the proposal to reduce the word limits for appellate briefs from 14,000 words to 12,500 words for opening briefs, and from 7,000 words to 6,250 words for reply briefs, should not be adopted. The current word limits, which have functioned

effectively for the last sixteen years, strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions. As explained below, a reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits.

We appreciate the importance of brevity and concision in appellate briefing and strive to achieve those goals in our work. We also understand the concern that some advocates unfortunately fail to embrace these principles and submit unnecessarily long briefs. *See, e.g.*, Comments of Hon. Laurence H. Silberman, at 1 (Jan. 13, 2015) ("Silberman Comments"). But the proposed word limits, we believe, would unduly constrain all litigants in their ability to submit sufficiently informative and comprehensive briefs across cases. Litigants already face a strong disincentive against submitting unduly long briefs—such briefs are simply not effective. *See* Silberman Comments, at 1. And while there may be *some* cases that can be well briefed in less than 14,000 words, that is not true for *all* cases, in our experience.

Indeed, a substantial number of cases in the courts of appeals today are highly complex—involving, for example, intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law. Proper exposition of these cases requires *at least* the existing word limit to adequately present the facts and legal issues for the benefit of the court. As other commenters have observed, *see e.g.*, Comments of American Academy of Appellate Lawyers, at Section D(5) (Dec. 2, 2014), this complexity is only growing. Thus, although the proposed amendment might lead to

shorter briefs, we, like other commenters, are skeptical of the premise that it would actually produce better or more helpful briefs. *See* Comments of Reed Smith, at 3 (Feb. 10, 2015).

Moreover, a reduced word limit 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. *See, e.g.*, United States Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 37 (explaining that "[p]arties with common interests in consolidated or joint appeals must join in a single brief where feasible" and that the court "looks with extreme disfavor on the filing of duplicative briefs"). The parties must often make difficult compromises in determining how best to present the legal issues. Moreover, such cases often involve a challenge by multiple parties to agency action. The Government, as the opposing party, does not share such challenges and can benefit from a divided opposition. Reducing the word limits would only exacerbate this disparity.

A reduced word limit would lead to other problems. It would increase administrative burdens on the appellate courts because there would surely be an increased number of motions to exceed the word limit. A reduced word limit also could force litigants to abandon or drastically shorten meritorious arguments; the appellate courts would increasingly need to resolve questions of waiver.

Finally, we note that appeals court filings have decreased by fifteen percent over the past ten years. *See* Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014, Caseload Analysis, U.S. Court of Appeals (Feb. 17, 2015), *available at*

http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx. 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.

In sum, the existing word limits have worked well over the past sixteen years, striking a proper balance in the vast majority of cases. The proposed reduction in word limits would have undesirable consequences that outweigh the purported benefit of having shorter—but not necessarily better—briefs. We respectfully suggest that the current word limits in Rule 32 be retained.

Rule 26(c): The "Three-Additional-Days" Rule

The Committee also proposed eliminating the three additional days to file a response provided under Rule 26(c) for a party receiving electronic service. We agree that this rule is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously, and that such service is today the prevailing mode of service.

We note, however, that because most litigants do opt for electronic service, the proposed change would effectively reduce the time for filing a reply brief from the current *de facto* period of seventeen days (fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)) to fourteen days. Maintaining the existing seventeen-day period for reply briefs would allow 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.

We therefore urge the Committee to accompany any elimination of Rule 26(c) with an offsetting amendment to preserve the existing seventeen-day period for filing a reply brief.

Sincerely yours,

/s/ Theodore J. Boutrous Jr.	/s/ Thomas G. Hungar	/s/ Caitlin J. Halligan
Theodore J. Boutrous Jr.	Thomas G. Hungar	Caitlin J. Halligan

Practice Leaders, Appellate and Constitutional Law Practice Group
Gibson, Dunn & Crutcher LLP

PUBLIC SUBMISSION

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0045
Comment from Donald Verrilli, Jr., U.S. Department of Justice

Submitter Information

Name: Donald Verrilli, Jr.
Organization: U.S. Department of Justice

General Comment

Comments are attached from Donald B. Verrilli, Jr., Solicitor General of the United States, expressing the views of the United States Department of Justice concerning the proposed amendments to the Federal Rules of Appellate Procedure (FRAP), including the proposed length-limit amendments (FRAP 5, 21, 27, 28.1, 32, 35, and 40, and Form 6) and the proposed amendment to the three-day rule (FRAP 26(c)).

Attachments

2015 FRAP amendments SG comments final

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530 Dc`ps_pw /5*0./3

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

The Department of Justice provides the following comments on two sets of proposed amendments to the appellate rules:

Proposed Length-Limit Amendments (FRAP 5, 21, 27, 28.1, 32, 35, and 40, and Form 6)

These proposed amendments would make two major changes to the length limits on filings in the federal courts of appeals. First, they would change the length-limit calculation for filings other than briefs from page limits to word limits for documents prepared using a computer. The Department of Justice defers to the views of the FRAP Committee concerning the need for such a change and whether it is more likely to reduce or to exacerbate the burden on clerks' offices in monitoring compliance with the rules. If the amended rules are adopted, we urge the FRAP Committee to include an observation in the Committee Notes, that courts should grant leave to exceed the word limits where circumstances warrant. Some courts, including the First and D.C. Circuits, resolve many appeals by summary disposition; such substantive motions may require more than the 5,000 words provided in the proposed amended FRAP 27. Similarly, other substantive filings—such as petitions for a writ of mandamus—may require more words than the amended rules would provide, especially to the extent that the estimated equivalence of 250 words per page results in a reduction of the length of filings from current practice. The following language could be added to the (uniform) Committee Note accompanying FRAP 5, 21, 27, 35, and 40:

> "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."

Second, the proposed amendments to FRAP 28.1 and 32 would reduce the word limits for briefs prepared using a computer. Principal briefs would be reduced from 14,000 words to 12,500 words, reflecting the assumption in the type-volume limits for other filings that computer-prepared documents can be expected to average about 250 words per page. Reply briefs, amicus briefs, and cross-appeal briefs would also be reduced correspondingly, based on the same assumption.

The Department of Justice 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. Based on the extensive experience our attorneys have compiled over the years in representing the Federal Government as the primary litigant in the federal courts of appeals, we agree that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit. But that same experience requires us to caution that in some cases parties will justifiably need to file longer briefs, and those situations arise with some frequency when the United States is a party. For example, in criminal appeals, the Government must often respond in one consolidated brief to briefs filed by multiple criminal defendants raising a plethora of issues. Similarly, in some criminal appeals a defendant will raise a multitude of arguments without providing the context necessary to allow for a proper evaluation of those arguments, requiring the Government to respond in considerable depth by giving the courts the details of the applicable background facts and proceedings, as well as the law necessary for understanding these issues. Some cases—such as challenges to government programs—attract the interests of multiple amici curiae, and the Government may therefore need to respond to arguments raised in multiple briefs. In these and other situations where parties are expected to include additional detail or address multiple arguments, it is important that the courts of appeals recognize the need to permit an over-length brief, as necessary. For those reasons, we urge the FRAP Committee to note, either in the rule text or in the Committee Note, that courts should grant leave to file an over-length brief where circumstances warrant.

We recommend that the amendment add the following provision (or similar language) as FRAP 32(h):

"(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."

The Committee Notes accompanying FRAP 28.1, 29, and 32 should also include an observation along the following lines:

"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."

Proposed Amendment to the Three-Day Rule (FRAP 26(c))

The proposed amendment to FRAP 26(c), like similar proposed amendments to the Civil, Criminal, and Bankruptcy Rules governing service, would implement a recommendation that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The Department of Justice recognizes that electronic communications are overwhelmingly completed without significant delay (although there are some exceptions due to technological problems that can and should be addressed on a case-by-case basis). And electronic service has now become widespread, to the point that it is now the default, required means of service for all represented parties with access to the electronic case filing and case management system. Thus, in most cases, there may no longer be a need to treat electronic service with any uncertainty about reliability or the likelihood of timely delivery and receipt.

On the other hand, electronic service has also created circumstances in which a party that must respond to a filing would be substantially disadvantaged in the absence of the three-day rule. Because electronic filings may be made after normal business hours, and courts generally allow filings up to midnight of the due date, a filing in a different time zone could be made as late as 3:00 a.m. (or later) the following day for lawyers on the East Coast of the United States. In addition, a

filing could be made late in the evening on a Friday, or on a day before a holiday. Where that happens before a holiday weekend, the result (absent the three-day rule) could be a reduction, in practice, from the ten calendar days to respond to as little as five business days, which may not suffice to respond to substantive or complicated jurisdictional motions. This situation raises concerns because government attorneys typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases. Accordingly, a longer period may be required in certain special circumstances if the three-day rule has been eliminated for electronic service.

If FRAP 26(c)—and the corresponding provisions in the Civil, Criminal, and Bankruptcy Rules—are amended as proposed, to eliminate the three-day rule for electronic service, we urge the Committee to include language in the Committee Note recognizing that certain circumstances may warrant additional time where electronic service creates difficulties like those described above. The following or similar language could be included:

> "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."

The Committee Notes accompanying the proposed amendments to Civil Rule 6(d), Bankruptcy Rule 9006(f), and Criminal Rule 45(c) should be consistent with the Committee Note for Appellate Rule 26(c). For that reason, comparable language should be included in all four Committee Notes.

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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0046
Comment from Richard Samp, NA

Submitter Information

Name: Richard Samp
Organization: NA

General Comment

My comments are attached.

Attachments

Judicial Conference- Proposed Word-Limit Changes

WASHINGTON LEGAL FOUNDATION
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February 17, 2015

Via Electronic Submission

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

Thank you for this opportunity to comment on the proposed amendments to the Federal Rules of Appellate Procedure. My litigation practice includes the drafting of a considerable number of amicus curiae briefs in the federal appellate courts. These comments focus on proposed changes to Rules 29 and 32, with a particular focus on the effects of proposed changes on amicus curiae filings.

The Advisory Committee has recommended that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words. Although unmentioned by the Advisory Committee, 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. For the reasons stated below, I oppose both word-limit reductions.

Party Briefs. A number of federal judges have submitted comments in support of the proposed change to Rule 32(a)(7)(B). A common theme of those comments is that many briefs are "much too long" and would be more effective if they were more concise. I fully agree with that sentiment, and for that reason, briefs I have submitted on behalf of parties rarely approach the 14,000-word limit. But there will often be occasions on which the complex subject matter of a case requires a 14,000-word brief, and in those instances a word-limit reduction will have one or both of the following results: (1) counsel will be prevented from fully developing important legal arguments; and/or (2) courts will be burdened by a significant increase in the number of motions requesting permission to file briefs in excess of the word limit.

Moreover, I rarely find that an attorney whose lengthy briefs are unpersuasive suddenly becomes more persuasive when he or she submits a shorter brief. Rather, my experience is that all the briefs submitted by some lawyers are poorly drafted and unpersuasive without regard to

length, while the appellate specialists whose work I most admire file lengthy briefs (when necessary) that are just as persuasive as their shorter briefs.

Some supporters of the proposed amendment have bemoaned a perceived increase in the number of pages in a typical brief; they note that briefs now often exceed 60 pages. But while page length has increased since 1998, the principal cause is unrelated to verbosity. Rather, page length has increased due largely to the 1998 amendment to Rule 32, which mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font. The increase in type size rendered briefs far more easily readable, but it also added six or seven pages to the typical brief.

Amicus Curiae Briefs. Rule 29(d) provides that "an amicus curiae brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Accordingly, a word-limit reduction for the brief of a party will have the effect of reducing the maximum words in an amicus brief from 7,000 words to 6,250 words. The Advisory Committee has supplied no explanation for that proposed reduction, which I oppose. While Rule 29(d) permits amicus filers to file a motion for leave to file a brief in excess of the normal word limit, I am unaware of any instance in which a federal appeals court granted such a motion.

I note initially 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 than does the current 14,000-word limit—is inapplicable to amicus briefs. Before 1998, the page limit on amicus briefs was 30 pages. So if one uses the Advisory Committee's estimate that the average pre-1998 page included 250 words, the Committee's rationale would support a 7,500-word limit (250 words/page x 30 pages) for amicus briefs, not the reduction to 6,250 words that the Committee is proposing.

More importantly, the most plausible argument raised by supporters of a word-limit reduction for a party's brief is inapplicable to amicus briefs. Many federal judges feel obliged to read a party's brief in its entirety, no matter how unpersuasive or poorly written. Some complain, however, that their time is wasted when they are forced to read overly long, unpersuasive briefs; and they thus support a measure that would tend to reduce the average length of party briefs. But I am unaware of federal judges who feel obliged to read all amicus briefs submitted in a case. Indeed, my understanding is that most judges do not read an amicus brief (or read nothing more than the summary of argument) unless the amicus filer has a track record of filing uniformly well-drafted briefs or a law clerk has recommended that the brief be read.

As a result, drafters of amicus briefs already have a large incentive to file concise briefs that include no more words than they deem absolutely necessary. If they hope to have their briefs read by the judge, they need to submit briefs that are no longer than is necessary to make the legal arguments they seek to convey. A 7,000-word amicus brief that is unpersuasive

because it is overly long will not result in a waste of judicial resources because it will not be read.

Accordingly, if the Committee on Rules goes ahead with the proposed amendment to Rule 32, I recommend that Rule 29 be amended to state explicitly that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words.

Amicus Curiae Briefs in Support of Rehearing Petitions. I largely support the proposed Rule 29(b), which would govern amicus filings "during consideration of whether to grant rehearing." I support creation of a nationwide rule governing such filings. Nationwide uniformity in filing rules would be a significant improvement over the current system, under which every circuit has its own set of rules, some of which are not written. Proposed Rule 29(b)(5) states that amicus briefs must be submitted no later than three days after the petition for rehearing is filed. I concur; that period is sufficient to allow the amicus filer to review the petition before filing but at the same time does not unduly interfere with the petition-review process. However, for the same reasons that I endorse continuation of the 7,000-word limit on amicus briefs in support of a party's principal brief, I suggest that proposed Rule 29(b)(4) be amended to increase the word limit on rehearing amicus briefs from 2,000 words to 2,500 words. A 2,500-word limit better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages.

Rule 26(c)'s "Three-Day Rule." The Advisory Committee proposes that the "three-day rule"—under which the time period for responding to a court filing is extended for three days when service of the paper is accomplished by certain methods—be amended so that it is no longer applicable to electronic service. I largely support the change; the three-day rule was designed with service by U.S. Mail in mind and makes little sense in the context of electronic service. However, my experience is that most lawyers, when they file and serve briefs, do so late in the day. Very often, the lawyer receiving electronic service will have gone home for the evening when the service email arrives. Accordingly, I recommend that the proposed amendment to Rule 26(c) be revised to make clear 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.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

PUBLIC SUBMISSION

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Document: USC-RULES-AP-2014-0002-0048
Comment from Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Submitter Information

Name: Seth Waxman
Organization: Wilmer Cutler Pickering Hale and Dorr LLP

General Comment

Please see the attached comments 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, OMelveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP.

Attachments

Comment - Wilmer Cutler Pickering Hale and Dorr LLP

February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

We submit these comments 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 appreciate this opportunity to address the proposal by the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). Our groups have extensive experience before the federal courts of appeals, and we draw on that experience to respectfully oppose the proposal to reduce the word limits for appellate briefs. We also suggest that eliminating the three additional days for electronic service provides an opportunity to consider whether the default deadline for filing a reply brief should be increased. Both of these suggestions reflect the increasing complexity of cases handled in the courts of appeals and would help avoid burdening courts with motions to extend the word limits or the time to file a reply brief.

RULE 32: WORD LIMITS

We oppose the proposal to reduce the word limits for opening and response briefs from 14,000 words to 12,500 words and to reduce the word limits for reply briefs from 7,000 words to

6,250 words. There is no compelling reason to change course after seventeen years under the current word limits, and there are good reasons to preserve the status quo.

As noted in other comments, the cases heard by the courts of appeals are complex and, if anything, only increasing in complexity. *E.g.*, American Academy of Appellate Lawyers, Cmt. § D(5) (Dec. 2, 2014); Joshua Lee, Cmt. (Sept. 16, 2014). Litigants on appeal must frequently address 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, and complicated technologies or business arrangements.

For many appeals, 1,500 words in an opening brief or 750 words on reply can mean the difference between including or excising a meritorious argument. It can also substantially affect the depth of treatment that each argument receives. Advocates understand that their objective is always to be helpful to the court as it works to understand their case and its salient points. While some advocates submit unnecessarily long briefs, there is already a penalty for going on longer than required: Such briefs tend to be less persuasive. At the same time, a shorter brief is not always possible or helpful to the court, lest the court not understand the context in which the case arises. We thus strive to submit shorter briefs whenever possible, but often find that the existing word limits constrain the substance of the arguments we can make. This is especially true in cases involving statutes with complicated common-law backgrounds or legislative histories, areas of law where the courts have issued conflicting rulings or decisions that require close distinctions, cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand.

The proposal to reduce the word limits contrasts with the Supreme Court's rule, which gives advocates 15,000 words for opening briefs on the merits. S. Ct. R. 33.1(g). Although the Supreme Court and the courts of appeals hear a different mix of cases, the number of words that the Supreme Court considers appropriate for addressing what is often a single question of law (and usually in a clean vehicle) should give the Committee pause about reducing the number of words litigants are given to develop multiple issues in an appeal from a case that may have involved numerous issues, many parties, or a complex trial record.

Moreover, it is not clear that the courts of appeals will benefit from reducing the word limits. Advocates forced to make cuts are likely to preserve substantive arguments at the expense of discussing some of the supporting authorities and record materials, such as details regarding the trial record and procedural history. This would require courts to spend more time tracking down cases and examining the record to analyze arguments that cross-reference those materials but that counsel do not have room to elaborate. The concern in such circumstances is not that litigants on appeal had to excise arguments completely, but that their briefs will fail to provide a complete understanding of what is at issue in the case and thus will be less helpful to the courts.

Lower word limits will also increase the number of motions seeking additional words. Office of General Counsel, EEOC, Cmt. at 1 (Feb. 5, 2015). Based on our experience, the current limits appear sufficient to accommodate the substantial majority of cases; requests for additional words appear relatively rare at present, and granted requests even more so. Tighter

limits would likely upset this balance, causing an uptick in the frequency of requests for more words and imposing an additional burden on the courts.

Additionally, many cases involve more than one party on each side. In some instances—including some of the most complex appeals from agency determinations—parties are presumptively required to file a joint brief. *See* D.C. Cir. R. 28(d) (providing that "[i]ntervenors on the same side must join a single brief to the extent practicable"). A single brief of 12,500 words may prove difficult in such cases, resulting in an ineffective joint submission, or multiple briefs where a single 14,000-word brief would have been "practicable." Even where joinder is not required, moreover, parties often work together to file joint briefs. Fed. R. App. P. 28(i); *see also, e.g.*, *Classen Immunotherapies, Inc. v. Shionogi, Inc., Merz Pharm., LLC, Merz Pharm., GmbH*, No. 2014-1364 (Fed. Cir. Aug. 8, 2014) (joint brief filed for all defendants). But the willingness to participate in a joint brief depends on the assurance that all issues will be fairly covered by that one submission. Again, then, the proposed reduction in word limits would reduce the attractiveness of such arrangements, with the unfortunate result that courts may receive *more* briefs in complex multi-party appeals than they currently do.

In the face of these reasons to stay the course, there is no compelling justification for changing direction after seventeen years of practice. The Committee points to what it believes was an "inadvertent[] increase[]" in the length limits as the reason for its proposed reduction. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 48 (Aug. 2014). The newly proposed conversion ratio, however, is based on a tiny sample of only fifteen opening briefs and thirteen reply briefs filed before

1993. *Id*. at 18, 20-24. Even within that small sample, eleven briefs—more than a third—would have exceeded the proposed new limits. *Id*. at 23-24. In addition, Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio and reported that, in a pre-1998 study of fifty briefs that he conducted for purposes of amending the Seventh Circuit Rules, the average word count was only "a little under 14,000." Easterbrook, Cmt. (Sept. 11, 2014). The premise that briefs have gotten longer as the result of a 1998 mistake therefore cannot justify the proposed change.

Nor would a change be warranted even if there had been a mistake. Litigants and courts have been operating under the current word limits for seventeen years. Although some briefs filed during that time undoubtedly should have been shorter, there is no evidence that the current limits have proved unworkable for the average case or that there is any other pressing reason to change them. The burden should be on those who would change the status quo, and there has been no showing that a nationwide reduction in the word limits is warranted.[1]

RULE 26(C): THE "THREE-DAY RULE"

Rule 26(c) currently gives a party receiving a brief by electronic service three extra days to respond. The Committee proposes to eliminate this extra time. We agree that a paper served electronically should be treated as delivered on the date of service. However, the proposed change would reduce the time for filing a reply brief from what is typically seventeen days to

[1] 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.

fourteen days. We suggest that rather than reduce the de facto seventeen-day deadline for reply briefs that has existed under Rule 26(c), the Committee should adopt an offsetting amendment that would set a seventeen-day deadline for filing a reply brief or, better yet, increase the deadline to twenty-one days.

The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread. This extra time can be critical for advocates juggling competing deadlines or representing incarcerated (and thus hard to reach) clients and is particularly important as litigation grows more complex. A longer deadline also allows more time for client review and feedback and benefits the courts by reducing the number of extension requests.

By comparison to the current proposal, the Supreme Court sets a thirty-day deadline for merits reply briefs. S. Ct. Rule 25.3. Even when that deadline is cut short because it would fall too close to oral argument, *see id.*, it is longer than the current de facto deadline in the courts of appeals and will typically be more than double the proposed new deadline.

Although there is no need to link the extra time to electronic service, we suggest that the Committee adopt an offsetting amendment that would set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting. This time could, of course, be shortened when there is a case-specific need to expedite an appeal. But an across-the-board contraction of the de facto deadline for filing reply briefs should not be adopted without considering whether a longer default period for reply briefs is warranted.

Respectfully yours,

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PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9c-8s0y
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0058
Comment from Saul Bercovitch, The State Bar of Californias Committee on Appellate Courts

Submitter Information

Name: Saul Bercovitch
Organization: The State Bar of Californias Committee on Appellate Courts

General Comment

Please see the attached comments from the State Bar of Californias Committee on Appellate Courts.

Attachments

proposed FRAP amendments-02-2015-CAC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment 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." The 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)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address 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. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(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 25(a)(2)(c)(ii), as further amended, would provide:

(ii) 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 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes 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. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports 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.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length 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. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that 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. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9d-jjhs
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0059
Comment from James Pew, Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center

Submitter Information

Name: James Pew
Organization: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center

General Comment

See attached file(s)

Attachments

Ex. A - U.S. Sugar Corp v. EPA Order

Ex. B - Solvay USA v. EPA Order

FRAP Amendment Comments

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

EPA-76FR15608
EPA-78FR7138

Filed On: May 15, 2014

United States Sugar Corporation,
Petitioner
v.

Environmental Protection Agency,
Respondent

National Environmental Development Association's Clean Air Project, et al.,
Intervenors

Consolidated with 11-1124, 11-1134, 11-1142, 11-1145, 11-1159, 11-1165, 11-1172, 11-1174, 11-1181, 13-1086, 13-1087, 13-1091, 13-1092, 13-1096, 13-1097, 13-1098, 13-1099, 13-1100, 13-1103

BEFORE: Griffith, Srinivasan, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for remand of the record, for partial voluntary remand without vacatur, and for revision of the briefing schedule, the responses thereto, and the reply; the motion for affirmative relief, the response thereto, and the reply; and the motion for remand of the case, the responses thereto, and the replies, it is

ORDERED that the motion for remand of the record, for partial voluntary remand without vacatur, and for revision of the briefing schedule be granted, and the motion for affirmative relief and the motion for remand of the case be denied. The numeric standards identified by EPA on pages 10-13 of its remand motion, set forth in "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters," 78 Fed. Reg. 7138 (Jan. 31, 2013), are hereby remanded to EPA for further proceedings. The Clerk is directed to issue forthwith a certified copy of this order to the agency in lieu of partial formal mandate. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

FURTHER ORDERED that the record be remanded to EPA for a period of 60 days from the date of this order to permit EPA to provide further explanation, in light of National Association of Clean Water Agencies v. EPA, 734 F.3d 1115 (D.C. Cir. 2013), for its upper prediction limit and variability analysis. It is

FURTHER ORDERED that the following briefing format and schedule apply to the remainder of these consolidated cases:

Industry Petitioners' Brief (not to exceed 11,200 words)	August 12, 2014
Environmental Petitioners' Brief (not to exceed 11,200 words)	August 12, 2014
Respondent's Brief (not to exceed 22,400 words)	November 10, 2014
Industry Intervenor-Respondents' Brief (not to exceed 7,000 words)	December 10, 2014
Environmental Intervenor-Respondents' Brief (not to exceed 7,000 words)	December 10, 2014
Industry Petitioners' Reply Brief (not to exceed 5,600 words)	December 24, 2014
Environmental Petitioners' Reply Brief (not to exceed 5,600 words)	December 24, 2014
Deferred Appendix	January 7, 2015
Final Briefs	January 21, 2015

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Procedures 41 (2013); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

Exhibit B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1189 **September Term, 2013**

EPA-76FR15456

Filed On: January 31, 2014

Solvay USA Inc.,
Petitioner

v.

Environmental Protection Agency,
Respondent

Metals Industries Recycling Coalition, et al.,
Intervenors

Consolidated with 11-1192, 11-1202, 11-1214, 11-1216, 11-1217, 11-1220, 11-1221, 11-1223, 11-1224, 11-1226, 11-1227, 11-1228, 11-1230, 11-1232, 11-1233, 11-1235, 11-1238, 13-1152, 13-1156, 13-1157, 13-1158, 13-1159, 13-1160, 13-1162, 13-1164, 13-1165, 13-1167

BEFORE: Tatel and Brown, Circuit Judges

O R D E R

Upon consideration of the joint motion to set briefing format and schedule, it is

ORDERED that the following briefing format and schedule shall apply:

Industry Petitioners' Brief (not to exceed 11,200 words)	April 28, 2014
Environmental Petitioners' Brief (not to exceed 11,200 words)	April 28, 2014
Respondent's Brief (not to exceed 22,400 words)	August 4, 2014

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1189 **September Term, 2013**

Industry Intervenor-Respondents' Brief (not to exceed 7,000 words)	September 2, 2014
Environmental Intervenor-Respondents' Brief (not to exceed 7,000 words)	September 2, 2014
Industry Petitioners' Reply Brief (not to exceed 5,600 words)	September 15, 2014
Environmental Petitioners' Reply Brief (not to exceed 5,600 words)	September 15, 2014
Deferred Appendix	September 29, 2014
Final Briefs	October 14, 2014

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

COMMENTS OF EARTHJUSTICE, SIERRA CLUB, DEFENDERS OF WILDLIFE, AND WESTERN ENVIRONMENTAL LAW CENER ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center very much appreciate the opportunity to comment on the proposed changes to the Federal Rules of Appellate Procedure. We respectfully urge the Advisory Committee not to adopt the proposed changes to the word limits for appellate briefs and to the rules regarding the computation and extension of time.

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

The proposed changes to Rule 32 would shorten the length for opening briefs from 14,000 words to 12,500 words and the length for reply briefs from 7,000 words to 6,250 words. As explained in detail below, these 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. This dilemma is especially pointed 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. *See, e.g.*, 42 U.S.C. § 7607(b) (providing that petitions for review of many final actions taken by the Environmental Protection Agency under the Clean Air Act must be brought within 60 days in the D.C. Circuit); 33 U.S.C. § 1369(b) (requiring petitions for review of regulations issued under the Clean Water Act to be brought in federal courts of appeals); 42 U.S.C. § 6976 (providing that petitions for review of regulations promulgated under the Solid Waste Disposal Act must be brought in the D.C. Circuit). In these cases, a decision not to raise a valid claim – or the failure to adequately brief a valid claim – can have long term adverse impacts not only on a litigant but on the public.

The records for judicial review in these cases 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. The proposed reduction in the word limits would affect attorneys' ability to bring important issues before the courts and to successfully challenge unlawful action.

Cases challenging government action are often multiparty cases where petitioners with different (and often adverse) interests present different and conflicting claims to the court. In environmental cases, for example, courts may be presented with arguments by regulated entities who claim that a regulation is too stringent and by environmental groups who claim it is insufficiently stringent. *See Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013). In such cases, the D.C. Circuit typically receives two or more petitioner briefs. *See id.* at 1118. Faced with the prospect of multiple briefs, the D.C. Circuit usually reduces the number of words allowed in any individual brief substantially. *See, e.g.*, Ex. A, Order, U.S. Sugar Corp. v. EPA, No. 11-1108 (D.C. Cir. May 15, 2014); Ex. B, Order, Solvay, USA, Inc. v. EPA, No. 11-1189 (D.C. Cir. Jan. 31, 2014).

In judicial review cases, courts generally defer to agency statutory interpretations so long as they do not contravene Congress's plainly expressed intent and are reasonable. *See Chevron v.*

Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). Similarly, they defer to agencies' factual determinations so long as they are not arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Thus, petitioners in such cases must be able to brief issues that are often both complex and numerous in sufficient detail to overcome significant deference. Notably, the D.C. Circuit has ruled that arguments raised too briefly are waived. *See e.g.*, *Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999); *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013*)*; *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 340 (D.C. Cir. 2007) (*quoting Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005)); *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 173 (D.C. Cir. 2013).

Even where the courts consider arguments that have not been developed in sufficient length, they may still reject such arguments if the briefs do not sufficiently explicate why the government's action was unlawful or arbitrary. Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing valid claims. The goal of inducing attorneys to present their claims succinctly is certainly worthwhile, but word limits should not act to cap the number of valid issues that parties can raise. Such a result would not only be unfortunate from a public policy point of view, but would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions.

Some may believe that if word limits are shortened, parties who truly need additional words can obtain them by submitting a motion to the court. As a practical matter, such motions are hardly ever granted. *See* D.C. Cir. R. 28(e)(1) ("The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons."). Further, it is neither in the interest of litigants nor judicial economy to create a situation in which parties are forced to file motions to exceed the word limits more frequently.

Moreover, if the word limits are shortened as proposed, it is likely that courts will continue to shorten them further in multi-party cases. It is understandable that courts would want to reduce word limits in multi-party cases, as the amount of material that judges and clerks need to read increases substantially with each additional brief. However, the impetus for reducing word limits for each brief in these cases will not cease to exist just because the default word limit is reduced from 14,000 to 12,500; rather, the result will be to simply lower the starting point for further reducing word limits.

Finally, 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) now provides that "[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing." It further provides that, "[w]hen the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." *Id.* When the Committee determined that briefs of 50 pages (and later 14,000 words) were appropriate, it did not contemplate the need to include such additional sections, which can substantially reduce the number of words available for merits arguments.

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

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

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

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

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

Nor is it the case that these shorter times always applied before the widespread adoption of electronic service. As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus, intermediate Saturdays, Sundays, and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule 27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4). Rather, under previous rules, a response to a motion filed on the Friday before a holiday weekend would have been due 16 calendar days (10 working days later) – even without the additional 3 days provided by the 3-day rule. Similarly, replies to a response filed the Friday

before a holiday weekend would have been due 12 calendar days (7 working days) later without an additional 3 days. In short, 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.

TAB 5D

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-E (length limits)

Among the proposals published for comment is the package of amendments that would alter length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The amendments would also shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page; the 14,000-word limit for a party's principal brief would become a 12,500-word limit. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. Proposed Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length.

This memorandum summarizes and analyzes the public comments.[1] The questions for decision by the Committee include:[2]

- Whether to adopt word limits for documents other than briefs, and if so, what conversion ratio to use
- Whether to reduce the word limits for briefs
  - If so, by how much
  - If so, whether to add Rule text and/or Note language addressing motions for extra length
- Whether to amend the Rules to make clear a circuit's ability to accept longer briefs on cross-appeals (*cf.* Rule 32(e))
- Whether to delete line limits as an alternative to word limits
- Whether to augment the list of items to be excluded when computing length limits

Part I of this memo sets out the proposed amendments as published. Part II summarizes the public comments. Part III analyzes issues relating directly to the

[1] Copies of the relevant comments are enclosed.

[2] Additional choices for the Committee are discussed in Part IV of the memo.

selection of length limits. Part IV analyzes other possible changes to the proposals. Because this memo is lengthy, here is a table of contents:

I. Text of Rules and Committee Notes as published

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies. 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 handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed:

(A) 5,000 words; or

(B) 520 lines of text printed in a monospaced face.

* * * * *

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 type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. 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 type-volume limits 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).

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

* * * * *

(d) Form of Papers; Number of Copies. 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 handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed:

(A) 7,500 words; or

(B) 780 lines of text printed in a monospaced face.

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 type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. 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 type-volume limits 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).

Rule 27. Motions

* * * * *

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

* * * * *

(2) **Page 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 handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) a motion or response to a motion produced using a computer must comply with Rule 32(g) and not exceed:

(i) 5,000 words; or

(ii) 520 lines of text printed in a monospaced face;

(C) a handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) a reply produced using a computer must comply with Rule 32(g) and not exceed:

(i) 2,500 words; or

(ii) 260 lines of text printed in a monospaced face.

* * * * *

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 type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. 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 type-volume limits 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).

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 complies with Rule 32(g) and:

(i) ~~it~~ contains no more than ~~14,000~~ 12,500 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 complies with Rule 32(g) and:

(i) ~~it~~ contains no more than ~~16,500~~ 14,700 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 complies with 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. The basis for the estimate of 280 words per page is unknown, and the 1998 adoption of Rule 32(a)(7)(B) superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the use of the estimate of 280 words per page inadvertently increased the length limits for briefs. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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)).

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~ 12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) Briefs and Papers That Require a Certificate. A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) – and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2) – 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

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, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments are made to Form 6.

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 handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(g) and not exceed:

(i) 3,750 words; or

(ii) 390 lines of text printed in a monospaced face.

(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 type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. 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 type-volume limits and the page limit, the calculation excludes any items listed in Rule 32(f).

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 handwritten or typewritten petition for panel rehearing must not exceed 15 pages; and

(2) a petition for panel rehearing produced using a computer must comply with Rule 32(g) and not exceed:

(A) 3,750 words; or

(B) 390 lines of text printed in a monospaced face.

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 type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. 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 type-volume limits and the page limit, the calculation excludes any items listed in Rule 32(f).

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

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This ~~brief~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [*insert Rule citation, e.g., 32(a)(7)(B)*] 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~~ document 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~~ document 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 _____

32 Dated: _____

II. Summary of public comments and 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.[3]

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.

[3] Reporter's note: See also my summary of Comments AP-2014-0002-0013 & AP-2014-0002-0015 in the memo concerning Item No. 13-AP-B (amicus briefs in connection with petitions for rehearing), elsewhere in this agenda book.

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.[4] 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[5] 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[6] – 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.[7] 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.

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[4] Reporter's note: The Ninth Circuit gives pro se appellants the option of using an "informal brief" form (to which additional sheets can be appended for a combined total of no more than "40 double-spaced pages") instead of complying with the form and length requirements set by Appellate Rule 32(a). *See* 9th Cir. Rules 28-1(c) & 32-5.

[5] Reporter's note: *See* Comment AP-2014-0002-0049, *infra*.

[6] Reporter's note: *See* Comment AP-2014-0002-0045, *infra*.

[7] Reporter's note: *See infra* Part III.B.3 (listing relevant local circuit provisions).

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.[8]

Responding to a question about a recent article by Carl S. Kaplan in the Journal of Appellate Practice and Process,[9] 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

[8] Reporter's note: See my summary of Comment AP-2014-0002-0046 in the memo concerning Item No. 13-AP-B (amicus briefs in connection with petitions for rehearing), elsewhere in this agenda book.

[9] Reporter's note: *See* Carl S. Kaplan, *Ten Items or Less: A Reflection on the Third Edition of Bryan Garner's* The Winning Brief, 15 J. App. Prac. & Proc. 139 (2014).

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.[10]

[10] Reporter's note: It is unclear whether the Committee on Federal Courts also objects to the length limit set in proposed Rule 29(b)(4) for amicus briefs in connection with

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.[11] 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.

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rehearing petitions. In Part II of the letter – which addresses proposed Rule 29(b) – the Committee states a belief that "the applicable word limit for petitions for rehearing should be based on the 280 words per page convention ...."

[11] Reporter's note: See also my summary of Comment AP-2014-0002-0022 in the memo concerning Item No. 13-AP-B (amicus briefs in connection with petitions for rehearing), elsewhere in this agenda book.

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 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.[12]

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.

[12] Reporter's note: 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.

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.

Predicts "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."[13] 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]the 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."

[13] Reporter's note: Supreme Court Rule 37.6 does not prohibit such involvement but rather requires its disclosure. Appellate Rule 29(c)(5), which likewise requires disclosure of such involvement, took effect December 1, 2010.

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[14] 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.[15] 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

[14] Reporter's note: *See* Comment AP-2014-0002-0049, *infra*.

[15] Reporter's note: *See infra* Part III.B.3 (listing relevant local circuit provisions).

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.[16] 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

[16] Reporter's note: This commentator's reference to a "reduced page limit" is puzzling, because the proposals published for comment would not reduce any page limit.

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]the 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,[17] so the courts already have a process for addressing undue length without any change to the Appellate Rules. And, if the default length limits set by the Appellate Rules are

[17] 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.

Reporter's note: Rule 32(a)(7)'s length limits for briefs are part of Rule 32(a) (titled "Form of a Brief"), and Rule 32(e) provides that "[e]very court of appeals must accept documents that comply with the form requirements of this rule." The 1998 Committee Note to (what was then numbered) Rule 32(d) explains in part: "A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms."

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.

III. Analysis – length limits

In this section I discuss (A) the history of the 1998 amendments; (B) empirical data; (C) suggested alterations of or substitutes for the published proposals; (D) arguments concerning the selection of length limits for briefs and other documents; and (E) an amendment to clarify a circuit's authority to accept longer filings.

A. History

Much of the public comment focused on the proposed Committee Notes' discussion of the use of the 280-word-per-page conversion ratio in the 1998 amendments that put in place Rule 32(a)(7)'s type-volume limits for briefs. The Committee Notes indicated a belief that the use of this conversion ratio inadvertently increased the length of appellate briefs. In challenging this belief, commenters have relied heavily on Judge Easterbrook's comment on the current proposal. Judge Easterbrook's comment provides a useful supplement to the official record of the 1998 amendments, and offers a somewhat different view of the Appellate Rules Committee's deliberations than the official record does. Judge Easterbrook's explanation of the basis for the selection of the 14,000-word limit differs notably from that found in the 1998 Committee Note to Rule 32 – and it was the latter that underpinned the published proposals' discussion of the basis for the 1998 amendment. A reader of the 1998 Committee Note might reasonably conclude that Rule 32(a)(7)'s 14,000-word limit was intended to approximate the length of a 50-page non-printed brief. And as Judge Easterbrook's comment makes clear, a typical 50-page non-printed brief would be significantly shorter than 14,000 words.

Moreover, while Judge Easterbrook's recollections usefully illuminate the deliberations of the Appellate Rules Committee and Standing Committee, they do not address the later deliberations of the Judicial Conference and the Supreme Court. To the extent that members of those bodies focused on the Rule 32 proposal when approving the package of Appellate Rules amendments that took effect in 1998,[18] they presumably relied upon the written materials presented to them – which would have included, prominently, the Committee Note. (Likewise, the Standing Committee's report to the Judicial Conference stated that the new 14,000-word limit "equate[d] roughly to the traditional fifty pages.") If a reasonable reader today could be forgiven for reading the Committee Note to indicate an intent to approximate the length of a 50-page non-printed brief, one wonders whether some members of the Judicial Conference and the Supreme

[18] The 1998 amendments to the Appellate Rules were extensive. They included the restyling of all the Appellate Rules, plus substantive amendments to a number of Rules (including, of course, Rule 32).

Court might have operated under the same assumption when approving the 1998 amendments.

Judge Easterbrook, in his comment, explained that he drafted the 1998 amendments and that, in doing so, he intentionally approximated the length of printed 50-page briefs rather than the (shorter) length of non-printed 50-page 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.
>
> Old Fed. R. App. P. 32[19] allowed 50-page briefs. Until the advent of word processing and desktop publishing, that meant printed briefs. So I set out to determine how many words were present in a 50-page printed brief, because that was the effective maximum for a brief prepared by a lawyer determined to be as verbose as (legitimately) allowed. I downloaded approximately 50 briefs that had been filed in the Supreme Court and determined (using Microsoft Word) how many words the average 50-page brief contained. That turned out to be a little under 14,000. That's where Seventh Circuit Local Rule 32 came from, and derivatively where the number in Fed. R. App. 32 (1998 version) came from.
>
> When the Advisory Committee took up this subject, I alerted it that the same word-count process on briefs law firms produced without printing yielded about 13,000 words. An active discussion ensued about which number to use. The Advisory Committee voted overwhelmingly to use 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. Members 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.

Judge Easterbrook's comment is invaluable in illuminating the reasons why he selected the type-volume limits now contained in Rule 32(a)(7). His comment is also helpful in augmenting the record concerning the deliberations of the Appellate Rules

[19] Reporter's note: Judge Easterbrook must mean to refer to the pre-1998 Appellate Rule 28(g). Until 1998, it was Rule 28(g), not Rule 32, that set the length limits for briefs.

Committee and the Standing Committee. I summarized in a fall 2014 memo the relevant discussions in the written rulemaking records:[20]

> I think it is fair to say that the proposals that became the 1998 amendments were supported repeatedly by statements that 14,000 words was equivalent to 50 pages. Discussions of words-per-brief limits arose a few years into the Committee's discussions of possible changes to Rule 32. In 1994, the Committee heard testimony that 50 pages would equal 12,500 words on an "office typewriter" but would equal 14,000 words or more "today, using a proportionately spaced typeface." Based on charts showing that 12-point Courier font yields 250 words per page, and on the DC Circuit's new rule, the Committee crafted a proposal featuring a 12,500-word-per-brief limit.
>
> Public comment on that proposal argued that a 12,500-word limit would reduce the length "below the traditional 50 page limit"; those commenters suggested a limit of 14,000 or 14,500 words. Some Committee members noted that sample pages using 280 words per page looked appropriate; conversely, other Committee members argued for the 12,500 limit, but did so without appearing to dispute the commenters' contention that 12,500 would shorten the existing limit. The Committee reverted to proposing a 14,000-word-per-brief limit, and its 1995 draft stated the belief "that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations."
>
> Later in the process, when the Appellate Rules Committee in 1997 discussed and gave final approval to the Rule 32 proposal, some members apparently suggested "that 14,000 is not a good equivalent to the old 50-page brief"; these members argued for a 13,000-word limit, maintaining that 14,000 words "is closer to the length of a professionally printed … 50-page brief." A Committee member responded, though, that "this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial." Other members favored 14,000 words "in order to avoid reopening the controversy." The Committee kept the limit at 14,000 words.
>
> When Judge Logan presented the proposal to the Standing Committee in 1997 for final approval, "[h]e pointed out that a 50-page brief would include about 14,000 words."

[20] See my October 3, 2014 memo on this subject, available in the Committee's fall 2014 agenda book, which is posted at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/2014-10-Appeals-Agenda-Book.pdf .

What of the later participants in the rulemaking process – the Judicial Conference and the Supreme Court? Members of the Judicial Conference presumably would have relied upon the written materials submitted to them – including the Standing Committee's report, the text of the proposed amendments, and the accompanying Committee Notes. Those documents stated an intent to approximate the length of a "traditional"[21] or "old"[22] 50-page brief. Neither document stated that by "traditional" or "old" the rulemakers meant to denote printed (as opposed to word-processed or typewritten) briefs. As the 1998 Committee Note to Rule 32(a)(5) stated, "[t]oday few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer." Thus, the discussions in the Committee Note and the Standing Committee's report might well have led some readers to infer that the intended baseline was either a word-processed brief (produced without undue amounts of block quotes and footnotes) or a typewritten brief – i.e., that the intended baseline was the length of non-printed rather than printed briefs.

The report of the Standing Committee to the Judicial Conference from September 1997 stated in relevant part (emphases are mine):

> **Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, 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 and are difficult for judges to read.** The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. **Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages)** and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10 ½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept

[21] This was the term used in the Standing Committee's report.

[22] This was the term used in the Committee Note.

pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.[23]

The Committee Note that accompanied the proposed amendment to Rule 32 stated in part (emphases, again, are mine):

> Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. **The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface.** Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. **All of this, and more, have made the 50-page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed.**
>
> **The limits in subparagraph (B) approximate the current 50-page limit** and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, **without permitting those with the best in-house typesetting an opportunity to expand their submissions**.
>
> The length can be determined either by counting words or lines. That is, the length of a brief is determined not by the number of pages but by the number or words or lines in the brief. This gives every party the same opportunity to present an argument **without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page**.
>
> The word counting method can be used with any typeface.

[23] Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, September 1997, at 7-8 (emphases added).

> A monospaced brief can meet the volume limitation by using the word or a line count. If the line counting method is used, the number of lines may not exceed 1,300 – 26 lines per page in a 50-page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.
>
> A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or line count of the word-processing system used to prepare the brief.
>
> Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signaling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.[24]

Neither the Standing Committee's report nor the Committee Note mentioned that, by Judge Easterbrook's estimate, a non-printed 50-page brief averaged 13,000 words or that Committee members had debated whether to use the 13,000 or the 14,000-word limit and had decided to err on the side of generosity.[25] It is, of course, impossible to know whether such information would have given pause to any members of the Judicial Conference when the package of amendments was presented for a vote in fall 1997.

B. Data

In this section, I collect data concerning four topics: (1) the volume of words per page; (2) the study by Professors Sisk & Heise concerning appellate briefs in the Ninth Circuit; (3) local circuit treatment of motions to file overlength briefs; and (4) the workload of the U.S. Courts of Appeals.

1. Data concerning type-volume

The Committee can now draw upon multiple studies of the number of words in a 50-page brief. In the sections that follow I discuss (a) the 1993 study by the D.C.

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[24] Emphases added.

[25] Especially in the light of the Standing Committee report's observation that "[p]rovisions for pamphlet-sized briefs ... have been deleted because of their very infrequent use," there might be reason to question whether a member of the Judicial Conference would have understood the Committee Note to be using printed briefs as the baseline when the Note stated that the new type-volume limits "approximate the current 50-page limit."

Circuit's Advisory Committee on Procedures; (b) Michael Gans' 2013 studies; (c) Judge Easterbrook's 1990s study; (d) the two studies recounted in Cynthia K. Timms' comments and testimony; and (e) anecdotal reports by members of the Committee on Federal Courts of the Association of the Bar of the City of New York ("ABCNY Federal Courts Committee").[26]

a. The 1993 D.C. Circuit Advisory Committee study

The 1993 D.C. Circuit Advisory Committee study looked at briefs filed in various circuits. The sample included ten Department of Justice ("DOJ") principal briefs, ten DOJ reply briefs, five Federal Communications Commission ("FCC") principal briefs, and three shorter briefs[27] filed by Wilmer, Cutler & Pickering. The sample was not random; rather, it excluded briefs that the study's authors deemed to include "an excessive number of single spaced footnotes or block quotes." The average number of words per page, by document within the sample, ranged from 217 to 288. The average number of words per page in the full sample was 251.[28]

b. The 2013 studies by Michael Gans

The 2013 study by Michael Gans covered two different sets of data. First, Mr. Gans obtained 210 briefs from "closed 1995-1998 files" from the Eighth Circuit – *i.e.*, "the last four years in which FRAP 28(g) and its 50-page limit were in effect." This was a random sample of briefs, except that it excluded pro se briefs. Mr. Gans found that

> [a]veraging all of the word counts from all of the briefs ... yielded an average word count per page of 259 words (and a median of 261 words). Multiplying that average by 50 pages yields a total of 12,950 words. It would appear, therefore, that the informal survey conducted by Mr. Letter and the other members of the DC Circuit Rules Advisory Committee may

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[26] In addition to the information summarized in the text, other comments offered information that seems more impressionistic and, thus, more difficult to evaluate.

The American Academy of Appellate Lawyers offered "anecdotal[]" information on the proposed conversion ratio for documents other than briefs: "Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits."

Mr. Lopez – the General Counsel of the EEOC – reported that "[o]n 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."

[27] These may have been reply briefs, but the study did not so indicate.

[28] I arrived at the figure of 251 words per page by dividing the total number of words in the sample by the total number of pages in the sample, thus: (11,371 + 11,793 + 12,070 + 12,777 + 12,438 + 11,402 + 13,292 + 13,246 + 12,345 + 12,019 + 5,977 + 5,864 + 6,787 + 6,141 + 6,856 + 6,297 + 6,417 + 5,667 + 6,382 + 6,053 + 11,660 + 13,836 + 13,585 + 12,408 + 12,563 + 3,037 + 4,806 + 4,230) / ([50 x 8] + [49 x 4] + 48 + [47 x 2] + [25 x 9] + 24 + 21 + 19 + 14) = 261,319 / 1,041 = 251.

> have slightly underestimated the length of 50-page briefs under the Rule 28(g) by between 3 and 4%.

Mr. Gans also studied "the word length of principal briefs filed in the 2008 calendar year." Using CM/ECF, he obtained a sample of 1,175 briefs filed in the Eighth Circuit. The sample was random, except that it excluded pro se briefs and briefs that were "filed under the page or line limits and d[id] not report words." Thirty-two of the briefs (or 3 percent) were "filed under an order permitting an overlength brief." Mr. Gans' analysis (of the 32 overlength briefs and the other 1,143 briefs) yielded the following results:

> My count showed 180 briefs (15%) were between 12,500 and 14,000 words, while the remaining 963 briefs were less than 12,500 words in length. In other words, 82% of the principal briefs[29] filed in 2008 under FRAP 32(a)(7)(B)(i) would have been an acceptable length under FRAP Rule 28(g), assuming 50 pages equals 12,500 words. If we use 12,950 words as the equivalent of 50 pages, the number of 2008 briefs which would have been an acceptable length under the old rule rises to 85%,[30] and the number between 12,950 and 14,000 words falls to around 12%.

c. Judge Easterbrook's early-to-mid-1990s study of printed Supreme Court briefs and law firm briefs produced without printing

As noted above, Judge Easterbrook explained the derivation of Rule 32(a)(7)'s 14,000-word limit as follows:

> 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.
>
> Old Fed. R. App. P. 32 allowed 50-page briefs. Until the advent of word processing and desktop publishing, that meant printed briefs. So I set out to determine how many words were present in a 50-page printed brief, because that was the effective maximum for a brief prepared by a lawyer determined to be as verbose as (legitimately) allowed. I downloaded approximately 50 briefs that had been filed in the Supreme Court and determined (using Microsoft Word) how many words the average 50-page brief contained. That turned out to be a little under 14,000. That's where Seventh Circuit Local Rule 32 came from, and derivatively where the number in Fed. R. App. 32 (1998 version) came from.

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[29] The figure of 82 percent includes the 32 overlength briefs in the denominator: 963 / 1,175 = 0.8195744680851064.

[30] As noted in footnote 29, *supra*, the calculation of this figure included the 32 overlength briefs in the denominator.

Though I have not located precise information on the date of adoption of the Seventh Circuit local rule to which Judge Easterbrook refers, it seems likely that the Seventh Circuit's rule was adopted in, roughly, 1995 or early 1996.[31] Assuming that to be the case, then one can infer that Judge Easterbrook conducted his study of U.S. Supreme Court briefs sometime during the period 1990-1995. During that time period, the requirements applicable to printed (i.e., booklet-format) Supreme Court briefs appear to have been similar but not identical to those applicable to printed Court of Appeals briefs. The Supreme Court's rule specified that text must be 11-point font or larger while footnotes must be 9-point font or larger; that both text and footnotes must have "2-point or more leading between lines"; and that "type matter" was to be "approximately 4⅛ by 7⅛ inches."[32] Meanwhile, Appellate Rule 32 specified that both text and footnotes must

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[31] A search in WestlawNext's historic USCA archives for ("14,000" /p brief) produces a Seventh Circuit Rule in the USCA96 database but not the USCA95 database. WestlawNext explains the coverage in its USCA96 database as follows: "All 50 titles of the United States Code Annotated including the Constitution, court rules, and appendixes. USCA titles are current through January 16, 1996 (Pub. L. No. 104-98)."

[32] As amended effective January 1, 1990, Supreme Court Rule 33.1 stated:

> (a) Except for papers permitted by Rules 21, 22, and 39 to be submitted in typewritten form (see Rule 34), every document filed with the Court must be printed by a standard typographic printing process or be typed and reproduced by offset printing, photocopying, computer printing, or similar process. The process used must produce a clear, black image on white paper. In an original action under Rule 17, 60 copies of every document printed under this Rule must be filed; in all other cases, 40 copies must be filed.
>
> (b) The text of every document, including any appendix thereto, produced by standard typographic printing must appear in print as 11-point or larger type with 2-point or more leading between lines. The print size and typeface of the United States Reports from Volume 453 to date are acceptable. Similar print size and typeface should be standard throughout. No attempt should be made to reduce or condense the typeface in a manner that would increase the content of a document. Footnotes must appear in print as 9-point or larger type with 2-point or more leading between lines. A document must be printed on both sides of the page.
>
> (c) The text of every document, including any appendix thereto, printed or duplicated by any process other than standard typographic printing shall be done in pica type at no more than 10 characters per inch. The lines must be double spaced. The right-hand margin need not be justified, but there must be a margin of at least three-fourths of an inch. In footnotes, elite type at no more than 12 characters per inch may be used. The document should be printed on both sides of the page, if practicable. It shall not be reduced in duplication. A document which is

be 11-point font or larger; did not specify the line spacing for printed briefs; and specified that "type matter" was to be "4 1/6 by 7 1/6 inches."

One might speculate that these distinctions cut in different directions: the Supreme Court permitted smaller font in footnotes, but set a minimum space between lines and a slightly smaller space for type matter. Thus, perhaps the differences between the Supreme Court's and Appellate Rules' formatting specifications canceled one another out, producing printed 50-page briefs of roughly similar length. In any event, the fundamental problem with this study – as a measure of brief length under the pre-1998 Appellate Rules – would seem to be the choice of printed instead of non-printed briefs. The 1998 Committee Note to Appellate Rule 32(a)(5) stated that "[t]oday few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer."

Judge Easterbrook states in his comment that he also told the Appellate Rules Committee "that the same word-count process on briefs law firms produced without printing yielded about 13,000 words."

d. The studies described by Cynthia K. Timms

As noted above, Ms. Timms provided the Committee with the results of two studies – one a retrospective study of briefs filed in the federal courts of appeals under the pre-1998 Appellate Rules, and the other a contemporaneous 2012 study of briefs filed in the Texas Supreme Court.[33]

For the study of federal court of appeals briefs, members of the Appellate Section of the State Bar of Texas 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)

> photographically reduced so that the print size is smaller than pica type will not be received by the Clerk.
>
> (d) Whether printed under subparagraph (b) or (c) of this paragraph, every document must be produced on opaque, unglazed paper 6⅛ by 9¼ inches in size, with type matter approximately 4⅛ by 7⅛ inches and margins of at least three-fourths of an inch on all sides. The document must be firmly bound in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to make an easily opened volume, and no part of the text shall be obscured by the binding. Spiral and other plastic bindings may not be used. Appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

The version of Rule 33.1 quoted above remained unchanged until the Rule was amended on July 26, 1995, effective October 2, 1995.

[33] *See* Comment AP-2014-0002-0027.

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." In her oral testimony, Ms. Timms noted the likelihood that the sample was skewed by the fact that only briefs in complex, high-end cases would have been saved for 16+ years.

Ms. Timms also shared with the Committee the findings from 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." (Ms. Timms noted applicable length limits, for some types of documents in the study, of 8 pages and 15 pages;[34] and only two of the actual page lengths listed in the relevant appendix exceeded 15 pages.) 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."

e. Reports by members of the ABCNY Federal Courts Committee

The comment submitted by the ABCNY Federal Courts Committee offered the following "admittedly anecdotal information":

> Members of our committee have anecdotally checked the word count per page in recent appellate briefs (which now reflect the 14 point or larger typeface required by Rule 32(a)(5), also a product of the 1998 amendments) as well as district court papers that comply with district court margin requirements and use 12 point typeface (larger than the 11 point typeface permitted prior to the 1998 amendments). Typical appellate briefs using 14 point typeface average 240 words per page (use of 11 point typeface, as permitted before the 1998 amendments, would yield significantly more words per page). Typical district court papers using 12 point typeface (larger than the 11 point typeface permitted by FRAP 32 before 1998), and margins consistent with pre-1998 FRAP Rule 32, can significantly exceed 280 words per page.[35]

Despite, thus, reporting that briefs filed in the 14-point type now required by Appellate Rule 32(a)(5)(A)[36] "average 240 words per page," the ABCNY Federal Courts

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[34] Ms. Timms noted: "The petition for review and response were limited to 15 pages. The reply brief was limited to 8 pages. Mandamus proceedings to the Texas Supreme Court were similarly limited in their first sets of filings. Only if the Texas Supreme Court called for further briefing would the parties be allowed to file their full briefs."

[35] *See* Comment AP-2014-0002-0019.

[36] Appellate Rule 32(a)(5)(A) provides in part that "[a] proportionally spaced face must be 14-point or larger." Documents other than briefs must comply with, inter alia, the requirements of Appellate Rule 32(a)(5). *See* Appellate Rules 32(c) & 27(d)(1)(E).

Committee also asserts that "utilizing a conversion of pages to words lower than the 280 words per page assumed at the time of the 1998 amendments would effect a significant reduction in length versus current practice" for documents other than briefs.

2. The Sisk & Heise study

Among the information submitted to the Committee is a study by Professors Gregory C. Sisk and Michael Heise of briefs filed in the U.S. Court of Appeals for the Ninth Circuit.[37] Professors Sisk and Heise found that "as the length of an appellant's brief increased ... , the rate of reversal increased."[38] Although they offer – as an explanation for this correlation – the surmise that "the source for both enhanced appellate success and expansive briefs by appellants may lie in the complexity of the underlying case and lower court disposition that sets the stage for reversal on appeal,"[39] they caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."[40]

Professors Sisk & Heise studied civil appeals decided in the Ninth Circuit during the calendar years 2010 through 2013.[41] They selected 50 published and 50 unpublished decisions from each year.[42] The sample was random, except that it excluded appeals involving a pro se litigant and appeals not decided on the merits.[43] The primary study model included "both published and unpublished decisions at the same proportion as they appear in the full population of decisions for the year."[44] They coded data at the level of decisions by individual judges; for example, a decision by a three-judge panel would yield three data points, and a decision by an eleven-judge en banc panel would yield

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[37] As of this writing, the most recent draft of the article is Gregory C. Sisk & Michael Heise, *"Too Many Notes"? An Empirical Study of Advocacy in Federal Appeals* (draft, March 23, 2015), forthcoming in 12:3 Journal of Empirical Legal Studies (2015) ("Sisk & Heise March 2015 draft"). The version of the study appended to Professor Sisk's comment and included in the agenda book is an earlier one (the "Sisk & Heise February 2015 draft"). I cite to the most recent version, which is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564870 , but I provide alternate page citations to the version in this agenda book as well. The differences between the versions do not appear to me to be material to the issues treated in this memo.

I am grateful to Professor Sisk for taking the time to discuss the study with me.

[38] Sisk & Heise March 2015 draft at 15; *see also* Sisk & Heise February 2015 draft at 18.

[39] Sisk & Heise March 2015 draft at 19; *see also* Sisk & Heise February 2015 draft at 22.

[40] Sisk & Heise March 2015 draft at 18; *see also* Sisk & Heise February 2015 draft at 20.

[41] *See* Sisk & Heise March 2015 draft at 4-5; *see also* Sisk & Heise February 2015 draft at 5.

[42] *See* Sisk & Heise March 2015 draft at 5; *see also* Sisk & Heise February 2015 draft at 5.

[43] *See* Sisk & Heise March 2015 draft at 5; *see also* Sisk & Heise February 2015 draft at 5.

[44] *See* Sisk & Heise March 2015 draft at 5; *see also* Sisk & Heise February 2015 draft at 6.

eleven data points.[45] They coded the decision of any judge who voted to disturb any portion of the ruling below "as a reversal, even if the judge voted to affirm on other issues presented in the appeal."[46]

Among other factors, the authors looked at the length of briefs filed in each appeal. "In cases in which there was more than one appellant or appellee who filed separate briefs, the longest brief was coded."[47] They found that the mean word length of appellant briefs was 9,320; the mean word length of "winning appellant briefs" was 10,355; and the mean word length of "losing appellant briefs" was 8,776.[48] They found that the mean word length of appellee briefs was 10,007; the mean word length of "winning appellee briefs" was 9,752; and the mean word length of "losing appellee briefs" was 10,491.[49] It appears that they considered an appellant brief to be a "winning" brief as to any data point that featured a judge's vote to "reverse," employing their definition of a reversal (meaning a vote to disturb any aspect of the judgment below), while they considered an appellee brief to be a "losing" brief as to any data point that featured an appellant's "winning" brief.[50] They did not check whether the issue or issues that resulted in the decision to disturb the judgment below were actually discussed in the brief whose length they counted.[51]

Controlling for "such factors as whether the appeal was argued, the type of case, procedural stage, and lawyer experience," they found that "Appellant Brief Length measured by words proved highly significant at the 99 percent probability level ($p < 0.01$) in our primary Mixed Model that included both published and unpublished decisions."[52] They report that "as the length of an appellant's brief increased by number

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[45] *See* Sisk & Heise March 2015 draft at 6; *see also* Sisk & Heise February 2015 draft at 6-7.

[46] *See* Sisk & Heise March 2015 draft at 6; *see also* Sisk & Heise February 2015 draft at 6.

[47] Sisk & Heise March 2015 draft at 7; *see also* Sisk & Heise February 2015 draft at 7.

[48] *See* Sisk & Heise March 2015 draft at 8 table 1; *see also* Sisk & Heise February 2015 draft at 9 table 1.

[49] *See id.*

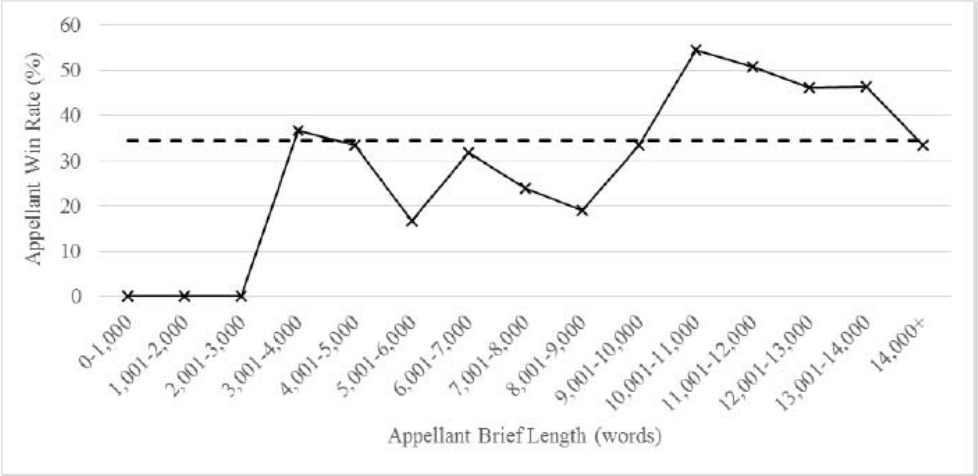
[50] I infer this from the fact that the numbers for "winning" and "losing" appellant and appellee briefs are exactly converse. *See* Sisk & Heise March 2015 draft at 8 table 1 (listing 281 "Winning appellant briefs," 535 "Losing appellant briefs," 535 "Winning appellee briefs," and 281 "Losing appellee briefs"); *see also* Sisk & Heise February 2015 draft at 9 table 1.

[51] I do not think this is made explicit in the article, but in a helpful email exchange Professor Sisk confirmed this to be the case.

[52] *See* Sisk & Heise March 2015 draft at 14-15; *see also* Sisk & Heise February 2015 draft at 17-18.

of words, the rate of reversal increased as well."[53] To illustrate that point, they offer the following figure:[54]

FIGURE 1: APPELLANT BRIEF LENGTH BY 1,000-WORD INCREMENTS COMPARED TO REVERSAL RATE, BY PERCENTAGE



NOTE: The dashed line indicates the appellant's overall win rate (securing a reversal) at 34.4 percent.

Professors Sisk and Heise have performed a very useful service in providing empirical data about appellate filings. Gathering such data is labor-intensive, and the Sisk & Heise study advances our understanding about the length of briefs filed in the Ninth Circuit. Though the discussion that follows sketches some reasons to doubt that the Sisk & Heise study can ground conclusions about a connection between brief length and success on appeal, I hasten to add that it would be very difficult, and likely prohibitively labor-intensive, to conduct a study that could shed reliable light on that connection. Moreover, I should stress that I lack the necessary training to evaluate the statistical analysis in the Sisk & Heise study. However, I can offer the following observations concerning the study design and possible ways to interpret the findings.

First, the study design defined an appellant's brief as a "win" if the judgment below was disturbed in any respect, and defined an appellee's brief as a "win," conversely, only if the judgment below was not disturbed in any respect. This seems to me to build some asymmetry into the study design. To illustrate, consider a case in which the appellant challenges five aspects of the judgment below. To count as having filed a "winning" brief, the appellant need merely prevail on any one of those five aspects – while to count as having filed a "winning" brief, the appellee must prevail on all five aspects. With this asymmetry built into the study, it seems to me that drawing

[53] *See* Sisk & Heise March 2015 draft at 15; *see also* Sisk & Heise February 2015 draft at 18.

[54] *See* Sisk & Heise March 2015 draft at 15; *see also* Sisk & Heise February 2015 draft at 18.

comparative conclusions about the relative effects of brief length for appellants and appellees is problematic.[55]

Second, if there were mutiple briefs filed on a given side, the study's authors counted the length of the longest brief without checking to see whether the argument or arguments that prevailed were included in that brief. In at least one instance, this resulted in the authors' counting an appellant's brief as a winning brief when the brief in question did not in fact mention the issue on which the appellant prevailed.[56]

Third, when Professors Sisk and Heise "suggest[] that, for appellants in complex civil appeals, the mark of marginal utility might not be reached under 14,000 words,"[57] it seems to me that they are prudent to phrase the claim modestly. Based on the authors' numerical findings, the appellant win rate is above the average appellant win rate for all four of the ranges spanning 10,001 - 14,000 (*i.e.*, the 10,001-11,000, 11,001-12,000, 12,001-13,000, and 13,001-14,000 points). But, as Figure 1 illustrates, the slope is downward along those points.

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[55] The authors assert that their "study suggests that a downward adjustment could cut most sharply against appellants in counseled civil appeals." Sisk & Heise March 2015 draft at 21; *see also* Sisk & Heise February 2015 draft at 24.

[56] Professors Sisk and Heise very helpfully posted their data at http://courseweb.stthomas.edu/gcsisk/brief.study/cover.html . I did not look at all of the cases in the study, but in reviewing a subset of the cases, I came across the *Champagne* case, the coding of which illustrates the problem outlined in the text. In *Champagne*, No. 08-16368, the only issue on which the court reversed was the award of attorneys' fees. That issue was not actually part of appeal No. 08-16368, nor was it briefed in the brief with the word count that Professors Sisk and Heise coded (the appellant's brief in No. 08-16368, which had 13,600 words). The attorney fee issue was treated in a related appeal, No. 08-17503, which was briefed separately; the appellants' brief in No. 08-17503 (and another appeal with which it was consolidated) was 5,602 words. So I would have thought that, in their calculations, either the authors should count the case as an appellant-loss case (three times; the panel decision was unanimous) with a 13,600 word brief, or as an appellant-win case (three times) with a 5,602-word brief.

Because the courts of appeals normally refuse to reverse on the basis of an argument raised for the first time in a reply brief, in an appeal with only one appellant one would expect that an argument generating a reversal would likely have been raised in the appellant's brief. But one cannot make the same assumption if the court resolves multiple appeals in one decision (as in the example noted above), or if there are multiple appellants, or if there is a cross-appeal. Professors Sisk and Heise accounted for the third of these possibilities by "conduct[ing] an alternative regression run excluding the twenty-two (22) cross-appeals"; they "found no material differences in the results, other than the variable for Appellee Lawyer Experience moving to marginal significance ...." Sisk & Heise March 2015 draft at 6 n.22; *see also* Sisk & Heise February 2015 draft at 6 n.20. They did not, however, provide similar information concerning the number (or effect on their regression analyses) of multiple appeals or appeals featuring multiple appellants.

[57] Sisk & Heise March 2015 draft at 21; *see also* Sisk & Heise February 2015 draft at 25.

Fourth, in interpreting the study's results one might wish to ask what sorts of dynamics might result in the filing of briefs at the low end and the high end of the length spectrum. At the low end, as the authors observe, appellant "briefs that were conspicuously short fell uniformly on the losing side."[58] When the appellant's opening brief is 3,000 words or less, one might infer that the appellant's counsel has not put in a great deal of effort. At the higher end of the spectrum, the question might be whether the appellant who filed a 14,000-word brief and won would likewise have won after filing a shorter brief. In a complex case, one might expect that the first draft of the appellant's brief may be longer than 14,000 words, and that a skilled attorney will then cut the brief down until it just meets the 14,000-word limit.[59] Given that assumption, we would expect to find a robust number of persuasive briefs that fall just within the word limit – *i.e.*, in the 13,001 - 14,000 word range. Would excising a further portion of such a brief transform a winning brief into a losing one? If so, what amount of further reduction would negate the brief's effectiveness? It seems impossible to answer this question based on the Sisk & Heise study data. One interpretation of the Sisk & Heise findings is merely that counsel on both sides tend to write more in cases where there is a higher chance of reversal. That conclusion is unsurprising. The study does not answer the question whether the results would have changed if everyone had 1,500 fewer words to work with.

3. Data concerning motions to file overlength briefs

Some commentators provided information on local circuit practices with respect to motions to file overlength briefs. I collect that information here, and I supplement it with a list of relevant local circuit provisions. Because the April 1, 2015 hearing included some discussion of case-management and mediation practices in the courts of appeals, I also note data collected on that subject by Professor Marin K. Levy.

Dorothy F. Easley 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."[60] Updated data from the Third Circuit appear in the memorandum included with the comment by the Pennsylvania Bar Association ("PBA"). The memo states in part:

> The Chair of the [PBA's Federal Practice Committee] 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.[61]

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[58] *See* Sisk & Heise March 2015 draft at 17; *see also* Sisk & Heise February 2015 draft at 20.

[59] *See* Comment AP-2014-0002-0037.

[60] Comment AP-2014-0002-0020.

[61] Comment AP-2014-0002-0040.

Data from other circuits are reported in a March 2012 article by Third Circuit Chief Judge Theodore A. McKee:

> [The Third Circuit] Clerk's office informally surveyed the Clerks of other Circuit Courts. Of the 12 Circuits surveyed, 9 Circuits reported that they "rarely" or "almost never" grant motions to exceed the page or word limitations. The Second Circuit, not included in this group, receives fewer than 10 motions a month. The remaining Circuits did not indicate any particular problem or concern with over-length briefs.[62]

Local circuit provisions include the following:

First Circuit Rule 32.4	The First Circuit encourages short, concise briefs. A motion for leave to file an oversized opening brief must be filed at least ten days in advance of the brief's due date, must specify the additional length sought, and must be supported by a detailed statement of grounds. A motion for leave to file an oversized reply brief must be filed at least seven days in advance. Such motions will be granted only for compelling reasons.
Second Circuit Rule 27.1(e)	Motion to File Oversized Brief. (1) Motion Disfavored. The court disfavors motions to file a brief exceeding the length permitted by FRAP 32(a)(7). (2) Explanation Required. A party seeking to file an oversized brief must state the requested length and the reasons for exceeding FRAP's limitations. (3) Time to File. A motion to file an oversized brief must be made at least 14 days before the brief is due. The court will deny an untimely motion absent extraordinary circumstances.

[62] Hon. Theodore A. McKee, Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule, On Appeal, March 2012, at 1-2.

Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure	.... Notice is hereby given that motions to exceed the page or word limitations for briefs are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances. Such circumstances may include multi-appellant consolidated appeals in which the appellee seeks to file a single responsive brief or complex/consolidated proceedings in which the parties are seeking to file jointly or the subject matter clearly requires expansion of the page or word limitations. Accordingly, it is ORDERED that a three-judge Standing Motions Panel is hereby appointed to rule on all motions to exceed the page/word limitations for briefs since the page/word limitations, prescribed by Fed. R. App. P. 32(a)(7), should be sufficient to address all issues in an appeal. It is further ORDERED that Counsel are advised to seek advance approval of requests to exceed the page/word limitations whenever possible or run the risk of rewriting and refiling a compliant brief. Any request to exceed page/word limitations submitted in the absence of such an advance request shall include an explanation of why counsel could not have foreseen any difficulty in complying with the limitations in time to seek advance approval from the panel. This order shall not apply to capital habeas cases.
Fourth Circuit Rule 32(b)	The Fourth Circuit encourages short, concise briefs. An opening or response brief that cites to both the paper appendix and the electronic record may, without motion, exceed the length limitations in FRAP 32(a)(7) and FRAP 28.1(e)(2) by up to 200 words. Briefs may not otherwise exceed the length limitations without the Court's advance permission. A motion for permission to submit a longer brief must be made to the Court of Appeals at least 10 days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons.
Fifth Circuit Rule 32.4	Motions for Extra-Length Briefs. A motion to file a brief in excess of the page length or word-volume limitations must be filed at least 10 days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.

Sixth Circuit IOP 28(a)	Briefs in excess of the lengths provided by the rules are seldom permitted.[63]
Seventh Circuit IOP 1(c)(7)	Motions for "leave to file [an] oversized brief" are "nonroutine."
Seventh Circuit IOP 1(c)(3)	A staff attorney shall read each nonroutine motion (see subparagraph (7)) and then present it to the motions judge and, if necessary, the motions panel. The judge or panel will then advise the staff attorney as to the decision and direct that an order be prepared accordingly. The staff attorney will then prepare the order. If the order states detailed reasons for the decision, the staff attorney will take the original of the order to the motions judge or one of the judges on the motions panel to read and approve. The same procedure will be followed whenever a judge asks to see the prepared order before it is released.
Eighth Circuit Rule 28A(k)	Motions to File Overlength Briefs. Motions for leave to file overlength briefs will be granted only in extraordinary cases. A motion for permission to file an overlength brief must be submitted at least 7 days prior to the brief's due date.
Ninth Circuit Rule 32-2	The Court looks with disfavor on motions to exceed the applicable page or type-volume limitations. Such motions will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the page or type-volume limitations set forth at FRAP 32(a)(7) (A) or (B) must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion. Any such motions shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count. The cost of preparing and revising the brief will not be considered by the Court in ruling on the motion.
Tenth Circuit Rule 28.3	Motions to exceed the word count will be denied unless extraordinary and compelling circumstances can be shown. A motion filed within 14 days of the brief's due date must show why earlier filing was not possible.

[63] *But see* Sixth Circuit Rule 32(b)(2) ("In an application under 28 U.S.C. § 2254 or § 2255 by a person under a death sentence and in an appeal from a federal sentence of death, the briefs may not exceed one-and-a-half times the length allowed by Fed. R. App. P. 32(a)(7)(A) and (B).").

Eleventh Circuit Rule 32-4	.... Motions for leave to file briefs which do not comply with the limitations set forth in FRAP 28.1(e) or FRAP 32(a)(7), as applicable, must be filed at least seven days in advance of the due date of the brief. The court looks with disfavor upon such motions and will only grant such a motion for extraordinary and compelling reasons.
D.C. Circuit Rule 28(e)	Request to Exceed the Limits on the Length of Briefs and for Extension of Time for Filing. (1) The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons. (2) A motion to exceed the limits on length of briefs or to extend the filing time for a brief must be filed at least 7 days before the brief is due. Motions filed less than 7 days before the due date will be denied absent exceptional circumstances, except that the clerk may grant unopposed late filed motions for extension of time that do not affect the oral argument schedule, for good cause shown. (3) Before filing a motion to exceed the limits on length of briefs, or to extend the time for filing, the moving party must attempt to obtain the consent of the opposing side. If consent is not obtained, the moving party must attempt to inquire whether an opposition or other form of response will be filed. The opening paragraph of any such motion must recite the position taken by the opposing party in response to these inquiries, or the efforts made to obtain a response. The following requirements pertain to service (i) on an opposing party who has not consented to electronic service or (ii) for motions to exceed the limits on length of briefs or to extend the time for filing that are not filed electronically. If the opposing side has stated an intention to file an opposition or other response, or has not been reached after reasonable effort, the moving party must serve the motion by hand, or if such service is not feasible, by giving telephone notice of the filing and serving the motion by the most expeditious form of service. If the moving party is unable to effect service by hand or telephone notice at the time of filing, the opening paragraph of the motion must recite the efforts made to do so. (4) Submission of a motion to exceed the limits on length of briefs or extend the filing time for a brief does not toll the time for compliance with filing requirements. Movants will be expected to meet all filing requirements in the absence of an order granting a waiver.

Federal Circuit Rule 28(c)	Motion to File Extended Brief. The court looks with disfavor on a motion to file an extended brief and grants it only for extraordinary reasons. Unless the order granting a motion to file an extended brief provides otherwise, when additional pages or words are allowed in the principal brief of an appellant or cross-appellant, a responsive brief permitted by the rules may contain the same number of additional pages or words.

As to circuits' case-management practices, Professor Levy conducted an in-depth study of the First, Second, Third, Fourth, and D.C. Circuits. In summarizing her findings, she stressed "the complexity, variation, and importance of case-management practices" in these circuits:

> First, all of the circuit courts discussed here engage in screening of some kind. Each circuit routes some of its appeals to an NAC [non-argument calendar] or panel for disposition before the judges have even received the briefs....
>
> Second, these practices vary tremendously, even in a sample composed of just under half of the circuit courts. In the D.C., First, and Fourth Circuits, staff attorneys are heavily involved in the screening process, determining which cases will go on to oral argument and which cases will not. By contrast, in the Second and Third Circuits, staff attorneys play almost no role in screening, apart from reviewing matters for technical defects. All cases that are taken off of the argument track go to special calendars or panels based upon subject-matter criteria that the judges have previously established.
>
> ....
>
> [C]ourts make different determinations about appropriate trade-offs. The Third Circuit has decided that judges, not staff attorneys, should decide whether a case will go to oral argument. Other circuits have concluded that screening is a key way to save judicial time and is an appropriate task for trained staff, with the understanding that judges can always decide later to route a case from the nonargument track to the regular calendar.[64]

Professor Levy also studied mediation programs in the same circuits, and summarized her findings as follows:

[64] Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315, 339 (2011) (footnotes omitted).

> Although the settlement rates of these programs are roughly comparable, the programs diverge on several key points: whether all civil cases are part of the program, whether certain parties are excluded from participating, and who serves as a mediator. The First, Second, and Fourth Circuits automatically send almost all of their civil appeals to mediation; in contrast, the D.C. and Third Circuits select only a subset of civil appeals for their mediation programs. Additionally, most courts do not permit pro se appellants to participate in their mediation programs – the Third Circuit is the only exception among the circuits surveyed here. Finally, in two circuits – the First and Third – parties may have judges acting as mediators, whereas in the others – the D.C., Second, and Fourth – parties have lawyers overseeing mediation. Although none of these individual differences may seem significant, when assessed cumulatively, it is evident that parties in civil appeals are facing quite different settlement programs across the different circuit courts.[65]

4. Data concerning the workload of judges on the U.S. Courts of Appeals

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP (the "Gibson Dunn group") states "that appeals 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."[66] The Gibson Dunn group is correct in noting a 15 percent decrease in filings in the regional U.S. Courts of Appeals[67] over the period from 2005 through 2014. But the current word limits took effect in 1998.

If the goal is to understand how the courts' workload today compares with their workload "when the current word limits were adopted," then it might be informative, as well, to consider filing data from 1997 (when the 1998 amendments received final

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[65] *Id.* at 344.

[66] Comment AP-2014-0002-0044 (citation omitted).

[67] The figures employed in calculating the percentage decrease omitted data for the Federal Circuit. *See* United States Courts, Caseload Analysis, available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx (discussing "[f]ilings in the 12 regional courts of appeals"); Table B, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2013 and 2014, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B00Mar14.pdf ("This table does not include data for the U.S. Court of Appeals for the Federal Circuit. Beginning in March 2014 data include miscellaneous cases not included previously."). There was a 17.5 percent decrease in filings in the Federal Circuit during the same period. *See* United States Courts, Caseload Analysis, available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx .

approval from the Advisory Committee, Standing Committee, and Judicial Conference) and 1998 (when the 1998 amendments took effect). For the 12-month period ending December 31, 1997, the number of filings in the regional Courts of Appeals totaled 52,219.[68] For the 12-month period ending December 31, 1998, the number of filings in the regional Courts of Appeals totaled 54,034.[69] These figures do not appreciably differ from the total number of filings in the regional Courts of Appeals for the 12-month period ending March 31, 2014 – namely, 55,623.[70] Moreover, if it is the case, as many commentators have asserted, that appeals are more likely to be complex now than in 1998,[71] then a similar *number* of filings might actually portend a greater overall workload.

C. Modifications and proposed alternatives

In discussing the proposed reductions in brief length (and the proposed word limits for other documents), commentators suggested ways to alter or supplant those proposals. I summarize those suggestions here.

Like a number of other commentators, the Solicitor General of the United States, on behalf of the DOJ, has expressed concern that the proposed word limits may be too short for some substantive motions (such a motion for summary disposition), for petitions for a writ of mandamus, or for other filings. If those word limits are adopted, the 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."[72]

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[68] *See* Administrative Office of the United States Courts, Federal Judicial Caseload: Recent Trends 17, available at http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf .

[69] *See id.*

[70] *See* Table B, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2013 and 2014, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B00Mar14.pdf .

One might also consider the number of filings per judge. According to Professor Levy, there were 300 filings per U.S. Court of Appeals judge in 1997, and 335 filings per judge in 2010. *See* Levy, *supra* note 64, at 324 & n.44. Professor Levy notes wide variation among the circuits in the number of filings per active judge; for example, "the Second Circuit had approximately 537 appeals per active judge in FY 2010, whereas the D.C. Circuit had only 131 appeals per active judge in the same time period." *Id.* at 332.

[71] *See infra* note 103 (collecting comments). *See also* Comment AP-2014-0002-0044 (stating that "a substantial number of cases in the courts of appeals today are highly complex" and "this complexity is only growing").

[72] Comment AP-2014-0002-0045.

The DOJ makes a similar recommendation with respect to Rule 32's length limits for briefs,[73] urging the Committee "to note, either in the rule text or in the Committee Note, that courts should grant leave to file an over-length brief where circumstances warrant." The DOJ offers the following possible Rule text (which would be a new Rule 32(h)):

> (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 offers the following language for 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.

The DOJ's proposal gives rise to a few drafting issues. First, though the DOJ suggests adding the language quoted above to the Committee Note for Rule 29, neither proposed Rule 32(h) nor the proposed Note language appears to address requests for extra length by amici. The Committee would need to decide whether it wished to include amici in the provision. If so, then it would be better to use a word other than "party" in the Rule text. If not, then I am unsure why the proposed Note language should be added to the Committee Note for Rule 29. (Using a word other than "party" might also remove some doubt that otherwise might arise concerning the provision's application to intervenors; though I would think that "party" should encompass intervenors, it seems possible that some might disagree.) In addition, one might ask whether proposed Rule 32(h) should be limited to the type-volume limits imposed by the Appellate Rules, or whether it should also encompass page limits that apply to a person drafting a filing

[73] Such an approach is also mentioned by Seth P. Waxman, writing 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. Mr. Waxman opposes the proposal to reduce the word limits for briefs. In a footnote, he also states that if the proposal is adopted, then "at a minimum, [the rulemakers should] 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." Comment AP-2014-0002-0048.

without the aid of a computer. Considerations of equal treatment might counsel applying the extension provision to both types of filers. Further, the Committee would need to decide whether the provision should apply only to briefs or whether it should also apply to the length limits for other documents – in keeping with the DOJ's proposed Note language for Rules 5, 21, 27, 35, and 40. Here is a sketch showing some possible alterations to DOJ's proposed Rule 32(h):

> (h) A ~~party~~ person may ~~seek~~ move for leave to file a ~~brief~~ document that exceeds the ~~type-volume limits imposed~~ length permitted by these rules, and courts should grant leave when ~~a party~~ the movant demonstrates that the ~~type-volume limitation~~ length otherwise permitted is insufficient in the specific circumstances of the case.

Alternatively, if the Committee is inclined to proceed with the proposed change in word limits and decides to adopt the DOJ's proposed Note language but not the proposed new Rule 32(h), the following modifications to the DOJ's proposed Note language may be worth considering:

> 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, or otherwise address facets of a complex case, may need to file a brief that exceeds the type-volume limitations specified in these rules.~~, and~~ The Committee expects that courts ~~should~~ will 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 as appropriate.

A number of commentators proposed substitute measures that, they suggest, would better address the problem of prolixity in briefing. Though analysis of these proposals would unduly distend this already-lengthy memo, here is a brief listing of those measures:

- Require a special attestation by counsel concerning the necessity of using 12,501 to 14,000 words.[74]

- Amend Rule 32(a) to state that shorter briefs are preferred.[75]

- Set a special word limit for complex cases.[76]

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[74] *See* Comment AP-2014-0002-0024.

[75] *See* Comment AP-2014-0002-0008.

[76] This is my interpretation of the following statement in Comment AP-2014-0002-0043: "The proposed change to the rules of appellate procedure 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."

- Permit a circuit to shorten the word limits on a case-by-case basis.[77]
- Foster certification standards for appellate specialists.[78]
- Provide better training for appellate advocates.[79]
- Improve briefing by altering font, line spacing, and margins.[80]
- Reduce repetition by altering the structure of the brief (*e.g.*, by deleting the summary of argument).[81]
- Develop a form for pro se briefs.[82]
- Conduct further research.[83]

Commentators offered the proposals listed above as replacements for the proposal to reduce the word limit for briefs. I should note that a few commentators, while supporting that proposed reduction, would go even further.[84]

D. Selection of length limits and conversion ratio

Here, I collect arguments for and against the length limits set out in the published proposals. I address (1) the length limits for parties' briefs; (2) the length limit for amicus briefs; and (3) length limits for other documents.

1. Length limits for parties' briefs

A central question for the Committee is whether to reduce the word limits for parties' briefs and, if so, by how much.

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[77] *See* April 2015 testimony of Charles A. Bird.
[78] *See* April 2015 testimony of Charles A. Bird.
[79] *See* Comments AP-2014-0002-0013 & AP-2014-0002-0015; Comment AP-2014-0002-0026; Comment AP-2014-0002-0032; Comment AP-2014-0002-0041; and Comment AP-2014-0002-0054.
[80] *See* Comment AP-2014-0002-0041.
[81] *See* Comment AP-2014-0002-0041.
[82] *See* April 2015 testimony of Charles A. Bird.
[83] *See* Comment AP-2014-0002-0018; April 2015 testimony of David H. Tennant.
[84] *See* Comment AP-2014-0002-0009 (advocating a single word limit for appellant's opening and reply briefs; "12.5K in overwhelming cases is plenty"); Comment AP-2014-0002-0033 (advocating adoption of a rule to discourage motions for permission to file overlength briefs).

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit;[85] all but one of the active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit;[86] two professional associations;[87] and three non-government lawyers.[88] In addition, the DOJ supports the proposed reduction but proposes an alteration discussed in the previous section of this memo.[89] Commentators supporting a word-limit reduction assert that the current word limits allow more length than is needed to brief a typical appeal.[90] In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and "marginal issues."[91] A tighter word limit, they argue, will drive lawyers to focus "on the core facts and dispositive legal issues."[92] They worry that "[m]assive, 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]."[93] They note that, under the proposals, a circuit would remain free to set longer limits by local rule.[94] And the possibility of moving for leave to file an overlength brief provides a safety valve for cases in which the word limit is too short.

Among the commentators opposing the reduction in brief length limits[95] were one judge;[96] 22 law firms (or practice groups within law firms) or public interest groups;[97] 10

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[85] *See* Comments AP-2014-0002-0014 (the judges of the D.C. Circuit) & AP-2014-0002-0017 (Judge Silberman).

[86] *See* Comment AP-2014-0002-0021.

[87] *See* Comments AP-2014-0002–0036 & AP-2014-0002–0040.

[88] *See* Comments AP-2014-0002–0005, AP-2014-0002–0009, & AP-2014-0002–0033.

[89] *See* Comment AP-2014-0002–0045; *see also* Part III.C.

[90] *See* Comment AP-2014-0002-0005; Comment AP-2014-0002-0009. Some of the commentators who opposing reducing the word limit nonetheless agree that many appeals do not require a brief length of more than 12,500 words. *See* Comment AP-2014-0002-0024; Comment AP-2014-0002-0053.

[91] Comment AP-2014-0002-0017.

[92] Comment AP-2014-0002-0021.

[93] Comment AP-2014-0002-0033.

[94] *See* Comment AP-2014-0002-0036. *See also* Part III.E (discussing proposed revision relating to this topic).

[95] The list in the text omits Professor Sisk, because Professor Sisk does not explicitly state a position on the proposed amendments, though he does make some statements that could be taken as grounds for opposing the proposed amendments. *See* Comment AP-2014-0002-0049; *see also* Part III.B.2 (discussing the Sisk & Heise study).

[96] *See* Comment AP-2014-0002–0006 (Judge Easterbrook). *See also* Comment AP-2014-0002-0040 (enclosing memorandum reporting, inter alia, that two Third Circuit judges expressed concern that shortening the length limit for briefs might lower briefs' quality); Comment AP-2014-0002-0047 (reporting that three Second Circuit judges had "expressed their view that there was no reason to reduce the word count of appellate briefs").

[97] *See* Comments AP-2014-0002-0024; AP-2014-0002-0026; AP-2014-0002-0035; AP-2014-0002-0044; AP-2014-0002-0048 (11 practice groups); AP-2014-0002-0050; AP-2014-0002-0051; AP-2014-0002-0054; AP-2014-0002-0059 (four public interest

professional associations;[98] 19 non-government lawyers;[99] and two government lawyers.[100] Commentators opposing the reduction in word limits assert that the current word limit has been unproblematic since its adoption in 1998. In simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity.[101] These commentators express concern that the full 14,000-word length is necessary to brief a complex, important appeal.[102] A number of commentators assert that appeals today are more likely to be complex than were appeals in 1998.[103] Commentators point to specified types of appeals as particularly necessitating the full 14,000-word length:

- Capital habeas cases.[104]
- Habeas cases generally.[105]
- Criminal cases generally.[106]

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groups).

[98] *See* Comments AP-2014-0002-0015; AP-2014-0002-0018; AP-2014-0002-0019; AP-2014-0002-0025; AP-2014-0002-0027; AP-2014-0002-0039; AP-2014-0002-0041; AP-2014-0002-0047; AP-2014-0002-0053; AP-2014-0002-0058.

[99] *See* Comments AP-2014-0002-0008; AP-2014-0002-0010; AP-2014-0002-0011; AP-2014-0002-0012; AP-2014-0002-0020; AP-2014-0002-0023; AP-2014-0002-0028; AP-2014-0002-0032; AP-2014-0002-0034; AP-2014-0002-0037; AP-2014-0002-0038; AP-2014-0002-0043; AP-2014-0002-0046; AP-2014-0002-0052; AP-2014-0002-0055 (three lawyers); AP-2014-0002-0056; AP-2014-0002-0057.

[100] *See* Comments AP-2014-0002-0022 & AP-2014-0002-0042.

[101] *See* Comment AP-2014-0002-0053.

[102] *See* Comment AP-2014-0002-0008; Comment AP-2014-0002-0011; Comment AP-2014-0002-0012; Comments AP-2014-0002-0013 & AP-2014-0002-0015; Comment AP-2014-0002-0027; Comment AP-2014-0002-0032; Comment AP-2014-0002-0041; Comment AP-2014-0002-0044; Comment AP-2014-0002-0046; Comment AP-2014-0002-0048; Comment AP-2014-0002-0052; Comment AP-2014-0002-0053; Comment AP-2014-0002-0054; Comment AP-2014-0002-0055; Comment AP-2014-0002-0058.

[103] *See* Comments AP-2014-0002-0013 & AP-2014-0002-0015; Comment AP-2014-0002-0025; Comment AP-2014-0002-0026; Comment AP-2014-0002-0035; Comment AP-2014-0002-0039 (describing growing complexity of criminal appeals).

[104] *See* Comment AP-2014-0002-0010. *Cf.* Sixth Circuit Rule 32(b)(2) ("In an application under 28 U.S.C. § 2254 or § 2255 by a person under a death sentence and in an appeal from a federal sentence of death, the briefs may not exceed one-and-a-half times the length allowed by Fed. R. App. P. 32(a)(7)(A) and (B).").

[105] *See* Comment AP-2014-0002-0038.

[106] *See* Comments AP-2014-0002-0013 & AP-2014-0002-0015 ("Criminal defense counsel lack discretion to omit a weak but non-frivolous issue."); AP-2014-0002-0020 (arguing that a tighter word limit could increase the number of habeas or Section 2255 proceedings "because of claimed ineffectiveness in appellate counsel."); AP-2014-0002-0038 ("In California the word limit for a brief in a civil case is 14,000, and in a criminal appeal it is 25,500."); AP-2014-0002-0039 (stating that the complexity of federal

- Workplace discrimination cases.[107]
- Immigration cases.[108]
- Cases involving environmental law.[109]
- Patent cases.[110]
- Telecommunications cases.[111]
- Cases involving securities law.[112]
- Nuclear-regulation or other energy-regulation cases.[113]
- Cases involving large punitive damages awards.[114]

Commentators also highlight particular standards of review as necessitating a detailed discussion – namely, harmless error review[115] and the deferential standards that govern review of agency determinations.[116]

At least one commentator worries that appellants would be disproportionately disadvantaged by the proposed length reduction because their principal briefs have more required components than appellees' principal briefs.[117] As for the appellant's reply brief, some commentators note that the appellant may need space to address matters newly raised in the appellee's principal brief, such as jurisdictional issues or alternative

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criminal cases has increased, due to the substantive law, the inclusion of multiple counts, and the increasing intricacy of sentencing and habeas issues); AP-2014-0002-0051 (noting, inter alia, that collateral review may be unavailable for issues "not adequately preserved on direct appeal"); AP-2014-0002-0056.

[107] *See* Comment AP-2014-0002-0022.

[108] *See* Comment AP-2014-0002-0024.

[109] *See* Comment AP-2014-0002-0034; Comment AP-2014-0002-0043; Comment AP-2014-0002-0059.

[110] *See* Comment AP-2014-0002-0037; Comment AP-2014-0002-0055.

[111] *See* Comment AP-2014-0002-0055.

[112] *See* Comment AP-2014-0002-0042 (SEC General Counsel).

[113] *See* Comment AP-2014-0002-0043.

[114] *See* Comment AP-2014-0002-0050.

[115] *See* Comment AP-2014-0002-0028 (harmless error review "requires the error to be viewed in the context of the entirety of the evidence"); Comment AP-2014-0002-0039 ("[W]e cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial."); Comment AP-2014-0002-0051.

[116] *See* Comment AP-2014-0002-0059.

[117] *See* Comment AP-2014-0002-0050.

grounds for affirmance.[118] Some circuits may impose additional required sections of a brief without exempting those additional sections from the length-limit calculation.[119]

Some commentators note that in some instances involving requests for review of agency action, the court of appeals is the first (and likely only) federal court to review the matter, and that the decision may implicate the public interest. They note as well that administrative records can be lengthy, and that a party may need to challenge multiple discrete aspects of an agency's action.[120]

Cases involving multiple parties per side give rise to a number of concerns. Some commentators point out that where there are multiple parties on a side, a shorter brief length limit may make those parties more likely to file separate briefs.[121] Other commentators, by contrast, worry about the effect on parties who, because they are on the same side of a joint or consolidated appeal, may be required to file a joint brief[122] or may be subjected to reduced length limits.[123] Still other commentators worry about both these effects.[124] And some commentators, conversely, worry about the other side of the equation – i.e., that a reduced brief length will disadvantage a litigant facing multiple opponents.[125]

Those opposing a reduction in briefing length limits note that such a reduction will generate an increase in the number of motions to file overlength briefs, requiring an additional expenditure of litigants' and courts' effort in dealing with those motions. They worry that if such motions are denied (or not made), then there is a risk of

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[118] *See* Comment AP-2014-0002-0052 (noting that the court of appeals can affirm on a ground not addressed by the trial court); April 2015 testimony of James S. Pew.

[119] *See* Comment AP-2014-0002-0059.

[120] *See* Comment AP-2014-0002-0059; April 2015 testimony of James S. Pew.

[121] *See* Comment AP-2014-0002-0037 ("[T]he courts of appeal will ... 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."); Comment AP-2014-0002-0052.

[122] *See* Comment AP-2014-0002-0044.

[123] *See* Comment AP-2014-0002-0059; April 2015 testimony of James S. Pew.

[124] *See* Comment AP-2014-0002-0048 (shorter length limits may result in "an ineffective joint submission, or multiple briefs").

[125] *See* Comment AP-2014-0002-0034 (stating that the defense side in an environmental case may have an aggregate briefing length much longer than that allocated to the plaintiffs because the defense side may include "a state agency intervenor and multiple interest group intervenors"); Comment AP-2014-0002-0052. The DOJ, while not opposing the proposed reduction in word limits, has voiced concern that, inter alia, the shortened word limits would be a problem when the Government needs to "respond in one consolidated brief to briefs filed by multiple criminal defendants" or needs to respond to multiple amicus filings. Comment AP-2014-0002-0045. *See* Part III.C for discussion of the DOJ's proposal for addressing this concern.

inadequate briefing. Whether or not the motions are granted, these commentators worry, they will impose uncertainty, cost, and delay.[126] Commentators point out local circuit provisions indicating that motions for extra length are disfavored,[127] and they observe that some circuits require the motion to be made a specified time in advance of the brief's due date.[128] Commentators also note that adjudication of a motion for extra length may occur at a time when the decisionmaker is unfamiliar with the issues involved in the appeal.[129] Some commentators argue that judges will be less willing to grant extra length to private parties than to the U.S. Government.[130] One concern would be that the institution of shorter limits should be accompanied by greater liberality in granting extra length – but that adjudicating motions for extra length would consume undue amounts of resources.

Opponents of a word-limit reduction voice concern that a shorter length limit will require parties to abandon some issues or else brief them inadequately. Deselecting issues and cutting arguments are dangerous, they report, because even experienced lawyers have trouble predicting which arguments will persuade the court.[131] Predictions are particularly difficult because in most circuits "the identity of panel members is unknown at the time of briefing ...."[132] And if issues are addressed in shorthand instead of cut entirely, commentators warn that inadequate briefing will result either in a finding

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[126] *See* Comment AP-2014-0002-0050:

> [T]he predictable increase in extension requests would add uncertainty and inefficiency to the appellate process. Courts do not typically rule on such requests immediately, and appellants facing tight deadlines would likely be forced to begin preparing briefs before knowing how many words will be allowed. And in courts like the Ninth Circuit that allow parties to tender a proposed brief with the motion for an extension of the due date of the brief, the appeal could be delayed if the motion is denied and the party is forced to shorten the brief.

[127] *See supra* Part III.B.3 (listing relevant local circuit provisions); Comment AP-2014-0002-0054.

[128] *See* Comment AP-2014-0002-0056; April 2015 testimony of David H. Tennant.

[129] *See* Comment AP-2014-0002-0053 (noting that 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"). Mr. Bird expressed concern that in adjudicating a motion for extra length, a court might pre-judge the issues involved in the appeal. *See* April 2015 testimony of Charles A. Bird.

[130] *See* April 2015 testimony of Charles A. Bird; April 2015 testimony of James S. Pew.

[131] *See* Comment AP-2014-0002-0050 ("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."); Comment AP-2014-0002-0051 (reporting that 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").

[132] *Id.*

that the brief-writer has waived the issue,[133] or in additional work for the court to research the relevant issues, or in a request for supplemental briefing, or in an inadequately-informed decision on the merits of the issue. Reducing the length of briefs may deprive the courts of important contextual information[134] and of specialized information of which generalist judges may be unaware.[135] A shorter length limit will hamper the efforts of responsible advocates to remedy inaccuracies and omissions in their opponents' briefs.[136] Commentators assert that adequate space for briefing is all the more important in the light of the increasing rarity of oral argument, and in order for litigants to feel that they have had their day in court.[137]

Moreover, even if a brief can be made shorter without sacrificing persuasiveness, such shortening requires effort and time for which clients may be unwilling to pay.[138] Clients (and trial counsel) may insist upon the inclusion of arguments that could otherwise be omitted.[139] Efforts to further shorten a brief may include undesirable strategies such as over-use of abbreviations.[140] Commentators assert that requiring shorter briefs will not improve the quality of those briefs, and advocate other measures, such as better training for lawyers.[141]

Opponents of a reduction in the word limit for briefs suggest that the perception that briefs became longer after the 1998 amendments stems in part from the fact that the post-1998 Rules require proportionally-spaced font to be 14-point, whereas the pre-1998 Rules permitted 11-point font.[142]

Opponents of the reduction also point out that the U.S. Supreme Court permits 15,000-word merits briefs.[143] There would seem to be two ways in which this fact might be relevant to the choice of word limit for briefs in the courts of appeals. At least one commentator has suggested that the Supreme Court's choice of 15,000 words provides evidence concerning the number of words that approximates a 50-page brief.[144] However, when the Supreme Court in 2007 instituted the 15,000-word limit, it was supplanting a 50-page limit for printed, booklet-format briefs. Since 1999, the Court has

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[133] Cases finding waiver of an issue due to inadequate briefing are easy to find. *See generally* 16AA Fed. Prac. & Proc. Juris. § 3974.1 (4th ed.) (collecting cases).
[134] *See* Comment AP-2014-0002-0050.
[135] *See* Comment AP-2014-0002-0052.
[136] *See* Comment AP-2014-0002-0053; April 2015 testimony of David H. Tennant.
[137] *See* April 2015 testimony of David H. Tennant.
[138] *See* Comment AP-2014-0002-0011 ("Clients can afford only so much editing."); April 2015 testimony of Charles A. Bird.
[139] *See* April 2015 testimony of Charles A. Bird.
[140] *See* Comment AP-2014-0002-0037.
[141] *See supra* Part III.C.
[142] *See* Comment AP-2014-0002-0046.
[143] *See* Supreme Court Rule 33.1(g).
[144] Judge Easterbrook states: "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."

required that merits briefs be printed in booklet format. That briefs printed in booklet format may fit significantly more on a page than do typewritten briefs is suggested by the fact that, prior to 1999, the Supreme Court's length limit for merits briefs was 50 typographically-printed pages or (alternatively) 110 typed, double-spaced pages.

Another question is whether the 15,000-word limit for Supreme Court merits briefs demonstrates cause for similar length in briefs filed in the courts of appeals. Commentators point out that there may be more issues involved in an appeal in the court of appeals, and that there may be more need for detailed discussion of the record.[145] One might also ask whether the workload of the Justices is comparable to that of judges on the courts of appeals. Though an answer to that question lies beyond the scope of this memo, it is evident that the composition of the Supreme Court's workload differs markedly from that of the workload of the courts of appeals, in ways that might afford the Justices more time to spend reading merits briefs in the roughly 100 cases per Term in which the Court grants plenary review.[146]

2. Length limits for amicus briefs

Though most commentators focused on the length limits for parties' briefs, three commentators argued that the published proposals would unduly constrict the length of amicus briefs. (Rule 29(d) sets the limit for an amicus brief at "no more than one-half the maximum length authorized by these rules for a party's principal brief," which means that decreasing the word limit for parties' principal briefs from 14,000 words to 12,500 words would likewise decrease the limit for amicus briefs – from 7,000 words to 6,250 words.)

Anne K. Small, General Counsel of the SEC, expresses concern that a shorter length limit for amicus briefs could impair the SEC's ability to explain complex factual and legal issues as an amicus in private securities litigation.[147] Richard A. Samp of the

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[145] *See* Comment AP-2014-0002-0006; Comment AP-2014-0002-0048 (merits briefs in the Supreme Court "address[] what is often a single question of law (and usually in a clean vehicle)").

[146] The Court's website offers this information:

> The Court's caseload has increased steadily to a current total of more than 10,000 cases on the docket per Term. The increase has been rapid in recent years. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in about 100 cases per Term. Formal written opinions are delivered in 80 to 90 cases. Approximately 50 to 60 additional cases are disposed of without granting plenary review. The publication of a Term's written opinions, including concurring opinions, dissenting opinions, and orders, approaches 5,000 pages. Some opinions are revised a dozen or more times before they are announced.

The Justices' Caseload, available at http://www.supremecourt.gov/about/justicecaseload.aspx .

[147] *See* Comment AP-2014-0002-0042.

Washington Legal Foundation states that, in his experience, the courts of appeals do not grant requests by amici for extra briefing length.[148] He also argues that amici have incentives to self-limit the length of their briefs because judges are not required to read them.[149]

Jeffrey R. White of the Center for Constitutional Litigation argues that 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 ...."[150] He also argues that 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.[151]

Mr. Samp asserts that "[b]efore 1998, the page limit on amicus briefs was 30 pages," and based on that assertion, he 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 factual premise for Mr. Samp's proposal appears to be erroneous. As far as I can tell, prior to 1998 there was no national rule limiting amicus brief length, unless one assumed that the limit for party briefs applied to amicus briefs. In 1993 the then-Reporter to the Appellate Rules Committee wrote in a memorandum that

> Rule 29, governing a brief of an amicus curiae is curiously sketchy. The rule provides that an amicus brief may be filed by a non-governmental party only with consent of all other parties or by leave of the court. It further provides that an amicus brief generally must be filed within the time allowed the party whose position the amicus supports. Lastly, it states that an amicus curiae will be allowed to participate in oral argument only in extraordinary circumstances. Rule 29 does not specify the length of an amicus brief or its contents.
>
> The Report of the Local Rules Project noted that five circuits have local rules that establish page limits for an amicus brief. The Report listed those rules as inconsistent with the federal rules on the assumption that failure to treat an amicus brief differently than other briefs means that an amicus brief is subject only to the ordinary page limitation established in Rule 28.[152]

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[148] *See* Comment AP-2014-0002-0046.

[149] *See id.*

[150] Comment AP-2014-0002-0035.

[151] *Id.*

[152] Memorandum from Carol Ann Mooney to Honorable Kenneth F. Ripple, Chair, and Members of the Advisory Committee on Appellate Rules and Liaison Members, regarding Item 91-24, Amendment of Fed. R. App. P. 29 to include page limits for

After describing a proposal by the Fifth Circuit to amend the Appellate Rules' treatment of amicus briefs, the memo continued: "The Advisory Committee briefly discussed the Fifth Circuit's suggestion at its December 1991 meeting. The Committee consensus was that a court has authority to refuse an amicus brief and the subsidiary authority to limit any amicus brief that the court chooses to permit. The Committee concluded that it would place the suggestion on the agenda for future discussion."[153]

The 1998 amendment to Rule 29 added Rule 29(d), which presumptively sets the length of an amicus brief at one-half the length set by the Rules for the party's principal brief. The 1998 Committee Note to Rule 29(d) states:

> This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Although I hesitate to assert that the 1998 Committee Note fully summarizes the Committee's prior deliberations, and I have not had time to look at the underlying Committee records, it seems likely that the idea behind the 1998 amendment was that one-half of the length accorded to the party was an appropriate default length for an amicus.

3. Conversion ratio for documents other than briefs

A number of commentators voiced support for adopting word limits for documents other than briefs.[154] But while two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published,[155] six

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and contents of an amicus brief, September 4, 1993, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/AP1993-09.pdf .

[153] *Id.*

[154] *See* Comment AP-2014-0002-0006; Comment AP-2014-0002-0022; Comment AP-2014-0002-0026; Comment AP-2014-0002-0035; Comment AP-2014-0002-0036; Comment AP-2014-0002-0057.

A dissenting view was voiced by 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). Ms. Dwyer 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 published proposals' "more exacting limits" and by asserting a lack of"evidence that lengthy petitions for permission to appeal have presented a problem for the Court," Ms. Dwyer suggests that the type/volume limits would shorten the existing length limits for these documents. And she suggests that checking for compliance with type/volume limits would be burdensome. *See* Comment AP-2014-0002-0016.

[155] *See* Comments AP-2014-0002-0036 & AP-2014-0002-0040.

professional associations,[156] two law firms or practice groups,[157] three private lawyers,[158] and one government lawyer[159] voiced opposition to the choice of word limits in those rules. Additionally, the Ninth Circuit Court of Appeals' Executive Committee voiced opposition to the proposed type-volume limits in Rules 5, 21, and 27,[160] and one professional association voiced opposition to the proposed type-volume limits in Rules 5. 21, 35, and 40.[161] Some ten of these commentators argued that the page-to-word conversion ratio should be 280 words per page or more,[162] rather than the 250 words per page employed in formulating the published proposals.[163]

Evidence indicating that lawyers could fit more than 250 words on a page under the pre-1998 Appellate Rules by using a proportionally spaced typeface seems inapposite if the goal is to produce a words-per-page estimate that approximates *current* practice. Prior to the 1998 amendments, attorneys could use 11-point font when producing briefs or other documents.[164] Since 1998, Appellate Rule 32(a)(5) has provided that "[a] proportionally spaced face must be 14-point or larger," and this requirement applies not only to briefs but also to other documents.[165] Accordingly, evidence concerning the number of proportionally-spaced words that could fit on a page in compliance with the pre-1998 form requirements does not show how many words can fit on a page under the current Appellate Rules.

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[156] *See* Comments AP-2014-0002-0015; AP-2014-0002-0019; AP-2014-0002-0025; AP-2014-0002-0027; AP-2014-0002-0039; and AP-2014-0002-0058.
[157] *See* Comments AP-2014-0002-0026 & AP-2014-0002-0035.
[158] *See* Comments AP-2014-0002-0008; AP-2014-0002-0020; and AP-2014-0002-0037.
[159] *See* Comment AP-2014-0002-0022.
[160] *See* Comment AP-2014-0002-0016 (discussed in footnote 154, *supra*).
[161] *See* Comment AP-2014-0002-0053.
[162] *See* Comment AP-2014-0002-0015 ("no less than 280 words per page, rounded up to the nearest sensible number"); Comment AP-2014-0002-0019 (280 words per page); Comment AP-2014-0002-0022 (280 words per page); Comment AP-2014-0002-0025 (280 words per page); Comment AP-2014-0002-0027 ("at least 280 words per page"); Comment AP-2014-0002-0035 ("280 words per page"); Comment AP-2014-0002-0037 ("at least 280 words per page, and preferably ... 300 words per page"); Comment AP-2014-0002-0039 (advocating use of "the 280-words formula (... without regard to its typographical accuracy)"); Comment AP-2014-0002-0053 (advocating use of "the current conversion rate of 280 words per page"); Comment AP-2014-0002-0058 (same).
[163] *See* Comment AP-2014-0002-0026 (asserting that the 250 words per page conversion ratio is too low).
[164] As to briefs, the pre-1998 Appellate Rule 32(a) provided in part: "All printed matter must appear in at least 11 point type on opaque, unglazed paper." As to other documents, the pre-1998 Appellate Rule 32(b) provided in relevant part: "Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced."
[165] Documents other than briefs must comply with, inter alia, the requirements of Appellate Rule 32(a)(5). *See* Appellate Rules 32(c) & 27(d)(1)(E).

As to evidence concerning the number of words per page in filings under the current Appellate Rules, the ABCNY Federal Courts Committee reports that its members looked at recent appellate briefs and found that "[t]ypical appellate briefs using 14 point typeface average 240 words per page"; the comment also notes that "use of 11 point typeface, as permitted before the 1998 amendments, would yield significantly more words per page." Because the 240-word-per-page figure is based on a study of *briefs* rather than other documents, and because those briefs presumably relied upon the type-volume limits rather than any page limits, the 240-word figure presumably reflects the number of words that fit naturally on a page when the writer has no motive to limit the number of pages. If one were to look at the number of words per page in filings currently governed by page limits, one might well find a considerably greater number of words per page; one commentator suggests as much based on anecdotal information.[166]

That is to say, under the current Appellate Rules, if a litigant's non-brief document exceeds the applicable page limit, the litigant has three options: (1) edit the document down; (2) seek leave for extra length; or (3) use formatting changes (e.g., footnotes, block quotes) to cut the number of pages. Switching from page limits to word limits would remove option (3). The debate over the choice of conversion rate thus appears to reflect the view that a conversion rate reflecting the number of words that fits naturally on a page would effect a reduction in the length that an advocate can obtain under the current Rules through the use of formatting changes. A number of commentators do not like the practice of manipulating page limits through the use of such formatting changes, and thus support in principle the idea of word limits; but these commentators would like the word limit to be one that reflects the number of words that one can currently fit on a page through the use of those formatting changes.

Ultimately, the question for the Committee is whether a conversion rate that reflects the number of words that fit naturally on a page, without manipulation, suffices for the sorts of documents governed by Rules 5, 21, 27, 35, and 40. Commentators advocating a conversion ratio greater than 250 words per page argue that the issues addressed by these documents can be complex and important[167] – a view shared even by some who do not oppose the published proposals' choice of word limits.[168]

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[166] *See* Comments AP-2014-0002-0013 & AP-2014-0002-0015.

[167] *See* Comment AP-2014-0002-0019; Comment AP-2014-0002-0053 (arguing that petitions for panel rehearing and/or rehearing en banc need adequate length 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"); *id.* ("We take no position on the other aspects of the proposed changes ... , including the proposed word count limits for motions under Rule 27 ....").

[168] *See* Comment AP-2014-0002-0045 (Donald B. Verrilli, Jr., on behalf of the DOJ, expressing concern that 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, and for other filings). *See also* Part III.C, discussing the DOJ's proposal for addressing this concern.

E. Local opt-out

The Appellate Rules state explicitly that a court of appeals has authority to adopt local rules that would set length limits longer than those in Rule 32(a). Rule 32(e) states: "Every court of appeals must accept documents that comply with the form requirements of this rule. 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." In the course of the Committee's discussions of the length-limits proposals, it was noted that Rule 28.1 does not include a similar provision. Participants in the Committee's discussions stressed that, if the length limits for briefs are to be shortened, the Rules must make explicit a circuit's authority to set a longer limit by local rule (as well as by order in a case).

Here is a sketch of an amendment to Rule 32 that would accomplish that goal:

> (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.

I suggest amending Rule 32(e) because it seems useful to treat the question of local-rule opt-outs in one centralized section. That approach would be consistent with the centralization of the list of exclusions in Rule 32(f) and the certificate provision in Rule 32(g). Adding references to "the length limits set by these rules" would make clear that this rule applies to length limits throughout the Appellate Rules.[169] The added language would make clear that a court of appeals cannot adopt a local rule shortening *any* of the length limits set by the Appellate Rules,[170] but can *expand* any of those limits either by local rule or by order in a case.

IV. Analysis – other features

Commentators also discussed other possible changes to the published proposals. I address here (A) line limits; (B) page limits for computer-prepared briefs; (C) exclusions from the length calculations; (D) an update to a cross-reference; (E) whether to define "monospaced face"; and (F) the effective date of the proposed amendments.

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[169] The current Rule's reference to "the form requirements of this rule" encompasses the length limits set in Rule 32(a)(7), because those limits are part of Rule 32(a)'s treatment of requirements of form. But the reference does not appear to encompass the length limits set by other Rules.

[170] A court of appeals would still be able to shorten a length limit by order in a given case. Rule 2 provides: "On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."

A. Deletion of line limits

Steven Finell proposes that length limits for computer users should be expressed solely in numbers of words and that the alternative line limits should be deleted. This suggestion makes eminent sense with respect to the length limits for documents other than briefs; however, different considerations apply to the length limits for briefs.

There appears to be consensus that those who use a computer to prepare a document will use a word-counting program, not a line-counting program, to determine the document's length. At the April 2015 hearing, I asked the witnesses whether there would be any disadvantage to deleting the line limits and relying solely on word limits, and the consensus among the witnesses was that there would be no disadvantage. Line limits, it seems, would only be useful to one who prepared a document on a typewriter rather than a computer. However, as to documents other than briefs, the proposed amendments would not offer a non-computer-user the option of a line limit. Accordingly, the line limits in the proposed amendments to Rules 5, 21, 27, 35, and 40 appear unnecessary and I propose that they be deleted. It might, of course, be asked whether one should make line limits available to non-computer-users rather then entirely deleting the line limits from these rules. However, the type-volume limits for documents other than briefs were designed to be equivalent to the length that a non-computer user would be allowed under the corresponding page limits. And the amendments would not alter the existing page limits in Rules 5, 21, 27, 35, and 40 (though the amendments would make those page limits available only to non-computer-users). The Committee has received no information to suggest that the absence of alternative line limits in the existing rules inconveniences non-computer users. Accordingly, it would seem to make sense to delete the line limits from proposed Rules 5, 21, 27, 35, and 40.

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. As the 1998 Committee Note explained:

> Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters.... Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed.

That is to say, 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. The rulemakers designed Rule 32(a)(7)(B)'s line-limit provision with that fact in mind: "The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a

person without a personal computer. The aim of these provisions is to create a level playing field." As the Committee Note further observed, "[t]he number of lines is easily counted manually."

Accordingly, if the Committee were to delete the line limits from Rules 28.1 and 32(a)(7)(B), then it would seem necessary to restructure the page limits in those rules so that the page limits (1) were longer and (2) were available only to non-computer-users. The alternative is to retain the line limits in Rules 28.1 and 32(a)(7)(B), while deleting the line limits from the length-limit rules governing documents other than briefs.

If the Committee chooses to retain line limits in Rules 28.1 and 32 but not elsewhere, then the following changes would seem necessary or desirable:

- Delete line limits from the text of Rules 5, 21, 27, 35, and 40
- Change the Committee Notes to Rules 5, 21, 27, 35, and 40 to refer to "word limits" rather than "type-volume limits" and to delete references to line limits
- Revise the subtitles of Rules 5(c), 21(d), 27(d), and 27(d)(2) to refer consistently to "length limits" rather than "page limits."
- Revise Form 6 to account for the facts that Rules 28.1 and 32 would use type-volume limits but that the other rules would use word limits. Revise the line-count-related options to refer to "briefs" rather than "documents."

Out of concern for the length of this memo, I sketch here only the changes to the text of the Rules and Form:

Rule 5. Appeal by Permission

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(c) Form of Papers; <u>Length Limits;</u> Number of Copies. 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. <u>Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):</u>

<u>(1) a handwritten or typewritten paper must not exceed 20 pages; and</u>

<u>(2) a paper produced using a computer must comply with Rule 32(g) and not exceed 5,000 words.</u>

* * * * *

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

* * * * *

(d) Form of Papers; Length Limits; Number of Copies. 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 handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed 7,500 words.

Rule 27. Motions

* * * * *

(d) Form of Papers; ~~Page~~ Length 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 handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) a motion or response to a motion produced using a computer must comply with Rule 32(g) and not exceed 5,000 words;

(C) a handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) a reply produced using a computer must comply with Rule 32(g) and not exceed 2,500 words.

* * * * *

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 handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(g) and not exceed 3,750 words.

(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.

* * * * *

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 handwritten or typewritten petition for panel rehearing must not exceed 15 pages; and

(2) a petition for panel rehearing produced using a computer must comply with Rule 32(g) and not exceed 3,750 words.

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: _____

B. The alternative of page limits for computer-prepared briefs

Mr. Finell suggests that Rules 28.1 and 32 should be revised so that computer users do not have the option of using the page limits for briefs. He states that 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."

Implementing Mr. Finell's suggest would require some additional drafting. The facially simplest method would be to restructure Rules 32(a)(7) and 28.1(e) so that each rule sets separate limits for "handwritten or typewritten" briefs, on the one hand, and "briefs produced using a computer," on the other. But, as noted in the preceding section of this memo, that method would be unfair to non-computer-users unless the page limits were substantially increased. Otherwise, it would be necessary to revise Rules 32(a)(7) and 28.1(e) in a way that preserves the option of line limits for briefs prepared without a computer. One might achieve this goal by inserting a new subsection in each rule to state the ground rules for each type of brief. Here is a sketch of such a change to Rule 32(a)(7):

(7) Length.

(A) Applicable Limits. A handwritten or typewritten brief must comply with Rule 32(a)(7)(B) or (C). A brief produced using a computer must comply with Rule 32(a)(7)(C).

~~(A)~~ (B) 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)~~ (C) Type-Volume Limitation.

(i) A principal brief is acceptable if it complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~ 12,500 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 complies with Rule 32(g) and contains no more than half of the type volume specified in Rule ~~32(a)(7)(B)(i)~~ 32(a)(7)(C)(i).

The question for the Committee is whether there is sufficient evidence that computer users are mis-using the page limits, such that eliminating the page limits for computer users is worthwhile.

C. Exclusions from the length limits

The proposal to centralize the list of excluded items in new Rule 32(f) did not attract much attention, though some commentators voiced support for this change.[171]

NACDL suggests that proposed Rule 32(f)'s "listing of excluded portions" should be augmented to include "any required statement of related cases in a brief."[172] Because the Appellate Rules do not require a statement of related cases, the issue posed by this suggestion is whether Rule 32(f)'s list of exclusions should include items that are not required by the Appellate Rules but that might be required by a local circuit provision. Rule 32(f), as published, permits local circuit rules to add to the list of excluded items, but it does not require a circuit that imposes an additional content requirement to exclude that required item from the length limits. Some added requirements might merit exclusion from the length limit, but others may be sufficiently entwined with the merits of the brief that they do not merit exclusion. The question for the Committee is whether the national Rule should seek to manage this issue in detail. Perhaps language might be added to the Committee Note encouraging circuits to exclude from the length limits items that are separate from the merits discussion in the brief.

NACDL also suggests that "[f]or similar reasons, the required statement justifying en banc review under Rule 35(b) should be excluded from the word-count in a rehearing petition."[173] NACDL does not indicate in any detail what those reasons are. The Appellate Rules Committee previously discussed this issue at its spring 2014 meeting:

> The Reporter asked whether the Committee wished to include – among the items to be excluded when computing length – the Rule 35(b)(1) statement concerning the reasons for en banc hearing or rehearing. An attorney participant suggested that the statement should be excluded from the length limit because such statements tend to be short. An appellate judge member disagreed, explaining that this statement is the heart of the petition for en banc rehearing. Nothing, this judge member said, requires the statement to be formulaic; and excluding the statement from the length limit might tempt lawyers to expand the statement. Mr. Gans agreed with the appellate judge member's prediction. The Reporter, noting that the

[171] *See* Comment AP-2014-0002-0053.
[172] Comment AP-2014-0002-0039.
[173] *Id.*

> local-rule equivalent of this statement is excluded from the length limit in the Eleventh Circuit, asked whether lawyers in that circuit abuse that exclusion by expanding the statement. An appellate judge member said that they do not.[174]

It is not apparent that NACDL's comment provides a rationale for departing from the Committee's prior decision to include the Rule 35(b)(1) statement for purposes of the length calculation.

D. Updating a cross-reference

Steven Finell 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).'"

I appreciate Mr. Finell's catching this error. I would propose a slightly different solution. It seems unnecessary to mention Rule 32(g) in Rule 32(a)(7)(A), given that the published proposal would revise Rule 32(a)(7)(B) to require compliance with Rule 32(g). Accordingly, it suffices simply to delete from Rule 32(a)(7)(A) the reference to Rule 32(a)(7)(C). Here is Rule 32(a)(7)(A), marked to show this correction:

> **(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)~~.

E. Defining "monospaced face"

Judge Newman notes that the Rules do not define "monospaced face," and suggests that the term should be defined, "now that it will be used in several places." If, as suggested above, the Committee decides to remove the proposed line limits from Rules 5, 21, 27, 35, and 40, then the impetus for this suggestion dissipates. If a non-computer-user is confused by the reference to "monospaced face" in Rules 28.1(e)(2) and 32(a)(7)(B), a call to the Circuit Clerk's office will provide clarification. Given that the Committee has heard no reports from the Circuit Clerks that litigants are confused by the references to "monospaced face" in Rules 28.1 and 32, adding a definition seems unnecessary.

F. Effective date

One commentator suggests taking care to ensure that new length limits, when adopted, should take effect only as to appeals commenced after the effective date – so as to avoid applying the old limit to an appellant and the new limit to an appellee in the same appeal.[175] This helpful suggestion accords with the pre-existing custom for

[174] Minutes of Advisory Committee on Appellate Rules, April 28 and 29, 2014.
[175] *See* Comment AP-2014-0002-0036.

Appellate Rules amendments; typically, the Supreme Court order adopting amendments to the Appellate Rules will state that the amendments "shall take effect on December 1, 201x, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." I think that customary language should address the commentator's concern, because I doubt that any court would find it just to apply different versions of the length-limits rules to different parties in the same appeal.

Encls.

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TAB 5D(1)

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United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

April 10, 2015

Professor Catherine T. Struve
Reporter
Judicial Conference Advisory Committee on Appellate Rules
By e-mail

Re: Word Count Information

Dear Professor Struve:

I want to provide you with a summary of the information I have gathered concerning word counts in briefs and petitions for rehearing. Please feel free to include this memo in the materials for our upcoming meeting on April 23 and April 24.

You will recall that my original memo from September, 2013 reported on the word counts in all attorney-prepared principal briefs filed in the Eighth Circuit during the 2008 calendar year (principal briefs are appellant's opening brief and appellee's responsive brief). A question had arisen as to whether the briefs in argued cases might be longer than briefs in general, so I ran another report counting the number of words in attorney-filed principal briefs in cases which were orally argued in the Eighth Circuit during the 2008 calendar year. Judge Colloton also asked me to provide these data sets for another calendar year, and I selected 2014. Additionally, I contacted all of the other circuit clerks and asked them if they collected word count data for briefs. The D.C. Circuit is the only other circuit which collects word count data for briefs, and they provided me with the word counts for attorney-filed briefs received during the 2014 calendar year. The D.C. Circuit could not, however, provide the length of attorney-filed briefs in cases argued in 2014.

Please note that the data sets for briefs filed in a calendar year and briefs in cases argued during a calendar year do not wholly overlap, as cases argued in a particular year are a mix of cases filed from the current and previous years and not all briefs filed in a given year are in cases which will be argued that year. I have arranged the data from the Eighth Circuit and the D.C. Circuit in the following chart.

8th Circuit Data	14,000+ words	14,000-12,500	Less than 12,500
2008 Briefs (1,175 briefs)	32 briefs (3%)	180 briefs (15%)	963 briefs(82%)
2008 Argued Cases (781 briefs)	33 briefs (4.2%)	149 briefs (19%)	599 briefs (76.8%)
2014 Briefs (1,143 briefs)	29 briefs (2%)	181 briefs (12.5%)	1,233 briefs (85.5%)
2014 Argued Cases (698 briefs)	19 briefs (2.7%)	133 briefs (19%)	546 briefs (78.3%)
D.C. Circuit Data	14,000+ words	14,000-12,500	Less than 12,500
2014 Briefs (749 Briefs)	29 briefs (3.9%)	173 briefs (23%)	547 briefs (73.1%)

I also performed a word count on a sampling of petitions for rehearing filed in the Eighth Circuit. I should note that no circuit collects word count data for motions or petitions for rehearing, and this information can only be obtained by manually counting words. For our sampling, I ran a report of the attorney-prepared petitions for rehearing filed in the last four months of 2014. Six of my deputy clerks and I were each assigned a set of the petitions. We each selected four petitions at random from our set of attorney-filed petitions and counted the words on three representative pages, which I defined for the deputies as fully printed pages in the body of the petition. No attempt was made to include or exclude pages with block quotes or footnotes. We examined a total of 84 pages of petitions for rehearing, and we found that the average number of words per page was 255. We found as many as 329 words per page and as few as 198. In most petitions, the word count per page fell between 245 and 260 words per page.

I hope this information is useful. If I can be of any further assistance before the April 23-24 meeting, please let me know.

Sincerely,
Michael E. Gans
Clerk of Court

cc: Judge Steven M. Colloton

TAB 5D(2)

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Length Limits Proposals

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8dt5-bbj7
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0003
Comment from Hon. Jon O. Newman

Submitter Information

Name: Jon Newman
Organization: NA

General Comment

I suggest 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."
Several of the proposed amendments us the term "monospaced face." 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. The term is not in the standard dictionary in my chambers. Moreover, its meaning is not self-evident. The prefix "mono-" means "one." The literal definition "one-spaced face" does not convey the thought that the width of the character and the adjacent space is equal for all characters.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8dvo-h0za
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0004
Comment from Richard A. Ferraro, Azymuth Telecommunications/Tailgent

Submitter Information

Name: Richard A. Ferraro
Organization: Azymuth Telecommunications/Tailgent

General Comment

As a rulemaking participant in Global Aviation Standards (SARPS) review before FRAC (final review and comment) With notice and review undertaken with further comments TBD, I have noticed the word BRIEF changed to DOCUMENT in draft, should this not be "GLOBAL in the change up" of the - entire document? remaining common throughout. I am
a future proposed Appellate appeals filer in General Motors Et, Al. Donald J. Keeler Richard A Ferraro executor distribute
interested in appeals process "post rulemaking" markup changes. Reason appeal (misspelling of Plaintiff name post Judicial decision by Honorable Justice of asset in-recovery loss mitigation status by debtor assignment) would this be consist throughout said Document.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8dx4-3mbe
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0005
Comment from Robert Markle, NA

Submitter Information

Name: Robert Markle
Organization: NA

General Comment

As an appellate practitioner, 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. Behemoth briefs are an imposition on the court as well as on opposing counsel. And they are typically less effective than those that are succinct.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8e9t-ygbv
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0006
Comment from Frank Easterbrook, NA

Submitter Information

Name: Frank Easterbrook
Organization: NA

General Comment

The replacement of page limits with word limits in all Rules of Appellate Procedure is sensible.

The question remains what these limits should be. Comment C (pages 17-18 of the booklet) states that the existing 14,000-word limit for principal briefs, from which other limits are derived, "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark." That statement of the number's origin is incorrect.

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 calculationand 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.

Old Fed. R. App. P. 32 allowed 50-page briefs. Until the advent of word processing and desktop publishing, that meant printed briefs. So I set out to determine how many words were present in a 50-page printed brief, because that was the effective maximum for a brief prepared by a lawyer determined to be as verbose as (legitimately) allowed. I downloaded approximately 50 briefs that had been filed in the Supreme Court and determined (using Microsoft Word) how many words the average 50-page brief contained. That turned out to be a little under 14,000. That's where Seventh Circuit Local Rule 32 came from, and derivatively where the number in Fed. R. App. 32 (1998 version) came from.

When the Advisory Committee took up this subject, I alerted it that the same word-count process on briefs law firms produced without printing yielded about 13,000 words. An active discussion ensued about which number to use. The Advisory Committee voted overwhelmingly to use 14,000 words, thinking it best to err on the side of generosityif only because that would curtail the number of motions that counsel would file seeking permission to go longer. Members 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.

That's all history. Today the question is not where 14,000 words came from but whether it is the right number. I continue to think it a suitable cap for a brief that can be filed without special permission. Most briefs filed in the Seventh Circuit are shorter; allowing lawyers who think that they need 14,000 words to use them, without filing a motion, is sensible.

Although Comment C does not mention this, the Supreme Court has made its own conversion from page limits to word limits. It 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.

Frank H. Easterbrook

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8eal-f18e
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0008
Comment from Louis R Koerner Jr, NA

Submitter Information

Name: Louis R Koerner Jr
Organization: NA

General Comment

I do a great deal of appellate work in the 5th Circuit that often includes rehearing applications. A constant overriding factor that I keep in mind at all time is word length. I have been successful in keeping my briefs within the word limitations but just barely as most of the cases that I involved in are complex and even 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.
Thanks for the opportunity to comment. I do not think that the system is broken and that it does not need to be fixed.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8eb4-ff2b
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0009
Comment from Hirbod Rashidi, NA

Submitter Information

Name: Hirbod Rashidi
Organization: NA

General Comment

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). Nevertheless, if the page limit is 14k and the opening brief comes close to that, then the appellant will need to seek permission and give good reason why additional briefing should be allowed in rebuttal. Whereas if appellant's opening brief is 10K words, then he/she will have 4k words reserved for rebuttal. This would not only keep briefing at a more reasonable word court, but would also put the litigants in a more equal footing with their filings.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ebz-ta03
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0010
Comment from Joshua Lee, NA

Submitter Information

Name: Joshua Lee
Organization: NA

General Comment

As an appellate practitioner, I strongly oppose the proposal to reduce the volume limits for appellate briefs. 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.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8epy-7i3o
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0011
Comment from John J. White, Jr., NA

Submitter Information

Name: John J. White, Jr.
Organization: NA

General Comment

See attached file(s)

Attachments

Shorter briefs may be better.redline

FRAP comment letter

Shorter briefs may be better. But, only when they're not. Reducing the word limit by over 10% won't reduce cases' complexity, nor the number of potential errors below. The lower word limit will probably do several things. Lawyers will ask for more words more often, and when they don't, they'll scour briefs to save a word here and there. Preposition use will increase. "The holding of the court in *Jones*. . ." will be replaced by "the *Jones* Court's holding," saving three words. Contractions can be effective because that's how people actually talk. But, contractions don't appear often in formal legal writing.[1] Faced with paring sentences or abandoning arguments, lawyers will save arguments first.

The adage, "If I had more time, I would have written a shorter letter" applies to briefs.[2] Clients can afford only so much editing. I can speak only to our practice and the practice of appellate attorneys I know. Nearly all lawyers would like our briefs shorter and clearer. We want to make it easy for the appellate court to rule our way. The lower courts rarely commit error in simpler cases. Errors happen in harder cases. We want the appellate court to understand the issues fully. That means background and explanation.

Inadequately briefed arguments are waived, properly so. Shorter word limits mean that some arguments don't get made. I've practiced long enough to have seen arguments that I'd have abandoned in a shorter brief win the day.

The current word limit has seemed about right for most cases I've worked on. Substantially shorter limits seemed disconnected from the reality of practice and the issues that need presenting to appellate courts.

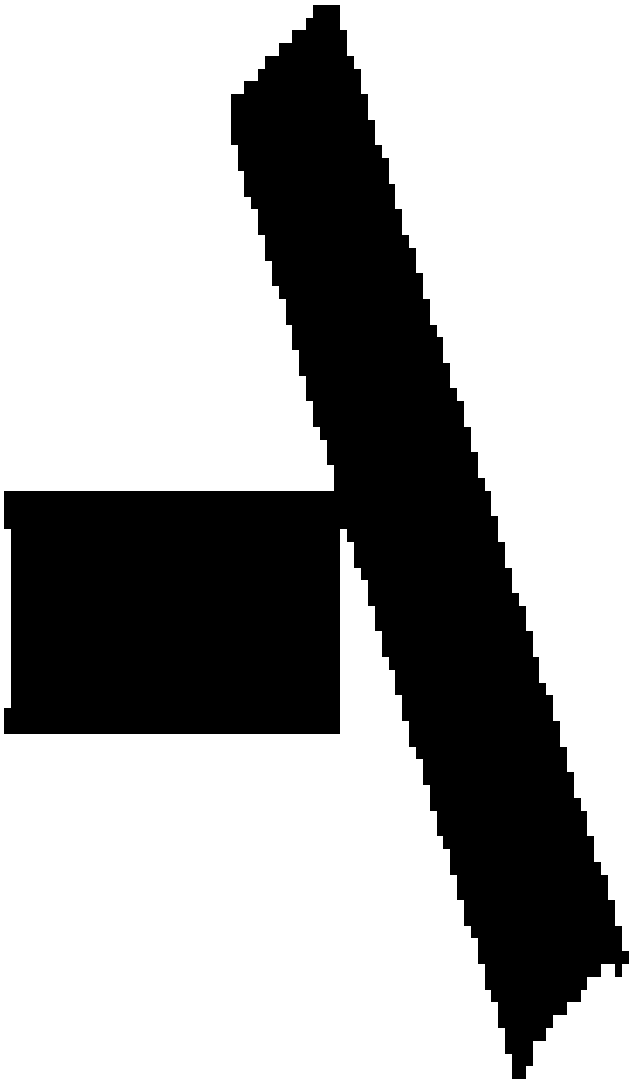
I have attached a redline version of this letter. Some improved the letter; others just saved words. All took time.

Deleted: are
Deleted: more than
Deleted: will not
Deleted: the
Deleted: of cases before the courts
Deleted: do not seek overlimit briefs
Deleted: will be
Deleted: ing
Deleted: is
Deleted: most
Deleted: do not
Deleted: assignments of error
Deleted: try to
Deleted: with equal force
Deleted: of us
Deleted: to make
Deleted: Court of Appeals
Deleted: make really big mistakes
Deleted: Mistakes
Deleted: Court of Appeals
Deleted: , and that
Deleted: ning the
Deleted: will
Deleted: just do not
Deleted: have
Deleted: would
Deleted: turn out to
Deleted: in which I have been involved
Deleted: the Courts of Appeals
Deleted: of the edits

[1] *But see Institute for Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940, 942 (9th Cir. 2013).

[2] The adage's origin is debated. *See* http://quoteinvestigator.com/2012/04/28/shorter-letter/ (last visited October 3, 2014).

Deleted: (" You don't need a peg leg or an eye patch.")
Deleted: of the adage



Alskog

April 23-24, 2015

Inadequately briefed arguments are waived, properly so. Shorter word limits mean that some arguments don't get made. I've practiced long enough to have seen arguments that I'd have abandoned in a shorter brief win the day.

The current word limit has seemed about right for most cases I've worked on. Substantially shorter limits seemed disconnected from the reality of practice and the issues that need presenting to appellate courts.

I have attached a redline version of this letter. Some improved the letter; others just saved words. All took time.

Very truly yours,

LIVENGOOD ALSKOG, PLLC

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8fbu-qg22
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0012
Comment from Andrew Kennedy, NA

Submitter Information

Name: Andrew Kennedy
Organization: NA

General Comment

The 14,000 word limit for main briefs and 7,000 word limit for reply briefs is workable and it should remain. The proposed word-limit reductions will unnecessarily increase the number of requests to go beyond those limits. While most appellate litigators strive to keep the word count down, this can be difficult in cases with extensive facts and extensive law. Main briefs are already called upon to challenge trial court opinions that can run far longer than 14,000 words or 50 pages.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ftu-2gxf
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0015
Position Paper of James C. Martin, on behalf of American Academy of Appellate Lawyers

Submitter Information

Name: James C. Martin
Organization: American Academy of Appellate Lawyers

General Comment

See Attached

Attachments

Academy Position Paper

AMERICAN ACADEMY OF APPELLATE LAWYERS

December 1, 2014

Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: Request to testify on proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Rose,

The American Academy of Appellate Lawyers requests the opportunity to testify at the public hearing on the proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, on January 9, 2015 in Phoenix, Arizona. The Academy is a professional association of nearly 300 members from across the country, whose membership is limited to lawyers, judges and educators dedicated to appellate practice and the administration of justice on appeal.

The Academy has submitted comments on the proposed amendments and a copy of its position paper is attached. The Academy's incoming president, Charles A. Bird, from San Diego, California, would be pleased to offer the Academy's views.

Very truly yours,

James C. Martin
President
American Academy of Appellate Lawyers

AMERICAN ACADEMY OF APPELLATE LAWYERS

JAMES C. MARTIN
PRESIDENT

CHARLES A. BIRD
PRESIDENT-ELECT

NANCY WINKELMAN
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AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The American Academy of Appellate Lawyers submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35 and 40 of the Federal Rules of Appellate Procedure. When appropriate, the comment below addresses changes common to groups of rules, not each rule separately.

The Academy supports all of the proposed amendments except for the proposal to reduce the word limits on briefs and to apply a conversion rate of 250 words per page to documents being converted from a page limit to a word limit. The Academy believes that the Advisory Committee's rationale does not support the proposed reduction in the word limits and proposed conversion rate. It also believes that such a reduction will not improve appellate advocacy and may well increase the workload of the courts.

A. Statement of Interest

The Academy is an invitation-only professional association of nearly 300 members from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

B. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C).

The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of the documents covered by these rules. Under the proposed amendments, and assuming the other rule requirements are met (*i.e.* postage), the filing date would be 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.

The Academy believes that the proposed amendments are designed to clarify and improve inmate-filing rules, and would promote the fair administration of justice. The Academy supports these proposed changes.

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

The proposed amendment to appellate Rule 4(a)(4) addresses a circuit split over whether a motion under Civil Rules 50, 52, or 59 is "timely" when filed within a court-ordered "extension" of a non-extendable deadline under those rules. Adopting the majority view, the proposed amendment would make clear that post-judgment motions filed outside the deadline set by the Civil Rules are not "timely" under Rule 4(a)(4), even if the district court has erroneously granted an extension of the deadline, and therefore do not toll the time for filing a notice of appeal under Rule 4(a)(4).

The Academy supports this proposed amendment, because it is consistent with the understanding of Academy members that a district court lacks the authority to extend these specific deadlines and that a motion filed outside the time permitted under Rules 50, 52, or 59 does not toll the deadline for filing a notice of appeal.

D. Length Limits: Rules 5, 21, 27, 28.1, 32, 35 and 40

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the page limits currently applicable to documents filed under those rules. The type-volume limit would be based on a conversion ratio of 250 words per page. The change would apply to documents prepared on a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

The proposed amendments also would reduce from 14,000 words to 12,500 words the word limit for briefs on appeals under Rule 32 and for briefs on cross-appeals under Rule 28.1.

1. The Academy supports the principle of replacing other length limits with word-number limits.

The Academy supports the core concept of parts C and D that the permitted length of appellate filings produced on computers should be determined by word count. The Academy explains below why it opposes the proposed word numbers in parts C and D more strongly than it supports the underlying concept.

2. For all purposes in the proposed rules, the Academy opposes the 250-word-per-page conversion ratio.

The Academy respectfully opposes both the reduction in permitted word-count of briefs and the 250-word-per-page conversion ratio applied to other filings. The Academy believes the proposed conversion ratio, particularly in reducing the length of briefs, is not

supported by the published materials or the Advisory Committee's process, and is unwise.

3. The published background does not support the proposed conversion ratio.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000-word limit for principal briefs. The same amendments set the word limit for reply briefs derivatively and set the limit for appellees' combined briefs in cross-appeals by related reasoning. Rule 32 determines the length of briefs of amicus curiae derivatively under rule 29(d). The proposed amendments reduce the limit for principal briefs to 12,500 words, reduce the limit for reply briefs derivatively, and reduce the limit for appellees' combined briefs by related reasoning. According to the Advisory Committee, the 1998 change was based on an assumption that the appropriate conversion rate was 280 words per page applied to the 50-page limit for briefs then in effect. The Advisory Committee states that the proposed reduction is based on a study of D.C. Circuit briefs filed under the pre-1998 rules, which showed that the average in those briefs was closer to 250 words per page.

Our research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken. The genesis of that comment appears to be oral discussion reported in the minutes of the Spring 2014 meeting of the Advisory Committee on

Appellate Rules. The May 8, 2014 Report of Advisory Committee on Appellate Rules to the Committee on Rules of Practice and Procedure states that the word limit "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)." That quotation appears at page 18 of the materials for public comment. The proposed committee-notes to the proposed amendments to rules 28.1 and 32 now unequivocally state that the 1998 Advisory Committee used the 280-word assumption. But those notes also acknowledge: (i) that the current Advisory Committee does not know the basis for that assumption, and (ii) that the 1998 amendments intentionally superseded "at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs."

In contrast, Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, has posted a public comment stating that the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. To the extent we have been able to trace the history of the 1998 amendments, including through Fellows of the Academy who participated, we believe the assertion that the 1998 Advisory Committee incorrectly "assumed" a word ratio in appellate briefs is inaccurate. The record suggests that, regardless of the data on the table, the Advisory Committee selected the 14,000-word limit because it appeared wise and reasonable.

The Academy does not believe that a rule amendment should be adopted without a clear, articulated guiding rationale. That articulated rationale also should be supported with a detailed analysis of why the change is necessary to the administration of justice. The proposed reduction of word limits for briefs, and the parallel adoption of the 250-word conversion ratio for other appellate filings, do not adhere to these principles, and the Academy opposes them for that reason.

4. The Advisory Committee record does not support the proposed conversion ratio.

The Academy also is concerned that the Advisory Committee's record does not support the suggestion that the 250-word conversion ratio is intended or necessary to correct historical error. The minutes of the Advisory Committee's April 2014 meeting do not reflect a shared concern among its voting members about correcting error. Rather, the reported comments of the voting members focus on a desire of appellate judges for shorter briefs, the unwillingness of some circuits to allow longer briefs, and "whether the bar would be shocked by a proposal to reduce length limits to 12,500 words. . .." The minutes also reflect that the committee's professional support staff had received no complaints about the actual length of appellate filings.

The minutes of the Advisory Committee's discussion do not suggest that the committee received any analysis of how the length limits for briefing work in the courts of appeals. The publicly available

history of the proposed amendment supports an inference that changing the word limits—and adopting the 250-word ratio for new limits—arose late in the process without debate or analysis. *See, e.g.*, Minutes of the Advisory Committee on Appellate Rules, Sept. 27, 2012; Memo, Catherine T. Struve, Reporter, to Advisory Committee on Appellate Rules (Mar. 25, 2013) (using 280-word conversion ratio).

The Advisory Committee voted 6–4 to move the proposal forward. This vote appears to rest on six members' individual preferences, perhaps supplemented by unreported anecdotal information. In any event, the record does not support making the proposed material change in appellate due process for litigants and appellate lawyers. The amendments are not supported by a factual record and reasoned analysis appropriate for the federal judiciary.

5. *The proposal to reduce briefing length-limits is not beneficial.*

The proposed amendment to rules 28.1 and 32 would adversely affect developing issues in complex appeals. In the Academy's experience, the current word limits enable counsel in complex cases to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal. Reducing the word limit would impair fair recitation of the facts after all but short trials. Even when the statement of facts can be compact, reducing the word limit would impair appropriate development of difficult and

controversial legal issues. The inevitable results include more motions to file briefs exceeding the limits and inappropriately constricted presentation of complex appeals when counsel fears requesting additional words or a circuit has a practice of denying exceptions.

The proposal also would impair parties' access to court. While lawyers primarily control how briefs are drafted, a client has the right to control which (nonfrivolous) issues are argued. Criminal defense counsel lack discretion to omit a weak but non-frivolous issue.

In the Academy's anecdotal experience, fewer civil cases go through trial and appeal after the beginning of the Great Recession. But the tried cases tend to be the most complex and to involve the highest stakes. If the average civil-case brief is longer today than in 1998, the reason could be that appeals in civil cases are more complex. Many judges who participate in our seminars report that this is so, and that the increasing volume of white-collar crime prosecutions pushes a similar trend in criminal appeals.

In simpler cases, generally the briefs are shorter and the 14,000-word limit is not implicated. Consequently, the proposed amendments will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.

To the extent that verbose or unnecessarily long briefs are being filed—which is not the Advisory Committee's stated justification for the proposed amendments—that problem is far better addressed through meaningful training by and guidance from judges and lawyers experienced in effective appellate practice The Advisory Committee can find some of the Academy's views on such initiatives in its Statement on the Functions and Future of Appellate Lawyers, prepared for the 2005 National Conference on Appellate Justice and reprinted at 8 J. App. Prac. & Process 1 (2006).

6. The 250-word conversion ratio should not be applied to other rules.

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the current page limits. Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits. The deleterious effect of the 250-word conversion rate would likely be even more pronounced on documents currently subject to shorter page limits – writs, rehearing petitions, petitions for leave to appeal – which often warrant greater development than the current page limits allow. The Academy requests that the length limits under all of those rules be converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.

As to proposed Rule 29(b), 2,000 words for a brief of an amicus curiae on rehearing is too short. At this stage, the great majority of AC briefs are filed in support of en banc review. That is, they tend to be filed in some of a court's most difficult cases. The proposed word length is barely sufficient for a party other than the government to explain its case-specific interest. The length for these briefs should be the same as the allowed length for the party's petition.

7. Conclusion

The record indicates that proposal 12-AP-E was an excellent idea that made a wrong turn. The good parts of it should be preserved, and the unjustifiably low conversion ratio should be revised. No amendment is needed to rules 28.1 and 32. The other rules should be amended, but the word limits should be based on a conversion ratio of 280 or more. Finally, briefs of amicus curiae on rehearing, which have no current limit, should have a 4,200-word limit.

E. Amicus filings in connection with rehearing: Rule 29

The proposed amendment would renumber the existing rule 29 as 29(a) and would add a new Rule 29(b). The new 29(b) would set a default for the treatment of amicus filings in connection with petitions for rehearing. While the proposed rule would continue to allow the United States, its officer or agency, or a state to file, without seeking leave, an amicus brief in support of rehearing, any other amicus brief regarding rehearing could be filed only by leave of court. In addition to

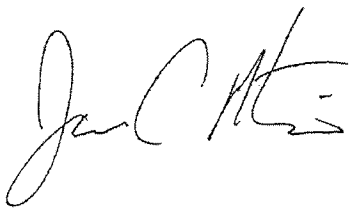
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

With the exception of a word limit based on a conversion rate of 250 words per page, discussed above, the Academy supports this proposed amendment.

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

The Advisory Committee proposes to amend Rule 26(c) to eliminate the three-day grace period when a brief is served electronically. Under the proposed amendment, 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. This proposed change would be accomplished by amending the rule to state that a paper served electronically is deemed to have been delivered on the date of service stated in the proof of service.

Although the Academy notes that electronic filing allows parties to file briefs late in the evening on the due date, the date of service is not counted in determining the deadline for filing and courts generally grant reasonable extensions of time for filing briefs. The Academy supports this proposed change to Rule 26(c).



James C. Martin
President, American Academy of Appellate Lawyers
November 24, 2014

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ert-glh5
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0014
Comment from Mark Langer, U.S. Court of Appeals for the D.C. Circuit

Submitter Information

Name: Mark Langer
Organization: U.S. Court of Appeals for the D.C. Circuit

General Comment

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.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8g4l-2rxl
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0016
Comment from Molly Dwyer, United States Court of Appeals for the Ninth Circuit

Submitter Information

Name: Molly Dwyer
Organization: United States Court of Appeals for the Ninth Circuit

General Comment

Comments from the United States Court of Appeals for the Ninth Circuit

Attachments

FRAP_comments_2016

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
James R. Browning U.S. Courthouse
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Clerk of Court

(415) 355-8295
Fax: (415) 355-8565

December 18, 2014

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Judge Sutton:

I write in response to the call for comments regarding Proposed Amendments to Federal Rules of Appellate Procedure 5(c), 21(d), 27(d)(2) and 29(b)(5).

The Ninth Circuit Court of Appeals' Executive Committee reviewed the proposed changes to the Federal Rules of Appellate Procedure and asked me to convey its views on the amendments to Rules 5(c), 21(d), 27(d)(2) and 29(b)(5). The Court's Advisory Committee on Rules of Practice also reviewed the modifications and supports the Executive Committee's position.

Length limits for petitions for permission to appeal, motions and petitions for writs of mandamus/prohibition (Proposed Fed. R. App. P. 5(c), 21(d), & 27(d)(2))

There isn't any evidence that lengthy petitions for permission to appeal have presented a problem for the Court. Instead, the imposition of more exacting limits for writ petitions and motions will create problems where none exist. These pleadings frequently seek time-sensitive relief and the importance of a prompt response would seem to outweigh the delay and effort generated by the need to confirm compliance with the applicable length limits. Both the Executive Committee of this Court and its Advisory Rules Committee find that existing page count limits provide sufficient guidance to the bar and do not support the addition of word/line count limits for these filings.

Post-disposition amici curiae briefs (Proposed Fed .R. App. R. 29(b)(5))

The draft federal rule states an amicus brief that supports a petition for rehearing is due within three days after the filing of the petition; a brief that opposes the petition is due on the response's due date. It is the view of the Executive Committee that the short intervals may create problems where none exist. Specifically, this 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. That lengthier period has not impaired the Court's post-disposition deliberations; the Court and its Advisory Rules Committee therefore encourage the national advisory committee to provide a similar, more generous, period within which to submit the friend of the court briefs.

Thank you for allowing us the opportunity to comment.

Respectfully,

Molly C. Dwyer

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8grr-amn3
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0017
Comment from Hon. Laurence H. Silberman

Submitter Information

Name: Laurence H. Silberman
Organization: NA

General Comment

See Attached

Attachments

Silberman Comment

United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Laurence H. Silberman
United States Senior Circuit Judge

January 13, 2015

Mr. Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

I have been sitting on the D.C. Circuit for almost thirty years. For the first half of my tenure, our briefs were limited to 12,500 words, subject to a motion to extend. Then in 1998, the word limit was expanded to parallel the limits in Supreme Court briefs. I think that was a mistake; the briefs now tend to be much too long. All the judges on the D.C. Circuit agree with me – and so do judges I have spoken to on other circuits. Indeed, the top-grade appellate specialists I have spoken to in Washington also agree. (One actually suggested the present length is an advantage for a skilled appellate specialist because he or she, by writing a shortened brief, as against a less skilled opponent, will benefit.)

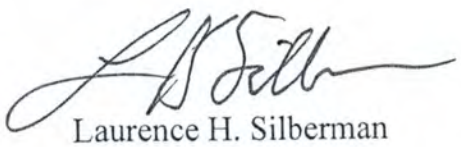
Although I do not mean to denigrate the importance of the Committee's mixed membership of lawyers and judges, on this issue I would think the view of the consumers of briefs, rather than the producers, would be more influential. We judges, of course, are in an advantageous position to determine whether a longer or somewhat shorter brief is more persuasive. The judges on our circuit actually read the briefs; many of us do not even ask for bench memos.

The problem is that many lawyers tend to write briefs to match the page limits, whether or not that is actually justified. An over-long brief, either because of excessive discussions of facts and background material which obscure the legal issues, or because of the addition of quite marginal arguments, is not effective – its even tiresome and can cause a judge to insufficiently appreciate the core legal arguments.

Although there are few judges I admire more than Frank Easterbrook, I disagree with his analogy to the Supreme Court's practice. When the Supreme Court grants *cert*, the issues are quite important and normally difficult, but more important, they are limited to the *cert* grant. The court does not have to face an array of marginal issues and most Supreme Courts advocates do not spend pages on factual presentations more appropriate to a jury argument or agency proceeding. We should keep in mind that Frank has a unique technique; he has said if he is not persuaded by the opening brief, he stops reading.

I regard the ancillary issues discussed in the submission of the American Academy of Appellate Lawyers – whether the Committee has adequately explained its reasons for proposing shorter briefs – to be quite beside the point. The only real question is: are the briefs now too long to be persuasive. The answer I submit is "yes."

Sincerely,



Laurence H. Silberman

cc: Hon. Steven M. Colloton
U.S. Court of Appeals for the Eighth Circuit

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8guj-gtt4
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0018
Comment from Lisa Perrochet, Appellate Courts Section, Los Angeles County Bar Association

Submitter Information

Name: Lisa Perrochet
Organization: Appellate Courts Section, Los Angeles County Bar Association

General Comment

I write on behalf of the Appellate Courts Section of the Los Angeles County Bar Association regarding the proposed change to the word count limits for appellate briefs. The Appellate Courts Section has more than 300 members who work in private practice and for agencies and entities such as the Office of the Attorney General, the California Court of Appeal, and Public Counsel. The Appellate Courts Section strives to improve the administration of appellate justice by providing continuing education to Section members to raise the quality of appellate advocacy and adjudication, and by serving as a bridge between the appellate bench and the bar on matters of mutual interest. One task the Section undertakes is to monitor, evaluate and comment on proposals affecting appellate practice.

The proposal to amend several provisions in the Federal Rules of Appellate Procedure to convert page limits to word limits is sensible, in principle. However, the proposal to amend Rule 28.1 and Rule 32, to shorten the word limit for appellate briefs from 14,000 words to 12,500 words, is one that the Appellate Courts Section opposes.

The comments submitted by Judge Easterbrook, the American Academy of Appellate Lawyers, and the American Bar Association Council of Appellate Lawyers aptly challenge the idea that support for the proposal can be found in rulemaking history, namely, a perceived calculation error when the 14,000 limit was originally set. Whatever the history is, however, the central question should be whether support for the proposal can be found in a benefit to the administration of justice.

The letter submitted as an attachment to this comment more fully explains the Section's position that arguments can be made either for lowering the word count cap, or for raising or even eliminating it, as some jurisdictions have done for some types of filings. But on balance, there is an insufficient showing of any benefit that outweighs the burden from such a change. While reducing the limit from 14,000 words to 12,500 words would presumably result in a certain number of shorter briefs that would otherwise fall between that range under the existing rules, there is no indication that appellate briefs in general would be smarter, offering more help to courts in arriving at a correct result on appeal. Nor does the proposal account for the burden on lawyers and courts who would need to prepare and process more motions for leave to file oversized briefing in the increasing number of complex cases where a 12,500 word limit would impair advocates' ability to help the court in its task.

The inherent uncertainty in finding the right word limit may account for the lack of consensus among the members of the Advisory Committee on Appellate Rules regarding this proposal. Before making any change, it would be appropriate to gather more data. For example, is 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? Or is it just that, no matter what the word count, judges will perceive the shorter, crisper briefs to be more pleasant to read, without knowing whether the decision-making process would have been well served if the judge had been provided with an extra analogy, more comprehensive record citations, a handy summary of voluminous exhibits, and other items that fall to the cutting room floor based on restrictive word counts?

Without a clear indication that courts can achieve better judicial outcomes if a lower word count is imposed, the proposed rule change constraining lawyers judgment in how they articulate their clients positions on appeal should be tabled.

Sincerely,

Lisa Perrochet
Chair, Rules and Law Subcommittee
Los Angeles County Bar Association, Appellate Courts Section

Attachments

2015-01-26 LACBA ACS letter re FRAP word count limits

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

Appellate Courts Section

Mailing address: P.O. Box 55020, Los Angeles, CA 90055-2020 (213) 896-6548 / Fax (213) 896-6586
Author's Direct No.:(818) 995-0800

Via online submission

January 26, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of
the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: LACBA Appellate Courts Section comments on proposed revisions to appellate brief word count limit

Dear Mr. Rose:

I write on behalf of the Appellate Courts Section of the Los Angeles County Bar Association regarding the proposed change to the word count limits for appellate briefs. The Appellate Courts Section has more than 300 members who work in private practice and for agencies and entities such as the Office of the Attorney General, the California Court of Appeal, and Public Counsel. The Appellate Courts Section strives to improve the administration of appellate justice by providing continuing education to Section members to raise the quality of appellate advocacy and adjudication, and by serving as a bridge between the appellate bench and the bar on matters of mutual interest. One task the Section undertakes is to monitor, evaluate and comment on proposals affecting appellate practice.

The proposal to amend several provisions in the Federal Rules of Appellate Procedure to convert page limits to word limits is sensible, in principle. However, the proposal to amend Rule 28.1 and Rule 32, to shorten the word limit for appellate briefs from 14,000 words to 12,500 words, is one that the Appellate Courts Section opposes.

The comments submitted by Judge Easterbrook, the American Academy of Appellate Lawyers, and the American Bar Association Council of Appellate Lawyers aptly challenge the idea that support for the proposal can be found in rulemaking history, namely, a perceived calculation error when the 14,000 limit was originally set. Whatever the history is, however, the central question should be whether support for the proposal can be found in a benefit to the administration of justice.

Section members, both those who are advocates writing briefs and those who are court staff reading briefs, broadly agree that more tightly focused briefs are more effective in advancing litigants' interests, and generally more helpful to the court in deciding cases. But will lowering the word count limit actually help thoughtful brief writers do a better job in accomplishing those goals? They already strive to cut fluff and distractions, usually producing briefs well under the word count limit. Some comments have suggested at least implicitly that those less experienced or skilled in appellate advocacy will develop a smarter sense for issue selection and word choice if the cap is lowered. The proposition is debatable. But if it is true that imposing a stricter limit will result in briefs better suited to helping courts arrive at a correct result on appeal, such that 12,500 words is a better limit than 14,000 words, then maybe 10,000 words would be better yet?

Some cases, however, legitimately require longer briefing, such as where the standard of review requires a detailed factual analysis of a long record, or a novel legal issue warrants a searching examination of legislative history, inconsistences among circuits, competing public policies, and so forth. As the ABA Council of Appellate Lawyers comment notes, judicial opinions themselves are becoming ever longer and cases are ever more complex. Might lower word count limits burden lawyers and courts with preparing and processing more motions for leave to file oversized briefing in such cases, without any corresponding benefit to the decision-making process? The motion process is imperfect at best, because at the point when the motion is ruled on, the court has not independently reviewed the record or undertaken research to confirm that the brief presents issues that are properly within the scope of what must be decided. The court must largely be guided by the advocate's judgment that the extra words really are needed. To avoid what is probably an inefficient exercise in motion practice, might a higher limit, or no limit at all, be better?

The inherent uncertainty in finding the "right" word limit may account for the lack of consensus among the members of the Advisory Committee on Appellate Rules regarding this proposal. Before making any change, it would be appropriate to gather more data. For example, is 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? Or is it just that, no matter what the word count, judges will perceive the shorter, crisper briefs to be more pleasant to read, without knowing whether the decision-making process would have been well served if the judge had been provided with an extra analogy, more comprehensive record citations, a handy summary of voluminous exhibits, and other items that fall to the cutting room floor based on restrictive word counts?

Without a clear indication that courts can achieve better judicial outcomes if a lower word count is imposed, the proposed rule change constraining lawyers' judgment in how they articulate their clients' positions on appeal should be tabled.

Sincerely,

Lisa Perrochet
Chair, Rules and Law Subcommittee
Los Angeles County Bar Association,
Appellate Courts Section

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gw0-6ilx
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0019
Comment from Association of the Bar of the City of New York

Submitter Information

Name: Association of the Bar of the City of New York
Organization: Association of the Bar of the City of New York

General Comment

Please see the attached Report of the Committee on Federal Courts of the Association of the Bar of the City of New York

Attachments

City Bar comment - Appellate Rules

NEW YORK CITY BAR

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January 28, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E., Suite 7-240
Washington, DC 20544

RE: Proposed Amendments to the
Federal Rules of Appellate Procedure

At the request of Ira Feinberg, Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, I am submitting for consideration by the Advisory Committee on Appellate Rules a copy of the Association's report on certain of the proposed amendments to the Federal Rules of Appellate Procedure. A copy of this report has been submitted electronically using the "Submit a Comment" link made available on the United States Courts website.

Sincerely,

Peter C. Hein, Member
Committee on Federal Courts

cc: Ira Feinberg, Chair, Committee on Federal Courts
Alan Rothstein, General Counsel, Association of the Bar of the City of New York

REPORT OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK ON
PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE

The Association of the Bar of the City of New York, through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure proposed by the Advisory Committee on Appellate Rules. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for reviewing and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. LENGTH LIMITS

A. Rule 32: Word limits on Principal Briefs and Reply Briefs

The Federal Courts Committee respectfully opposes the reduction in the word count limits for principal briefs from 14,000 to 12,500 words, and the corresponding reduction in the word count limit for reply briefs.[1]

The Federal Courts Committee believes strongly that the current 14,000 word limit is often necessary in complex cases to permit each party to present its statement of the case, summary of argument and argument on the legal issues. While meeting the 14,000 word limit in complex

[1] We likewise oppose reducing the current word limit for cross appeals (Rule 28.1).

cases typically requires significant editing, counsel do generally seek to edit their briefs to meet the 14,000 word limit rather than submitting an application for permission to file a brief in excess of the limit. A reduction in the word count limit would often compel counsel in complex cases either to unduly truncate their presentation of the factual record relevant to the issues on appeal and their legal arguments or, alternatively, to seek permission to file a brief in excess of the proposed new (lower) word limits. Either course is likely to increase the burden on the Courts of Appeals, and creates the risk of unfairness to litigants in some cases where they simply may not have sufficient space to clearly articulate the relevant facts and legal arguments.

The Federal Courts Committee believes that such a significant change in established practice should not be made without a compelling justification. Yet the Report of the Advisory Committee on the Appellate Rules does not identify any basis in experience since the current word counts were adopted in 1998 that demonstrates a need to modify the existing word limits. Moreover, members of our committee are not aware, from their own experience, of any practical problems flowing from the existing word limits, and do not believe that the current word limits encourage unnecessarily lengthy briefs in cases where that length is not warranted.

The sole rationale provided by the Advisory Committee for the proposed change in the word limits is the assertion that the 14,000-word limit "appears to have been based" on the "assumption" that one page of a brief was (prior to the 1998 amendments) equivalent to 280 words. The Advisory Committee takes the position that this "assumption" was incorrect, and that – based on a 1993 study prepared by an advisory committee in the D.C. Circuit – "250 words per page is closer to the mark." Report of Advisory Committee on Appellate Rules, dated May 8, 2014 (revised June 6, 2014), at 18 of 372.[2] We respectfully submit that this rationale does not provide a sufficient basis for upsetting the word limits that have been in place for principal briefs and reply briefs for over 15 years. In addition to the points made above, several additional considerations reinforce our concern

[2] Page references are to the Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure, August 2014.

about the Advisory Committee's reliance on one over-20-year-old study, which was conducted over five years before the 1998 amendments that established the current word limits:

(1) The Advisory Committee Notes to the 1998 amendments reflect a comprehensive analysis of form, typeface and type-volume limitation issues. The discussion of type-volume limitations reflects a recognition that the use of a proportional typeface can increase the amount of material per page as compared to the use of a monospaced typeface, as well as other technical considerations that may influence the length of a brief. Thus, the word limits adopted in the 1998 amendments appear to be the product of careful focus and consideration, and there is insufficient basis for the Advisory Committee's view that the word limits adopted were the product of inadvertence.

(2) The July 1993 study that is referenced in the Report of the Advisory Committee (see *id.* at 20-24 of 372, and 54 of 372) is hardly a comprehensive study of issues relating to brief length. It relies upon a very limited selection of briefs from only three sources: ten principal briefs and ten reply briefs from a Department of Justice Civil Division archive of appellate briefs, plus five appellate briefs filed by the FCC and three appellate briefs filed by the law firm of Wilmer Cutler and Pickering. According to the 1993 study, these briefs were not randomly selected; rather, briefs that the authors subjectively viewed as containing an excessive number of single-space footnotes and block quotes were avoided. Overall, the average word count is said to have approximated 250 words per page. But the 28 briefs considered ranged in word count up to 288 words per page, and five of the 28 briefs had 270 or more words per page. And the fact that differences in the formatting of particular briefs could account for different per page word counts – as is evident from the fact that one of the 28 briefs considered had over 288 words per page – also underscores the inappropriateness of relying upon this over-20-year-old study to change the word limits in place since 1998.[3]

[3] As noted, the study considered only 28 non-randomly selected briefs from three sources. The format used in those briefs could have impacted the per page word count. Among other things, the 1993 study suggests the briefs studied included the captions and signature blocks. See page 21 of

In any event, the July 1993 study, as well as the local circuit rule based on an estimate of 250 words per page also referred to in the Report of the Advisory Committee on Appellate Rules (see p. 54 of 372), were presumably part of the body of material available to those working on the 1998 amendments. Yet the 1998 amendments adopted the current word limits and chose not to incorporate a word limit based on 250 words per page. One may infer that the 14,000 word limit adopted for principal briefs was not the result of "inadvertent" error, but rather was deemed appropriate when one took into consideration potential differences in word count for briefs based on different formats and typefaces utilized at the time of the 1998 amendments as well as other considerations.

Members of our committee have anecdotally checked the word count per page in recent appellate briefs (which now reflect the 14 point or larger typeface required by Rule 32(a)(5), also a product of the 1998 amendments) as well as district court papers that comply with district court margin requirements and use 12 point typeface (larger than the 11 point typeface permitted prior to the 1998 amendments). Typical appellate briefs using 14 point typeface average 240 words per page (use of 11 point typeface, as permitted before the 1998 amendments, would yield significantly more words per page). Typical district court papers using 12 point typeface (larger than the 11 point typeface permitted by FRAP 32 before 1998), and margins consistent with pre-1998 FRAP Rule 32, can significantly exceed 280 words per page. We point to this admittedly anecdotal information not in an effort to establish the "correct" word count per page that might have been expected in a pre-1998 brief, but rather simply to make the point that the limited number of briefs considered in one over-20-year-old study may not have been representative, and that it does not make sense, in 2014, to be modifying a long-established and accepted word count limit based on a count of words in 28 briefs from 3 sources in an over 20 year-old study.

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372. If one makes adjustments for the space used for the case caption (which could take up 1/3, or more, of the first page of a brief) and the signature block – neither of which need to be considered in a word count – the briefs studied would have averaged a greater number of words per page of actual text. In addition, the lines of text used per page and the typeface used could both have impacted the word count.

B. Word Limits for Other Papers

We agree with the proposal to provide for a volume limitation based on a word count (or lines of text printed in a monospace typeface), for papers produced using computers, for petitions for permission to appeal (Rule 5), writs of mandamus (Rule 21), motions (Rule 27), petitions for hearing or rehearing en banc (Rule 35), and petitions for panel rehearing (Rule 40). However, we believe the page-to-word conversion should be based on the convention of 280 words per page, utilized in connection with the 1998 amendments, for principal briefs and reply briefs. Since the current rules that utilize page limits have been in place even as filings have gravitated to the use of proportional type, utilizing a conversion of pages to words lower than the 280 words per page assumed at the time of the 1998 amendments would effect a significant reduction in length versus current practice, as well as a reduction in length compared to the practice that existed in 1998 when word limits were first adopted for principal briefs.

Petitions for permission to appeal, writs of mandamus, motions and petitions for rehearing can entail important issues and it benefits both the parties and the Courts of Appeals to allow counsel adequate latitude to present their positions.

Moreover, there is no indication in the Report of the Advisory Committee on Appellate Rules that the current page limits – even with the use of proportional type – result in excessively long papers not warranted by the complexity of the issues being addressed.

II. BRIEFS OF AN AMICUS CURIAE DURING CONSIDERATION OF WHETHER TO GRANT RE-HEARING

The proposed amendments to FRAP 29 would establish specific rules governing the time in which an amicus curiae must file its brief, accompanied by a motion for filing when necessary, in support of a petition for rehearing. For some unexplained reason, the proposed rule requires such an amicus brief to be filed no later than three days after the petition is filed (for amicus curiae supporting the petition or supporting neither party), rather than the seven days permitted by Rule 29 for amicus briefs filed during briefing of the appeal; the proposed amendments also require an amicus curiae opposing a petition to file on the same date set for responses by the parties, instead of seven days later. The current Rule, by permitting an amicus curiae to file no later than seven days after the principal brief of the party being supported, allows an amicus curiae to take into account the arguments of the party it supports when finalizing its own brief. No reason is given in the Report of the Advisory Committee on Appellate Rules for shortening the time for filing amicus briefs in the case of petitions for panel rehearing or rehearing en banc, and it is not clear why allowing the seven-day period of time currently permitted presents a practical problem in the case of petitions for panel rehearing or rehearing en banc. In the experience of the members of the Federal Courts Committee, there is rarely an extraordinary need for urgency with respect to the filing of briefs on rehearing, nor do the Courts of Appeals typically address petitions for rehearing with the urgency that the proposed rule seems to assume. And in cases where there is a need for urgency in the disposition of a petition for rehearing, the Court of Appeals can issue an order modifying the usual schedule for the filing of amicus briefs.

Finally, we believe the applicable word limit for petitions for rehearing should be based on the 280 words per page convention, for the reasons expressed above.[4]

Dated: January 28, 2015
New York, New York

Respectfully submitted,

Committee on Federal Courts
Association of the Bar of the City of New York

Ira M. Feinberg, *Chair*
Benjamin A. Fleming, *Secretary*
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[4] The Advisory Committee also proposes to amend FRAP 26(c) to remove service by electronic means from the modes of service that allow three added days to act after being served. This proposal parallels a similar proposal to modify the Federal Rules of Civil Procedure. The Federal Courts Committee supports this proposal, for the reasons outlined in a separate report of the Association of the Bar of the City of New York on the proposed amendments to the Federal Rules of Civil Procedure.

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PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gwi-nnyd
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0020
Comment from Dorothy Easley, Easley Appellate Practice

Submitter Information

Name: Dorothy Easley
Organization: Easley Appellate Practice

General Comment

Please see attached article in The Florida Bar Appellate Practice Section that details the concerns, but an abstract of that articles is:
The concern among many appellate practitioners is this reduction in word count and its impact on the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived. The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are deemed most certainly waived. Further reducing word count could have a significant adverse impact on appellate briefing and preservation.
Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients. But consider this-- twenty-five percent of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. These statistics and judicial observations that appellate briefs are increasingly THE most important tool in understanding the issues on appeal indicate that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.
Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. Increased work load to further research and understand the appellate issues, to make well-informed decisions, in both civil and criminal appeals that are fact-intensive (e.g. employment law cases, Section 1983 cases, criminal law cases concerning intent etc.). 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. In other words, word count reductions may actually increase the appellate courts labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex. Insufficient room to explain those complexities coupled with appellate issue preservation restrictions and reductions in oral argument do not aid the appellate process that labors to make decisions that are correct, not decisions that are the most expedient.

Attachments

APP-winter2014 EASLEY ARTICLE

Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

By Dorothy F. Easley[1]

D. EASLEY

With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "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."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

continued on page 9

Proposed Amendments
from page 2

(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "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".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

1 Dorothy F. Easley earned her J.D., with honors, in 1994 from the University of Miami School of Law and her M.S., with highest honors, in 1986 from SUNY/CESF. She is board certified in appellate practice, managing partner of Easley Appellate Practice, PLLC, and is admitted to practice in all Circuit Courts of Appeals and the Supreme Court. Ms. Easley is a past chair of the Appellate Practice Section, 2009-2010.

2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) BAR ASS'N THIRD CIR. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gzx-ugmn
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0021
Comment from Mary Beck Briscoe, 10th Circuit Court of Appeals

Submitter Information

Name: Mary Beck Briscoe
Organization: 10th Circuit Court of Appeals

General Comment

See attached file(s)

Attachments

Sutton ltr re FRAP 32 2-3-15

Mary Beck Briscoe, Chief Judge
United States Court of Appeals, Tenth Circuit
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February 3, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Appellate Procedure 32

Dear Judge Sutton:

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 of the briefs submitted to our court are needlessly lengthy. Some appellate lawyers appear to think it necessary to use the allotted number of words as a matter of course. As a result, we often receive briefs in relatively straightforward cases that approach the current 14,000-word limit. By modestly reducing the word limit to 12,500, we believe briefing will be markedly improved.

Although we recognize that meeting a reduced word limit may be difficult in certain instances, it is the sense of our court that shorter briefs are better in the vast majority of cases. 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.

In the rare cases for which 12,500-word briefs are truly inadequate, counsel may move for leave to exceed the word limit. The flexibility provided by such motions will mitigate any potentially adverse effects of the rule change.

We thank the Committee for the opportunity to comment.

Respectfully,

Mary Beck Briscoe

MBB:cb

cc:

Hon. Paul J. Kelly, Jr., Circuit Judge
Hon. Carlos F. Lucero, Circuit Judge
Hon. Harris L Hartz, Circuit Judge
Hon. Timothy M. Tymkovich, Circuit Judge
Hon. Neil M. Gorsuch, Circuit Judge
Hon. Jerome A. Holmes, Circuit Judge
Hon. Scott M. Matheson, Jr., Circuit Judge
Hon. Robert E. Bacharach, Circuit Judge
Hon. Gregory A. Phillips, Circuit Judge
Hon. Carolyn B. McHugh, Circuit Judge
Hon. Nancy L. Moritz, Circuit Judge
Hon. Monroe G. McKay, Senior Judge
Hon. Stephanie K. Seymour, Senior Judge
Hon. John C. Porfilio, Senior Judge
Hon. Stephen H. Anderson, Senior Judge
Hon. Bobby R. Baldock, Senior Judge

cc:

Hon. Wade Brorby, Senior Judge
Hon. David M. Ebel, Senior Judge
Hon. Michael R. Murphy, Senior Judge
Hon. Terrence L. O'Brien, Senior Judge
David Tighe, Tenth Circuit Executive
Betsy Shumaker, Tenth Circuit Clerk

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gz7-vvvc
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0022
Comment from P. David Lopez, EEOC, Office of General Counsel

Submitter Information

Name: P. David Lopez
Organization: EEOC, Office of General Counsel

General Comment

Please see the attached comment-letter of the General Counsel, Equal Employment Opportunity Commission.

Attachments

EEOC comments on proposed FRAP amendments 2015

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

February 2, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington DC 20544

Dear Judge Sutton:

The Office of General Counsel of the Equal Employment Opportunity Commission submits the following comments on the proposed amendments to the Federal Rules of Appellate Procedure, published on August 15, 2014.

The Appellate Services section of the Office of General Counsel handles appeals where EEOC is a party and also files briefs as amicus curiae in private appeals raising issues of importance to the interpretation of the federal statutes that EEOC enforces. In 2014, for example, Appellate Services filed 61 appellate briefs. The proposed changes would therefore directly affect EEOC's enforcement responsibilities.

1. EEOC urges the Committee to retain the current word limits for main briefs, cross-appeal briefs, reply briefs, and amicus briefs. Experienced counsel know that documents filed with the courts should be as succinct as possible. The current limits work well for all but the most complex appeals.

The proposed new lower word limits, in Proposed Rule 28.1, Proposed Rule 32(a)(7), Related Committee Notes, and, by implication, Proposed Rule 29(a)(5), would be especially problematic for counsel handling legally and/or factually complicated appeals — as EEOC appeals often are. If the limits were adopted, counsel in such cases would routinely need to seek leave to file over-length briefs, creating extra work for the courts as well as counsel. If leave were denied, counsel might well be unable to address the issues and arguments in their cases cogently and thoroughly. This would benefit neither the parties nor the courts.

2. EEOC agrees with the proposal to replace page limits with word limits in other documents prepared by computer. The new word limits for such documents — rehearing petitions, motions, interlocutory appeals, mandamus petitions, and related amicus briefs — should be comparable to the existing word limits for briefs — that is, 280 words per page. The

proposed conversion rate of 250 words per page, found in Proposed Rules 5, 21, 27, 35, 40, and related Committee Notes, 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.

3. EEOC agrees with the proposal in Proposed Rule 29(b)(2) and (5) to specify a due date for amicus briefs in rehearing proceedings and to permit the Government to file without seeking leave of court. However, because of the potential importance of such proceedings to the development of the law, the EEOC recommends that amici be permitted to file briefs one week after the party's rehearing petition. Particularly where the Office of General Counsel would have to obtain Commission approval before filing an amicus brief, the three-day-limit in Proposed Rule 29(b)(5) is insufficient.

In addition, the word limits for amicus briefs and party petitions should be the same. That is the rule in most circuits now, and such a rule makes sense. Because they must also include a statement of interest, amici, like the parties, typically need at least fifteen pages to set out the conflicting authority and develop arguments explaining why a challenged decision is flawed. Yet, the proposed new word limit in Proposed Rule 29(b)(4) — only 2000 words — effectively institutionalizes a rule, now only in the D.C. Circuit, limiting amici to half (or less) the length of a party's petition. The proposal does not explain or even acknowledge this new limitation.

Thank you for the opportunity to provide comments on the proposed amendments to the Federal Rules of Appellate Procedure.

Sincerely,

P. David Lopez
General Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h13-tp7y
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0023
Comment from Matthew Stiegler, thirdcircuitblog.com

Submitter Information

Name: Matthew Stiegler
Organization: thirdcircuitblog.com

General Comment

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. I favor the current word limit.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h1y-rge9
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0024
Comment from Charles Roth, NA

Submitter Information

Name: Charles Roth
Organization: NA

General Comment

We would suggest a different approach to the proposed word limits, which we think would achieve the Committee's objectives without triggering the adverse consequences noted by others. We also suggest an increase in the word length for rehearing-stage amicus briefs, in line with the current Tenth Circuit local rule. See attached file(s)

Attachments

Roth FRAP change comments

NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

February 6, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Appellate Procedure 29 and 32

Dear Judge Sutton,

I write in response to the Committee's proposed changes to Rules 29 and 32 of the Federal Rules of Appellate Procedure.

I am the Director of Litigation at the National Immigrant Justice Center (NIJC). We are active litigators in all of the geographic federal circuits on immigration matters. We frequently co-counsel with pro bono law firms, and attempt to provide consistently high-quality briefing to the Courts of Appeals. NIJC tends to become involved in cases which are particularly likely to establish significant precedent. NIJC cases have resulted in more than 80 published Court of Appeals opinions in the past ten years, and in multiple grants of certiorari.

NIJC files amicus curiae briefs with some frequency, both at the merits stage and in support of rehearing efforts. NIJC's amicus briefs have been cited and presumably found helpful by appellate bodies, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013); *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012); *Diouf v. Napolitano*, 634 F. 3d 1081, 1087 (9th Cir. 2011), and NIJC has on occasion participated as amicus in argument. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc). NIJC amicus briefs in support of rehearing have resulted in modification of panel decisions, *see*, *e.g.*, *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (amending 641 F.3d 1103); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012) (replacing 658 F.3d 1222); *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013) (replacing 662 F.3d 1128, 651 F.3d 969); *Zahren v. Holder*, 637 F.3d 698 (7th Cir. 2011) (supplementing 487 F.3d 1039); in one case, an amicus brief we filed helped convince a unanimous panel to grant rehearing to reverse itself. *Walji v. Gonzales*, 500 F.3d 432 (5th Cir. 2007) (vacating 489 F.3d 738).

Heartland Alliance for Human Needs & Human Rights | National Immigrant Justice Center
208 S. LaSalle Street, Suite 1818, Chicago, Illinois 60604 | ph: 312-660-1370 | fax: 312-660-1505 | www.immigrantjustice.org

Rule 32 Word Count:

I share the committee's sense that some appellate briefs are too long or of poor quality, and that most briefs should be less than 12,500 words in length. In preparing this comment, I reviewed approximately two dozen NIJC briefs filed in recent years, and all or nearly all were less than 12,500 words in length.

That said, some appeals have involved such a plethora of complex issues that we have approached the current word limit. For instance, in *Samirah v. Ashcroft*, 335 F.3d 545 (7th Cir 2003) and *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010), our briefs needed to address (a) habeas authority, (b) authority under § 1331, mandamus, and the APA, (c) the potential jurisdictional bars at 8 U.S.C. § 1252(a)(2)(B); (d) novel questions of statutory interpretation; (e) novel questions of regulatory interpretation; (f) the political question doctrine; (g) the doctrine of consular nonreviewability; (h) the application of the law of the case doctrine and res judicata; (i) procedural due process, including the existence *vel non* of a liberty interest, (j) remedy issues including 8 U.S.C. § 1252(g), and (k) disputed procedural and factual issues relating to our client's prior legal status. Indeed, even then the case was decided on a basis which we briefed only in passing, which avoided many of the legal issues briefed by the parties. A lower word count limit would likely have caused us to seek the Court's leave to exceed those limits.

Likewise, in *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), we were required to brief novel jurisdictional issues under 8 U.S.C. § 1252(a)(2)(C); novel statutory issues relating to eligibility for asylum and withholding of removal triggered by a particularly serious crime finding; factual and legal issues relating to the Convention Against Torture (CAT); and a complex habeas corpus issue applying *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) and *Demore v. Kim*, 538 U.S. 510, 523 (2003), to a situation of extended detention. Our client's victory in the Court of Appeals on the CAT issues vindicated our decision to argue those issues. Our client's release mooted the habeas arguments, which have subsequently prevailed in the Third and Ninth Circuits. The Supreme Court's grant of certiorari as to the other legal issues, 128 S.Ct. 29 (2007) (voluntarily dismissed at 128 S.Ct. 828 (2007)), shows the significance of the issues on which we did not prevail in the Court of Appeals. At the Court of Appeals, we were (barely) able to fit within a 14,000 word limit; but it would have done injustice to our client, and a disservice to the Court of Appeals, to cabin such a complex matter into a smaller space.

The majority of NIJC cases involve significant and novel matters, and well over 50% result in published opinions. Even so, most issues can be adequently briefed in 12,500 words or less. But as Judge Easterbrook noted, 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.

The comments submitted thus far to the Committee demonstrate that many judges feel that many briefs are too long and waste their time; but that many experienced appellate advocates feel that the proposed rule change would waste time in different ways.

I join my voice to that of other litigators who believe that the rule proposed by the committee would create substantial ancillary work for the courts and for attorneys (in NIJC's case, pro bono attorneys). It appears to me that Judge Easterbrook is likely correct in suspecting that a reduction in the size of briefs would likely – in those cases – trigger additional work for us as attorneys and for the Court by triggering additional requests for leave to file over-length briefs. It strikes me that 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.

I note further that there may be costs to courts where such overlength motions are denied. For instance, a party denied leave to file an overlength brief may thereafter file a brief which does not adequately address some issues. Courts generally decline to address issues not adequately addressed in an opening brief; but such a court might feel unhappy doing so where the party tried to address the issue in the proposed overlength brief (attached as an exhibit to a motion for leave to file an over-length brief) but did not do so in the shorter brief. Yet the court could face a conundrum in such a situation. If a court has denied leave to file an overlength brief, the opposing party would naturally produce a brief responsive to the brief actually accepted for filing by the court. Should a court thereafter find that it would be prudent to address that inadequately briefed issue (perhaps to prudentially avoid other more complex issues) it would find that the opposing party did not have a fair opportunity to respond to the briefing; and would then find itself forced to choose between a suboptimal approach to resolving the appeal, and ordering supplemental briefing. Needless to say, the effect of a word count reduction in that scenario would be substantial inefficiency.

I would also submit that the number of overlenghth brief motions might become greater because of a perception that the word count reduction may affect judicial attitudes toward motions for leave to file overlength briefs. The current perception that courts strongly disapprove of overlength briefs is a strong check upon their filing. If motions to file overlength briefs appear more reasonable, then courts will view them less disapprovingly, and will grant them more often. This will likely have a cyclical effect; if such motions are granted with some regularity, that will reduce the perceived downside risk in filing such motions, and encourage more numerous motions; which will further increase the judicial workload.

I would suggest a middle ground option which might suffice to address the Committee's concerns while avoiding the downsides of the proposed rule. The Committee might adopt 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. Such an attestation could be included within the scope of the Rule 32(a)(7)(C) attestation already filed with briefs.

Such an approach would have the effect of discouraging the filing of briefs exceeding 12,500 words, without triggering any increase in motions for leave to file overlength briefs. This could accomplish a slight reduction in brief size without triggering the need to expend judicial time to police the new limits and to adjudicate resulting ancillary motions. (A similar approach could be applied to reply brief deadlines.)

Rule 29 Rehearing-Stage Amicus Changes:

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.

As noted above, NIJC is relatively active in supporting and seeking rehearing and rehearing en banc, filing approximately a dozen such motions annually. Many circuits lack a local rule or precedential decision governing this situation, which triggers substantial uncertainty amongst clerks offices and counsel.

NIJC views the proposed timing of amicus briefs as sensible. The current Seventh Circuit rule, *see Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers) – which requires same-day filing of amicus briefs – strikes us as artificial and on verging on inviting impropriety. I acknowledge that it might be efficient for courts considering rehearing petitions to receive all supportive filings at the same time, but that efficiency is outweighed by other considerations. The *Fry* rule effectively (as it acknowledges) requires a putative amicus to work directly with the party to obtain extensions, if required, and even to coordinate on brief content. An *amicus curiae* is not supposed to repeat arguments made by a party; but the only way to know if a party which has not yet filed a brief will make a given argument is to ask that party what they intend to argue. Certainly, it is common that parties share briefs with *amicus curiae*, and vice versa; but it is not always appropriate. Forcing putative amici to coordinate with a party is at best unwise. NIJC suspects that amicus briefs can

be very helpful to a court when a party misperceives the issues in the case, or chooses to frame them in a way which might be helpful to the party but may also obscure possible (often preferable) resolutions of those issues. Yet under the *Fry* rule, an amicus is beholden to the party in various respects, which tends to facilitate amicus briefs which do not directly address party arguments. A same-day filing rule hinders an amicus from undertaking the sometimes delicate, nuanced analysis which would often be most helpful to a court. We commend the Committee for proposing a different rule.

NIJC finds it easy to function under the current, generous Ninth Circuit rule, but the Ninth Circuit presumably employs that rule because (given the massive size of its docket) its judges do not consider a rehearing matter before its amicus brief deadline. Likewise, we appreciate the Tenth Circuit local rule (permitting 7 days to file), but given that Court's relatively light docket, a potential amicus may worry that Tenth Circuit judges will form judgments about a rehearing petition sooner than the 7 day mark. As amici supporting rehearing, we often feel an impetus to file quickly, but without any firm deadlines. Courts which review rehearing petitions expeditiously presumably find it inefficient to wait for several weeks to adjudicate rehearing petitions; and cannot know whether an amicus brief is even being considered. It seems evident that a court will find an amicus brief less helpful if the court has already considered, and formed judgments about, a rehearing petition. The proposed three-day rule seems to us to strike the right balance.

However, NIJC is concerned about the proposed 2000 word limit on amicus briefs. When the Tenth Circuit adopted Local Rule 29.1, it initially proposed a 7.5 page limit to briefs, similar to the limit proposed by the Committee. NIJC submitted comments to the Tenth Circuit, urging that Court to set a higher word limit; and the Tenth Circuit subsequently adopted a 3000 word limit, approximately 11 pages. (By email communication, the clerk of that court indicated to me that the Court had altered its rule in response to our comments.)

I would submit to the Committee, as I urged the Tenth Circuit some years ago, that by definition, the party seeking rehearing has already failed to persuade the Court of the merits of its claim. This might be because the claim is weak, but it might also be because the claim was poorly presented. I practice immigration law. Regrettably, the immigration bar has become known for the proliferation of poor or substandard representation (this might be due to the relative lack of resources on the part of immigrants facing removal). Thus, courts are commonly making judgments about immigration matters on the basis of briefing which fails to contain significant points in support of arguments. Courts naturally attempt to make the best decision possible on the record before them (and generally decline to address issues not raised in the briefs). Because precedential decisions can only be overturned by the en banc court - a process

which requires significant resources and is not appropriate except for relatively major issues - it would be advantageous for panels addressing rehearing petitions to have relatively fuller briefing before them, so that any modifications may be made using fewer appellate resources. The alternative, particularly where one court would end up issuing a decision which would disagree with other Courts of Appeals (a circumstance which would invite repeated en banc requests), would often require greater resources to remedy.

I urge the Committee that 2000 words is rarely enough space to make arguments which would be helpful to a court considering rehearing. NIJC engages in amicus briefing under the principle that courts do not value an amicus brief as a "vote" for an outcome, or as evidence of the importance of an issue; presumably the fact of publication evidences the importance of a court decision. We do hope that we may earn the trust and respect of federal courts through consistently strong representation. But we assume that courts value our amicus briefs for their legal content. A rehearing stage amicus brief which is only 2000 words in length will rarely have time to do more than gesture at issues raised in a court decision, issues which the Court has presumably already considered at some length. Adoption of the Tenth Circuit's word limit would be more likely to permit helpful amicus filings at the rehearing stage, precisely because that limit would allow an amicus to explain context, where helpful; develop arguments; and explore implications of the court's earlier opinion.

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 principle) benefit of amicus briefing at the rehearing stage. A grant of full en banc rehearing is always rare, even in the Ninth Circuit; decision modification is much less so. One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision. The proposed rule seems to ignore this significant utility of the rehearing amicus.

For instance, the initial panel decision in *Carrillo de Palacios v. Holder*, 651 F.3d 969 (9th Cir. 2011), denied a petition for review on two alternate grounds. One of those grounds was not only a novel holding without any precedent in any court, but ran contrary to (uncited) subregulatory agency authority. The government subsequently chose not to defend that part of the panel opinion. The Court of Appeals eventually denied en banc rehearing, but issued a new decision affirming that outcome based only on the other, less controversial, ground. *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013).

Similarly, a panel may write a decision which unintentionally sweeps more broadly than intended by the Panel. In *Anaya-Aguilar v. Holder*, 683 F. 3d 369 (7th Cir. 2012), the Seventh Circuit adopted a rule precluding jurisdiction over certain decisions of the Board of Immigration Appeals, but employed language which appeared to bar not only

claimed abuse of discretion, but legal and constitutional claims. On rehearing, the Court of Appeals issued a brief order clarifying the scope of its earlier decision, ensuring that its decision was consistent with precedent and avoiding the need for plenary en banc review. *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012). The petitioner in that case had little incentive to ask the court to modify or clarify its precedent; to the contrary, the court's clarification likely reduced the chances of a grant of certiorari. An amicus like NIJC, which frequently practices in that circuit, had the means and incentive to raise the issue.

In the rehearing context, there is often alignment between the interests of an amicus and the interests of judicial efficiency. Both benefit from clear and correct rules, while a party may benefit from the case law remaining in confusion, or from it appearing erroneous enough to attract the attention of the Supreme Court.

We submit that these cases illustrate one of the primary utilities of the rehearing process: i.e., to permit a panel to clarify or correct its decision – including to reserve issues (the complexity of which may not have been initially evident) for future resolution – without requiring the resources of the full en banc court. I listed a number of other similar outcomes in my introduction to these comments.

In sum, in my experience, amicus briefs at the rehearing stage are often the most helpful to a court when prior representation has been the most unhelpful. Limiting rehearing stage amicus briefs to 2000 words (approximately 8 pages, much of which is consumed by required sections such as the statement of the amicus) would constitute a regrettable limitation on the ability of groups like NIJC to provide courts with that assistance. It would be an unfortunate and unnecessary limitation, which would impede the utility of an otherwise useful and efficient amendment to the rules.

I thank the Committee for the opportunity to submit these comments.

Respectfully Submitted,

s/ Charles Roth
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National Immigrant Justice Center
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PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h41-w4pl
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0025
Comment from Steven Mayer, California Academy of Appellate Lawyers

Submitter Information

Name: Steven Mayer
Organization: California Academy of Appellate Lawyers

General Comment

The California Academy of Appellate Lawyers (CAAL) opposes the proposed amendments to Federal Rules of Appellate Procedure (FRAP) 5, 21, 27, 28.1, 32, 25 and 40, which would adopt a conversion ratio of 250 words per page and thus reduce the maximum length of appellate briefs and other documents filed in the United States Courts of Appeals. In our experience, the current length limits are appropriate. The word-count limits currently in the Rules should not be changed, 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.

The California Academy of Appellate Lawyers is a non-profit organization founded in 1972. Its members are California lawyers with substantial appellate experience, who are elected to membership after rigorous scrutiny of their skills as appellate advocates. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

We concur in the detailed analysis of these proposed amendments set forth in section D of the comments by the American Academy of Appellate Lawyers dated November 24, 2014, and add the following brief additional comments.

We find the rationale advanced by the Advisory Committee in support of these amendments to be unpersuasive. There is no showing, or even any assertion, that the current length limits have not worked well or have created unnecessary problems for the Courts of Appeals or counsel. In support of the change, the Advisory Committee asserts only that shorter limits might have been adopted in 1998, based on empirical data gathered in one circuit. Judge Frank Easterbrook of the Seventh Circuit, in his comments submitted September 11, 2014, responds that the current word-count limits were adopted deliberately, on the basis of a different empirical analysis of which the current Advisory Committee was apparently unaware. Put bluntly, the proposed amendments appear to be a solution in search of a problem.

To the contrary, the shorter limits now being proposed are likely to make the appellate process more, not less, difficult. The statutory law grows every year. Multiple volumes of the Federal Reporter 3d appear every month. Legal doctrines become more, not less, complex with the passage of time.

An appellate brief is likely to be required to explain and apply more, not less, law now than in 1998 when the current word-count limits were adopted.

In a case that is unavoidably complex as a matter of either law or fact, a well-crafted brief truly requiring 14,000 words will be more helpful to the courts decisional process than a truncated brief. Neither the court nor the client is well served if counsel must oversimplify complex doctrine, or complex factual circumstances, leaving out something that judges might find important. Yet the proposed amendments would require counsel to do so or to burden the reviewing court with a motion to exceed the length-limit in a far greater number of cases.

The proposed amendments are unlikely to produce significant economies for either lawyers or judges. In a complex case, a 12,500-word principal brief would not be more easily or more quickly written than a 14,000-word brief. If anything, the contrary might be true. Similarly, additional judicial time digging into the record or case law in a complex case may be required to understand a truncated briefs factual or legal presentation.

Though unnecessary prolixity does burden the Courts of Appeals and opposing counsel in too many cases, the proposed revision seems unlikely to improve matters. The lawyer who actually needs only 8,000 words but now insists on writing 14,000 would, under the amended rule, use 12,500 words to say what could be said in 8,000, and neither the court nor the client would be any better served. On the other hand, the lawyer who actually needs 14,000 words would be required either to burden the court with a motion to file an oversize brief, or else compress the factual or legal discussion in a manner that would render the brief less helpful to the Court of Appeals than under the existing rule.

In sum, the existing word limits based on a ratio of 280 words per page should be retained without change, and word limits for additional types of documents should also be computed using the ratio of 280 words per page.

Very truly yours,

Steven L. Mayer
President, California Academy of Appellate Lawyers, 2014-2015

Attachments

FRAP Comment

CALIFORNIA ACADEMY OF APPELLATE LAWYERS

February 9, 2015

BY U.S. MAIL

Mr. Jonathan C. Rose
Secretary
Committee on Rules of Practice and Procedure of
the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

The California Academy of Appellate Lawyers (CAAL) opposes the proposed amendments to Federal Rules of Appellate Procedure (FRAP) 5, 21, 27, 28.1, 32, 25 and 40, which would adopt a conversion ratio of 250 words per page and thus reduce the maximum length of appellate briefs and other documents filed in the United States Courts of Appeals. In our experience, the current length limits are appropriate. The word-count limits currently in the Rules should not be changed, 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.

The California Academy of Appellate Lawyers is a non-profit organization founded in 1972. Its members are California lawyers with substantial appellate experience, who are elected to membership after rigorous scrutiny of their skills as appellate advocates. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

We concur in the detailed analysis of these proposed amendments set forth in section D of the comments by the American Academy of Appellate Lawyers dated November 24, 2014, and add the following brief additional comments.[1]

We find the rationale advanced by the Advisory Committee in support of these amendments to be unpersuasive. There is no showing, or even any assertion, that the current length limits have not worked well or have created

[1] The pages of AAAL's comments are unnumbered; the material we refer to appears on pages 4-11. CAAL takes no position on the proposals discussed in the other sections of AAAL's comments.

unnecessary problems for the Courts of Appeals or counsel. In support of the change, the Advisory Committee asserts only that shorter limits might have been adopted in 1998, based on empirical data gathered in one circuit. Judge Frank Easterbrook of the Seventh Circuit, in his comments submitted September 11, 2014, responds that the current word-count limits were adopted deliberately, on the basis of a different empirical analysis of which the current Advisory Committee was apparently unaware. Put bluntly, the proposed amendments appear to be a solution in search of a problem.

To the contrary, the shorter limits now being proposed are likely to make the appellate process more, not less, difficult. The statutory law grows every year. Multiple volumes of the *Federal Reporter 3d* appear every month. Legal doctrines become more, not less, complex with the passage of time. An appellate brief is likely to be required to explain and apply more, not less, law now than in 1998 when the current word-count limits were adopted.

In a case that is unavoidably complex as a matter of either law or fact, a well-crafted brief truly requiring 14,000 words will be more helpful to the court's decisional process than a truncated brief. Neither the court nor the client is well served if counsel must oversimplify complex doctrine, or complex factual circumstances, leaving out something that judges might find important. Yet the proposed amendments would require counsel to do so – or to burden the reviewing court with a motion to exceed the length-limit – in a far greater number of cases.

The proposed amendments are unlikely to produce significant economies for either lawyers or judges. In a complex case, a 12,500-word principal brief would not be more easily or more quickly written than a 14,000-word brief. If anything, the contrary might be true. Similarly, additional judicial time digging into the record or case law in a complex case may be required to understand a truncated brief's factual or legal presentation.

Though unnecessary prolixity does burden the Courts of Appeals and opposing counsel in too many cases, the proposed revision seems unlikely to improve matters. The lawyer who actually needs only 8000 words but now insists on writing 14,000 would, under the amended rule, use 12,500 words to say what could be said in 8000, and neither the court nor the client would be any better served. On the other hand, the lawyer who actually needs 14,000 words would be required either to burden the court with a motion to file an oversize brief, or else compress the factual or legal discussion in a manner that would render the brief less helpful to the Court of Appeals than under the existing rule.

In sum, the existing word limits based on a ratio of 280 words per page should be retained without change, and word limits for additional types of documents should also be computed using the ratio of 280 words per page.

Very truly yours,

Steven L. Mayer
President, California Academy of Appellate Lawyers, 2014 - 2015

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0026
Comment from Paul Fogel, Appellate Practice Group of Reed Smith LLP

Submitter Information

Name: Paul Fogel
Organization: Appellate Practice Group of Reed Smith LLP

General Comment

Please see the attached comment from the Appellate Practice Group of Reed Smith LLP.

Attachments

Comment - Appellate Practice Group of Reed Smith LLP

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February 10, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure
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Thurgood Marshall Federal Judiciary Building
One Columbus Circuit N.E., Suite 7-240
Washington, DC 20544

Re: Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. Rose:

The Appellate Practice Group of Reed Smith LLP submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 5, 21, 27, 28.1, 32, 35, 40 of the Federal Rules of Appellate Procedure and reduce the length limits for briefs, as indicated in Part C of its June 6, 2014 Report to the Standing Committee on Rules of Practice and Procedure. Reed Smith supports the Advisory Committee's proposal to convert page limits to word limits. But it respectfully opposes the proposal to reduce the word limit for briefs under Rules 32 and 28.1, as well as the proposal to employ a 250 word per page conversion ratio to the rules governing other filings. There is no sound basis for changing a rule that has worked well for 17 years, and the word limit proposals would lead to numerous negative consequences.

Statement of Interest

Reed Smith's Appellate Practice Group was founded 40 years ago as one of the country's first appellate practices. It has handled thousands of appellate matters in federal and state courts around the country that have resulted in more than 600 published decisions. Also, Reed Smith frequently files *amicus curiae* briefs on behalf of companies, organizations, and individuals whose interests may be

affected by a case. Its members teach law school and continuing legal education classes and regularly publish articles on important legal developments that affect its clients. The attorneys who comprise Reed Smith's Appellate Practice Group are also members of state and federal appellate bar associations, including former presidents, reflecting their deep commitment to appellate practice and their profound interest in the appellate decision-making process.

Length Limits: Rules 5, 21, 27, 28.1, 32, 35, and 40

The proposed amendments would reduce from 14,000 words to 12,500 words the word limit for briefs under Rules 32 and 28.1. Also, the proposed amendments would apply a conversion ratio of 250 words per page in order to substitute word limits for the page limits that currently apply to filings under Rules 5, 21, 27, 35, and 40. Although Reed Smith supports the Advisory Committee's proposal to convert page limits to word limits, it respectfully opposes the proposal to reduce the word limit for briefs under Rules 32 and 28.1, as well as the proposal to employ a 250 word per page conversion ratio to the rules governing other filings.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000 word limit for principal briefs. According to the Advisory Committee's June 6, 2014 Report, however, the 14,000 word limit was based on an erroneous assumption that the appropriate conversion rate was 280 words per page as applied to the 50 page limit for briefs that was in effect at that time. The Advisory Committee's proposed reduction is based on a study of briefs filed in the U.S. Court of Appeals for the D.C. Circuit (under the pre-1998 rules), which showed that the average number of words per page in those briefs was closer to 250 words than 280 words.

Commenters have raised questions about the Advisory Committee's reasoning. Notably, Judge Frank H. Easterbrook, who in 1998 was a member of the Standing Committee and the liaison to the

Appellate Rules Committee, has stated that the 14,000 word limit was not based on an erroneous 280 words per page conversion ratio. Rather, the 14,000 word limit was based on a rule that the U.S. Court of Appeals for the Seventh Circuit had issued a few years earlier—Seventh Circuit Rule 32—that came from a study of briefs filed in the U.S. Supreme Court. Additionally, the American Academy of Appellate Lawyers has noted that the Advisory Committee's record does not support the suggestion that use of the 250 word conversion ratio is necessary to correct a historical error. Instead, the reported comments focus on the complexity of modern day appeals, the willingness of appellate courts to grant motions to file oversized briefs, and the controversial nature of reducing the word limits.

In any event, there is no sound reason to alter a rule that, by all accounts, has worked well for 17 years. There is no documented analysis showing that unnecessarily long briefs are burdening the appellate courts or that appellate courts somehow are powerless, without across the board word reductions, to police any perceived abuses in the briefing process. We agree that an appellate brief should not be any longer than necessary to advocate a party's position. But shorter does not mean well written, and a rule arbitrarily replacing the 14,000 word limit with a 12,500 word limit will not improve the quality of briefs. Lawyers who currently author poorly written 14,000 word briefs will author poorly written 12,500 word briefs. Meanwhile, skilled lawyers who already employ brevity in appropriate circumstances will be forced to limit their arguments in complex appeals where the use of 14,000 words would provide tangible benefits for the decision-maker.

Changing the rule in conformity with the proposal also would come with negative consequences. As both civil and criminal trials become more complex, so have the appeals from the judgments issued in these trials. Apart from trials, the proliferation of statutes has added complexities to public and private causes of action. The records and law on dispositive motions in cases and class actions or on

other pretrial issues is becoming more involved as well. While the reduced word limit will pose few problems in cases with a concise record or a single issue, the reduced word limit will pose significant problems in more complex appeals, where the 14,000 word limit is needed to properly present the issues. Inevitably, lawyers in complex appeals will move to file briefs that exceed the word limits, making more work for the courts. To the extent that briefs are cramped to meet the limits, the court loses the benefits that a full development of a claim of error or argument supporting affirmance would provide.

Furthermore, this word reduction proposal threatens the primary tool left to parties in the system to advocate their case. Over the past decade, the Courts of Appeals have reduced opportunities for oral argument and have emphasized the importance of briefing. Now, the Advisory Committee's proposal threatens to reduce the limit on words in this "most important" aspect of the appellate process. For the litigants in the system, these steps affect the appearance of how appellate justice is delivered.

Problems in briefing quality are better addressed through training and guidance from judges and lawyers who are experienced in appellate practice. The appellate practice is developing as a specialty, and appellate practitioners and judges are actively writing and speaking on the fine points of appellate practice. More secondary materials are available as well. These avenues are the most impactful for improving the quality of appellate practice, including promoting brevity in briefing.

Reed Smith's appellate specialists respectfully submit that the Committee should reject the proposal to reduce the word limits and urge that resources and efforts be directed to improving the quality of appellate practice. That is the best systemic solution for issues related to the briefing process.

Very truly yours,

Paul D. Fogel
Appellate Practice Group Leader
Reed Smith LLP

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Docket: USC-RULES-AP-2014-0002
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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0027
Comment from Cynthia Timms, Appellate Section of the State Bar of Texas

Submitter Information

Name: Cynthia Timms
Organization: Appellate Section of the State Bar of Texas

General Comment

Attached are the comments of the Appellate Section of the State Bar of Texas

Attachments

Texas Appellate Section Comments

STATE BAR OF TEXAS

APPELLATE SECTION

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COMMENTS OF THE APPELLATE SECTION OF THE STATE BAR OF TEXAS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Purpose of Proposed Comments

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

Statement of Interest

The Section represents its attorney members, promotes the role of appellate lawyers in Texas, enhances their skills, and improves appellate practice in Texas. It furthers these goals by offering continuing legal education, disseminating materials on matters of interest to members of the Section, and creating opportunities for the exchange of ideas among members of the Section. The Section currently has around 1960 members.[1]

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

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

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

[1] This position is being presented only on behalf of the Appellate Section of the State Bar of Texas. This position should not be construed as representing the position of the Board of Directors, the Executive Committee, or the general membership of the State Bar. The Appellate Section, which is taking this position, is a voluntary section of about 1960 members composed of lawyers practicing in a specified area of law. This position is taken as a result of a unanimous vote of the council of the Appellate Section, which is the governing body of that section. No approval or disapproval of the general membership of this Section has been obtained.

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

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

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

A. Analysis of the 2015 Study

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

The original object of the study was to gather briefs that were 50 pages in length (or more) because it was thought those briefs would probably reflect the attorneys' attempt to put as many words on the page as possible. That task proved too difficult, given the passage of time and the fact that attorneys apparently used the full 50 pages only if it was absolutely necessary. As a result, around 60% of the briefs were nearly 50 pages or longer. The rest varied between 39.81 pages and 48.85.[2]

The study demonstrates no briefs had as few words per page as 250—the number the

[2] As noted in the study itself, when the last page was a partial page, the number of lines on the last page were counted and divided by 26, with the number 26 representing the number of lines on a typical double-spaced page. The incomplete last page, therefore, is expressed as a decimal. The calculation of the number of words per page also relied on the number of pages being expressed with the decimal. So, for example, one brief had 13,129 words and 39.54 pages. 13,129 was divided by 39.54. The result was 332.04, which was stated as "332" in the study as the number of words per page. The numbers of words per page were expressed as whole numbers using normal rounding principles.

1993 study found was the average. Instead, the fewest number of words per page was 263. The maximum number of words per page was 336. If the words per page are averaged over the 15 briefs, the average equals 294 words per page. That number exceeds the 280 words per page adopted in the 1998 amendments to the Federal Rules of Appellate Procedure, and it far exceeds the 250 words per page being suggested in the current proposed amendments.

B. Analysis of the 2012 Study

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

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

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

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

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

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

to Rules 5, 21, 27, 35, and 40.

D. Overall Comments Regarding Proposed Amendments on Length Limits

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

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

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

Attorneys should not have to undergo a process like this when there is nothing wrong with the current limitations. In fact, the May 8 Committee Report provides no other reason for altering the type volume limitations other than the assumed-correctness of the 1993 analysis attached to that report. As shown in these comments, the 1993 analysis does not accurately reflect the word count per page in all of the briefs being filed under the pre-1998 Rules of Appellate Procedure.

Conclusion

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

Sincerely,

/s/ Cynthia K. Timms

Cynthia K. Timms
Chair, State Bar of Texas Appellate Section

Appendix A

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

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

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

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

Appendix B

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

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

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

AVERAGE: 291 words per page

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h54-7u6g
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0028
Comment from Steven M. Klepper, NA

Submitter Information

Name: Steven M. Klepper
Organization: NA

General Comment

While I generally favor shorter briefs, I oppose the proposed reduction of word limits based on my experience with appeals (civil and criminal) following lengthy trials. Since it is almost certain that some error occurred during the course of a lengthy trial, the dispositive question often is whether error was harmless. The harmlessness analysis requires the error to be viewed in the context of the entirety of the evidence.

That task is hard under the current word limits. An advocates job is not merely to compile the evidence that favored his or her client. Rather, the job is also to account for the entirety of the other sides evidence. A reply brief is often too late, since an appellant loses credibility when the opposition brief identifies evidence that the opening brief fails to discuss.

A reduction in word limits will, I suspect, increase the rate of attacks on the candor of appellants counsel for allegedly failing to account for the appellees evidence. Moreover, I fear an increase of instances where an appellants reply brief asserts points that belong in an opening brief, thereby giving the appellee no opportunity to respond, unless and until the court holds oral argument.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h57-o1yx
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0032
Comment from Michael Skotnicki, NA

Submitter Information

Name: Michael Skotnicki
Organization: NA

General Comment

I oppose the proposed change to the briefing word limitations. I teach persuasive writing techniques as a continuing education instructor and blog about the process of writing appellate briefs. While brevity in brief writing may be the goal of the readers of briefs, appellate judges, their goal should be receiving better written, more readable 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. It is rarely ever said that a wonderfully written novel was too long. Thus, in my opinion, word count is not the root of the problem the proposed amendment seeks to cure.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h5q-r6v7
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0033
Comment from STANLEY NEUSTADTER, NA

Submitter Information

Name: STANLEY NEUSTADTER
Organization: NA

General Comment

Ive been handling exclusively appeals (mostly criminal, mostly New York state, several different circuits, one SCOTUS) since 1968. Ive never clerked, but Ive been positioned to read innumerable hundreds of briefs in cases, criminal & civil, that I was not involved in. My conclusion: 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 wouldnt 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 counsels bald assertion that the record is lengthy and complex. It is one of counsels key functions to reduce and simplify lengthy and complex lower court proceedings, not to replicate those costly features on appeal. Under the strict motion rule I have in mind, the time spent composing a rare colorable motion could be more profitably devoted to editing down the bulbous brief, better serving both client and court.

To those who oppose the reduction, I pose this question: If your thoughts and words are so precious and irreducible, why not counter-lobby for 16,000 words, or for no limits at all?

STANLEY NEUSTADTER
Manhattan

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h59-fcpj
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0034
Comment from Jason Rylander, NA

Submitter Information

Name: Jason Rylander
Organization: NA

General Comment

I oppose the proposal to reduce brief lengths from 14,000 to 12,500 words. Environmental law my practice area 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. Recently, I have participated in cases where the same federal action has been simultaneously challenged in multiple courts, thus requiring action by the Multi-District Litigation Panel to consolidate the cases to avoid duplicative or conflicting rulings.

A typical case may involve a state agency intervenor and multiple interest group intervenors. Generally, a state agency will request its own brief as a sovereign. Even if the remainder of the intervenors are required to file a joint brief (and they may not), the defense in such a case will have at least 28,000 words to work with, compared to 22,000 for plaintiffs (including the reply brief).

Brevity may be a best practice for appellate counsel, but it should be counsels choice how to respond to disparate parties and claims within an appropriate framework. As the proposed word limits appear to lack adequate justification (see comments of Judge Easterbrook and the Appellate Practice Group of Reed Smith, LLP) and may prove undesirable in complex litigation, I urge the Advisory Committee on Appellate Rules to retain the current length limits for briefs.

Thank you for considering my views.

Jason C. Rylander
Senior Attorney
Defenders of Wildlife

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h59-jdyy
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0035
Comment from Jeffrey R. White, Center for Constitutional Litigation

Submitter Information

Name: Jeffrey R. White
Organization: Center for Constitutional Litigation

General Comment

Please see the attached comments submitted by the Center for Constitutional Litigation.
See attached file(s)

Attachments

CCL Comments 021115

CENTER FOR
CONSTITUTIONAL LITIGATION
A PROFESSIONAL CORPORATION

Via Electronic Submission

February 11, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

The Center for Constitutional Litigation, P.C. ("CCL") submits these comments on proposed amendments to the Federal Rules of Appellate Procedure currently being considered by the Committee. We sincerely appreciate the Committee's willingness to consider CCL's views.

CCL has served as an appellate firm for the plaintiffs' bar since 2001. Trial lawyers turn to CCL to represent their clients in civil appeals involving complex legal issues. CCL has represented parties in high-profile cases in the Supreme Court of the United States and in all the federal circuit courts of appeals, excepting the Federal Circuit. In addition, CCL represents the American Association for Justice as amicus curiae in courts around the country, including the federal courts of appeals. The ability to write effective appellate briefs is vital to our success and to the vindication of the rights of our clients.

CCL therefore offers the following comments regarding the proposed changes.

Rule 4: Tolling Motions

CCL does not oppose the proposed amendment to Rule 4(a)(4)(a) that would adopt the majority view that post-judgment motions made outside of the time limits of the Civil Rules are not "timely," and thus cannot toll the time for filing a civil appeal.

Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6: Type-Volume Limitations

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.

CCL agrees with the Committee's observation that the Rules' reliance on page limits has "been largely overtaken by changes in technology." In 1998, the Committee recognized that widespread use of personal computers had opened the door to manipulation of fonts, kerning, margins, and other "tricks" that threatened to make the existing 50-page limit "virtually meaningless." Advisory Committee Note to 1998 amendments. Rule 32 was therefore sensibly

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amended to incorporate type-volume limits as a more effective means of controlling the length of briefs. In 2005, Rule 28.1 adopted limits on cross-appeal briefs that were based on the Rule 32 type-volume limitation. The same recognition of the impact of technology supports the conversion of page limits in other rules to equivalent word limits, and CCL supports that conversion.

The proposal to shorten briefs and other documents is another matter entirely. The proffered justification for the proposed change is that the 14,000 word limit adopted in 1998 was based on the Advisory Committee's erroneous determination that 50-page briefs contained approximately 280 words per page. The proponents of lower limits contend that the true conversion rate should have been 250 words per page.

Judge Frank Easterbrook was present at the creation of the 1998 rule and disputes this version of events. His comment indicates that the 50-page to 14,000-word conversion was based on his own word count of printed briefs. Similarly, the comment by the General Counsel of the Equal Employment Opportunity Commission states that some of the EEOC's briefs under the 50-page limit contained over 14,000 words. The American Academy of Appellate Lawyers has commented that the record of the proceedings leading up to the 1998 amendments does not provide "any basis to support the comment that the 1998 Advisory Committee was confused or mistaken."

The Advisory Committee in 1998 arrived at 14,000 words as the enforceable equivalent of a 50-page filing that would work no change in the amount of content of principal briefs. Even when the Advisory Committee was given the opportunity to "correct" any error in the conversion ratio in 2005, the Committee instead applied the same conversion ratio in Rule 28.1 as it used in Rule 32. After almost a decade of practice under the type-volume limits of Rule 28.1 and more than fifteen years of practice under Rule 32's type-volume limits, the suggestion that those limits must now be reduced threatens to disrupt appellate practice nationwide. The technology rationale for converting to type-volume limits provides no justification for enlarging or reducing those limits; it is a rationale for preserving existing practice and settled expectations.

Nor has any persuasive rationale for shorting type-volume limits been advanced. The judges of the Tenth Circuit and Judge Silberman of the D.C. Circuit have commented that many briefs filed in their courts are too long. But wordy and unfocused briefs come in all sizes, including 12,500 words. Lower limits on the quantity of written advocacy will not likely improve its quality.

To the contrary, CCL believes that blanket reduction in the size of briefs and other filings will reduce the quality of appellate advocacy and undermine proper decision making by the federal appellate courts. Those civil actions that proceed to trial and then to appeal are often the most complex and intractable disputes. Justice is not served when counsel cannot lay out the facts of a complex case in sufficient detail, identify all the issues of consequence, and set forth the governing statutory and precedential law. The opportunity to fully present the facts, issues and law in appellate briefing is especially important because any federal appeal may be decided without oral argument, even if oral argument is requested by the parties. Fed. R. App. P. 34(a)(2)(C); *see also* United States Court of Appeals for the Fourth Circuit Local Rule 34(a)

("*Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.*").

The law that must be discussed in appellate briefing has not become simpler in recent decades. The inexorable growth of statutes and regulations – "hyperlexis" – is well known. *See* Mila Sohoni, *The Idea of "Too Much Law,"* 80 Fordham L. Rev. 1585, 1591 (2012); Dru Stevenson, *Costs of Codification*, 2014 U. Ill. L. Rev. 1129 (2014). Supreme Court opinions, the authoritative declarations of federal law, have become substantially longer. Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 634 (2008). There is no reason to believe federal appellate opinions have not followed suit. The growth of computerized legal research has enabled counsel to better identify and organize the weight of legal authority governing the issues in his or her case. A blanket reduction in word limits moves the advocate away from nuanced discussion toward a string of citations.

It is no answer that counsel can move for an enlargement of the word limits. Even if such requests were routinely granted, the shortened limits would have succeeded only in increasing the work of courts and counsel. In our experience, amici curiae rarely seek and courts rarely grant enlargement of the word limit for amicus briefs. 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, thus increasing the number of briefs (and words and pages) filed, not reducing them.

Because CCL regularly prepares and files amicus curiae briefs on behalf of the American Association for Justice and other clients, CCL notes that the proposed reduction in type-volume limitations will affect amicus briefs disproportionately. Under Rule 29, the word limit for amicus briefs is half of that for a party's principal brief, and so would be reduced more than 10 percent to 6,250 words. However, Rule 29 also requires a "statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." An amicus must also state "whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) 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, identif[y] each such person." Both these statements count against the word limit.

Because there appears to be no good reason to impose a blanket reduction in the size of all filings, CCL submits that the proposed amendments to Rule 32 and 28.1 be withdrawn, and the page limits for Rules 5, 21, 27, 35, and 40 be converted using the existing ratio of 280 words per page.

Rule 29: Amicus Filings in Connection With Rehearing

Similarly, 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."

Proposed Rule 29(b) would make special provision for amicus filings during a court's consideration of petitions for rehearing or rehearing en banc. No rule currently governs such filings, and CCL agrees with the Advisory Committee that the bar would welcome clear guidance on this point.

CCL agrees with the comment submitted by the General Counsel for the EEOC that the proposed deadline for filing an amicus brief should be extended from 3 days to one week after the party has filed the petition for rehearing. Amici should be afforded reasonable time to consider the petition and to fulfill their internal requirements for approval of amicus participation.

CCL disagrees with the proposal to limit amicus briefs to 2,000 words. Rehearings 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. Addressing those matters in addition to setting forth the identity and interest of the amicus often may require longer briefs.

It is significant that the federal circuits that have local rules on this point set substantially higher word limits. *See* Ninth Circuit Rule 29-2(c) (An amicus brief submitted while petition for rehearing is pending is limited to 4,200 words.).

CCL further suggests 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, the proposed Rule 29(a) limits its application to amicus filings during a court's initial consideration of a case on the merits. CCL questions the rationale for limiting amicus briefs to a court's initial consideration of a case on the merits, which is not explained in the Committee Notes.

On rare occasions, CCL and/or the American Association for Justice present amicus briefs at a later consideration of the case on the merits where no brief was filed during the court's initial consideration of the merits—either after rehearing en banc has been granted or after a case has been remanded from the Supreme Court. On these rare occasions, our amicus briefs have focused on issues that were raised by the panel's or the Supreme Court's majority or dissenting opinions, or were necessary to present our client's interests in a case where those interests were not clear before the initial consideration of the merits by the court. We believe it is unwise to limit Rule 29(a) to the "initial" consideration of the case on the merits.

CCL thanks the Committee for this opportunity to comment on these proposed rule changes.

Regards,

Jeffrey R. White
Senior Litigation Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h5v-szuf
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0036
Comment from Federal Courts Committee NYCLA, Federal Courts Committee of the New York County Lawyers Associaton

Submitter Information

Name: Federal Courts Committee NYCLA
Organization: Federal Courts Committee of the New York County Lawyers Associaton

General Comment

Please see the attached Report by the Federal Courts Committee of the New York County Lawyers Association.

Attachments

Report on Federal Rules of Appellate Procedure FINAL 2-12-15

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Vincent T. Chang
Co-Chair
Hon. Joseph Kevin McKay
Co-Chair
Federal Courts Committee

February 12, 2015

FEDERAL COURTS COMMITTEE OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Courts Committee (the "Committee")[1] of the New York County Lawyers Association ("NYCLA") has approved the following comments concerning the proposed amendments to the Federal Rules of Appellate Procedure (the "Proposed Amendments") proposed by the Judicial Conference Advisory Committee on Appellate, Bankruptcy, Civil and Criminal Rules (the "Advisory Committee") and published for public comment on August 15, 2014.[2] If enacted, the amendments will become effective December 1, 2016.

NYCLA is an organization of nearly 9,000 lawyers. Its Federal Courts Committee comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA and its Federal Courts Committee issue reports and position papers on matters of interest to our membership, including proposed changes in law and procedure that we believe impact the public interest.

As further detailed below, the Committee generally supports the Proposed Amendments, but opposes certain of the proposed amendments and suggestions with respect to other items. In particular, the Committee opposes certain changes to the requirements for inmate filings. In the sections below, we first comment on a proposed amendment to the so-called "three days are added" rule, which we also address in our separate comments on the Federal Rules of Civil Procedure, and then offer comments on the proposed amendments to other rules in the Federal Rules of Appellate Procedure, including rules on inmate filings and changes in word count limits and amicus briefs.

PROPOSED AMENDMENTS AND COMMITTEE COMMENTS

A. "Three Days Are Added" Rule

Proposed Amendment:

The Federal Rules of Appellate Procedure provide that where a party's time to act is measured from the service of a paper, three days are added to that time if the paper is served other than by hand delivery. *See* Fed. R. App. P. 26(c). The Proposed Amendments would

[1] The views expressed are those of the Federal Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

[2] The Advisory Committee simultaneously published proposed amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure; however, the comments contained herein are limited to the proposed amendments to the Federal Rules of Appellate Procedure. The Committee has issued separate comments on the proposed amendments to the Federal Rules of Civil Procedure.

eliminate electronic service from the types of service that add three days to the other party's time to act. In other words, for purposes of the "three days are added" rules, electronic service would be the functional equivalent of service by hand and would no longer trigger the rule.

The Proposed Amendment to the Federal Rules of Appellate Procedure is as follows[3]:

Rule 26. Computing and Extending Time

****

(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.

The Proposed Amendments – and parallel Proposed Amendments to Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Criminal Procedure[4] – are based on the same underlying rationale. Fed. R. App. P. 25 was amended in 2001 to provide for service by electronic means. At the same time, Fed. R. App. P. 26 was amended to include such electronic service among the types of service that give the recipient three additional days to act. At that time, there were two reasons for such inclusion: (a) concerns about delays in electronic transmission due (for example) to incompatible systems or the like; and (b) a desire to induce parties to consent to electronic service, which initially was authorized only with the consent of the person being served.

The Proposed Amendments recognize that both of these reasons no longer exist. Electronic communication is now the norm, and is considered reliable.[5] In most federal courts, electronic filing – the standard means of electronic service – is mandated in virtually all cases; any attorney wishing to practice before the court must "consent" to it. There is therefore little remaining reason to treat electronic service with the wariness that led to its initial inclusion among the types of service that extend a period to act by three days. As the Advisory Committee Notes to the Proposed Amendments point out, electronic service has become the norm.

[3] Additions are signified with red underlining; deletions are signified with ~~red strikethrough~~.

[4] Although the Proposed Amendments to the Criminal and Bankruptcy Rules are beyond the scope of these comments, we note that the Proposed Amendments would alter the "three days are added" rules in essentially the same manner in all federal courts.

[5] The rules separately address the possibility of any actual failure of electronic communication. Fed. R. App. P. 25(c)(2) authorizes electronic service only through the court's transmission of electronic filings – which, under Fed. R. App. P. 25(a)(2)(D), can be made only in accordance with the court's local rules. These local rules, in turn, generally include provisions respecting technical failures. *See, e.g.*, Second Circuit Rule 25.1(d)(3).

In addition, eliminating the extra three days for the mode of service that is now the most common greatly simplifies the computation of time. As the Advisory Committee Notes point out:

> 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 complications by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the Proposed Amendment would change the rule to provide for additional time *only* where a party's time to act is triggered by service on that party ("after being served"), not where a party's time to act is triggered by that party's own service of a document ("after service"). This is obviously a simple matter of logic; there is no reason to give a party an extra three days by virtue of that party's own choice to serve a document in a manner other than personal delivery or electronic service.

The Committee's Comments:

The Committee generally endorses the adoption of the Proposed Amendments to Fed. R. App. P. 26 for all of the reasons set forth above. We do, however, make one observation.[6]

Although the rules do not specify as much, as a practical matter an attorney can generally serve opposing counsel by hand only during the business hours of that counsel's office. The reason for this is because, unless the paper is handed directly to opposing counsel, the rules require that it be delivered "to a responsible person at the office of counsel" (Fed. R. App. P. 25(c)(1)(A)), which requires, at a minimum, opposing counsel's office be open and accessible.

Electronic service, in contrast, can be accomplished at any hour – regardless of whether the recipient's office is open. This is one reasons why some attorneys prefer to serve papers electronically. But it also means that electronic service may not be quite the same as hand delivery for purposes of reasonable notice. A paper can be served electronically on a given day any time until 11:59 p.m., whereas in practice most attorneys could not receive service by hand at such an hour. At first blush, it seems unfair to treat 11:59 p.m. electronic service the same as service by hand during business hours for the purpose of triggering a time to act that is measured in calendar days. That unfairness is magnified where the papers are voluminous: electronic

[6] A minority of the Committee's members dissented to the Committee endorsing the adoption of the Proposed Amendments to Fed. R. App. P. 26, principally for the reasons stated in the majority's "one observation." However, the dissenters disagree with the majority's statements in the "one observation," characterizing the reasons for opposing these amendments as a "small anomaly" and characterizing these amendments as "an efficient adjustment of the rules to comport with the realities of modern practice." The dissenters believe that the proposed changes will lead to "gamesmanship" with frequent service of papers electronically after the close of business, especially on Fridays, to reduce the adversary's effective response time by three days. Additionally, service electronically is not equivalent to hand delivery, because of the time imposed on the recipient for printing and compiling papers, which may include voluminous exhibits. For these reasons, the dissenters do not believe these changes to be "an efficient adjustment of the rules" and would not approve them.

service imposes on the recipient the burden of printing and organizing papers that, if served by any other means, would arrive bound and tabbed.

On balance, however, the Committee does not believe that this is a reason to reject these Proposed Amendments. In most instances, counsel work out briefing schedules among themselves, and can address such issues as the timing of electronic service in their agreements. Almost invariably, a party that needs an additional day because of late-night service should be able to obtain it either by agreement or from the court. We therefore do not see this small anomaly as a barrier to what we otherwise agree is an efficient adjustment of the rules to comport with the realities of modern practice.[7]

B. Tolling Motions

Proposed Amendment:

Fed. R. App. P. 4(a)(4) currently 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" (emphasis added). As the Advisory Committee explains, this rule has generated a split in the circuits concerning what happens if a district court has extended the deadline for such a post-judgment motion and no party has objected to that extension. The majority (including the Second Circuit) holds that compliance with such an extended deadline does *not* toll the time to file an appeal, but a minority (including the Sixth Circuit) holds that it does.

The Proposed Amendment would resolve this split by adopting the majority view: Fed. R. App. P. 4(a)(4) would now specify that in order to toll the time to file an appeal, a post-judgment motion would have to be made "within the time allowed by" the Federal Rules of Civil Procedure.

The Committee's Comments:

The Committee supports this amendment, which will create uniformity and clarity (and which, we note, will not change the practice in the Second Circuit).

[7] We note, moreover, that in the Second Circuit (a) the due dates for principal briefs are generally set by order based on the parties' requests (the deadlines for which are triggered by events other than service); and (b) the due date for any reply brief is triggered by the *filing* of the appellee's brief, not by its service. *See* Second Circuit Rule 31.2. As a result, in the Second Circuit the Proposed Amendment would impact the timing of papers only for motions (which are governed by Fed. R. App. P. 27). We also note 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.

C. Inmate Filings

Proposed Amendment:

Proposed amendments to the Fed. R. App. P. 4 and 25 and a new proposed Form 7, with accompanying revisions to Forms 1 and 5, would modify the requirements for litigants who are prison inmates to establish timely filing of notices of appeal and other papers in certain circumstances. Rule 4 relates to filing notices of appeal, which are initially filed in the district court from which the appeal is taken. Rule 25 relates to the filing of any paper in the court of appeals.

Under the current and amended version of those rules, inmates may file papers by mailing them to the courthouse, and their papers may be considered timely if deposited in the prison mailing system by the deadline for filing. The proposed amendments, which are substantively the same for Rule 4 and Rule 25, would alter the existing rules in three principal respects.

First, the current rules provide that "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The proposed amendments would eliminate this language, allowing inmates to take advantage of the timely-filing rule regardless of whether they use the institution's legal mail system (if it has one) or its general mail system.

Second, the proposed amendments address when an inmate can submit a declaration or affidavit to establish that the filing was deposited in the mail system as of the filing deadline. The amendments would clarify that, subject to the court's discretion, the inmate must include such a declaration or affidavit with the document being mailed. The current rule does not expressly require inclusion of such a declaration with the paper being filed, and courts have reached different conclusions as to whether an inmate can submit a declaration or affidavit of timely mailing after-the-fact.

Third, the proposed amendments modify the language required for such declarations or affidavits of timely filing. Among the amendments is a proposed Form 7, which is a sample inmate declaration of timely filing by mail.

The proposed revisions to Rule 25(a)(2)(C) and the accompanying proposed Advisory Committee Note are set forth below. (The revisions to Rule 4(c), which governs inmates filing a Notice of Appeal, are substantively the same.)

Proposed Revisions to Rule 25(a)(2)(C):

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate filing.** 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 second sentence of the former Rule—which had required the use of a "system designed for legal mail" when one existed—is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

As indicated above, the Advisory Committee proposes that a sample declaration be added to the Appellate Rules as a new Form 7. Form 7 is a sample court-captioned declaration. The body of the sample declaration reads as follows:

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

To alert inmates to the requirements that would be imposed under the amendments to Appellate Rule 4, the Advisory Committee proposes the addition of new language to the sample notices of appeal (Forms 1 and 5). The warning would appear in bracketed language at the bottom of those Forms, as follows (the proposed changes to Form 1 and Form 5 are identical):

> *[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the 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.]*

The Committee's Comments:

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.

The proposed amendments to the inmate filing provisions of Rules 4 and 25 would impose an additional procedural hurdle on a select class of pro se litigants, namely inmates of prisons or other institutions.[8] Non-inmate *pro se* parties can deposit filings directly into the U.S. mail or with a private courier (the rules allow filing by mail for all parties, so long as the clerk receives the papers by the last day for filing). Different considerations apply to prison inmates, who have no direct access to the U.S. mail system, and no control over delays within a prison mail system. The current provisions in Rule 4(c) and Rule 25(a)(2)(C) reflect these considerations.

The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by *pro se* prisoner litigants. In the Committee's experience, *pro se* litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly

[8] Prison inmates represented by counsel will generally file all papers electronically through counsel and are likely not affected by the proposed amendments.

from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require *pro se* prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The Committee endorses the amendments to include a sample declaration of timely filing (Form 7), and to include references to that sample in the current form notices of appeal. The Committee does not favor the language of the proposed new Form 7. The form declaration requires the inmate to swear under penalty of perjury that she "deposited" the paper for filing in the institution's mail system as of a particular date. An 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. Interestingly, the Advisory Committee acknowledges and corrects a similar problem under the existing rule, and proposes requiring that the inmate declare that first class postage 'is being prepaid," not (as directed by the existing Rule) that it "has been prepaid." *See* Advisory Committee Note to FRAP 4, 25 Amdts. ("This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system."). In addition, the past-tense language 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.

D. Length Limits

Proposed Amendment:

The proposed amendments to Fed. R. App. P. 32 and 28.1 would reduce the word count limits for appellate briefs, reducing the word limit for main briefs from 14,000 words to 12,500 words; for reply briefs from 7,000 words to 6,250 words. In cases involving cross-appeals, the proposed amendments would reduce the word count for the appellant's principal brief from 14,000 words to 12,500; the appellee/cross-appellant's brief from 16,500 words to 14,700 words; and the appellant's reply brief and the appellee/cross-appellant's reply brief from 14,000 to 12,500 words. The proposed amendments do not affect the existing limits as stated in lines of text, which remain an alternative basis for complying with the rules' length limits. The Advisory Committee explains that the reduction in word count limits is intended to correct an anomalous conversion rate that was used in 1998, when then-applicable page limits were converted into word and line limits:

> 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments

inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

(Advisory Committee Note to Rule 32 Proposed Amdt.)

Further amendments to Rule 32 would clarify the specific sections of briefs that are excluded from the word count, set forth in a new Rule 32(f).

Finally, Rule 32 is amended to include a global certification requirement for virtually all papers filed before the court of appeals, not just briefs, that the paper complies with applicable type-volume requirements.

The revisions to Rule 32 are copied below.

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2)—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.

Proposed amendments to Fed. R. App. P. 5, 21, 27, 32, 35, and 40 relate to filings other than parties' merits briefs. Each Rule would be amended to include length limits for computer-generated papers in terms of number of words or, alternatively, number of lines printed in monospaced font. The amended versions of these rules preserve page limits only for handwritten or typewritten papers. The proposed limits effectively convert the existing page limits under these rules into word and line limits, applying a conversion rate of one page equaling 250 words or 26 lines of text.[9]

The Advisory Committee proposes accompanying changes to Form 6, the sample certification that a party has complied with length limits for briefs. The revised Form 6 could be used for certifying compliance as to any "document" filed with the court of appeals, rather than merely briefs. The revised Form 6 reflects that, under the proposed amendments, a party can certify compliance with all computer-generated papers, not merely briefs, in terms of the document's word count or line count.

The Committee's Comments:

The Committee endorses these proposed amendments.

The Report of the Advisory Committee on Appellate Rules explains that the 1998 adoption of word limits inadvertently increased the permissible length of briefs before the courts of appeals. At that time, the Appellate Rules were amended to replace the 50-page limit for briefs with a 14,000 word limit, apparently employing a conversion rate of 280 words per page – a number of unknown origin. A study of briefs under the pre-1998 rules indicates that an average 250 words per page would have been a more accurate benchmark. The proposed amendments use this more accurate conversion rate, applying it to the 1998 page limits for briefs

[9] Thus, requests for permission to appeal (Rule 5), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text. Petitions for mandamus and other extraordinary writs (Rule 21), currently limited to 30 pages, would be limited to 7,500 words or 780 lines of text. Motions and responses to motions (Rule 27), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text; reply briefs on motions, currently limited to 10 pages, would be limited to 2,500 words or 260 lines of text. Petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), currently limited to 15 pages, would be limited to 3,750 words or 390 lines of text.

and the current limits (expressed in pages) for other filings. The Committee agrees with the Advisory Committee's rationale of adopting word limits that better achieve the intended result of maintaining the length limits in place in 1998. Notwithstanding these amendments, any circuit could adopt local rules to maintain the existing limits or otherwise permit longer limits.

The Committee also endorses the proposed amendments relating to papers other than briefs on the merits, as they provide greater uniformity in length limits across different types of appellate papers, and greater clarity in calculating a paper's length. Under the proposed amendments, the length limits for computer generated papers in support of petitions for Appeal by permission (Rule 5), mandamus and other extraordinary writs (Rule 21), motions (Rule 27), petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), all currently expressed in pages, would be governed by word or line counts. The proposed amendments to Rule 32 provide more clarity as to what items are excluded from the word or line count. The more comprehensive list makes clear that the word or line count should not include any cover page, signature block, or proof of service – components that are not expressly mentioned in Rule 32's current list of exclusions.

For the sake of fairness, the Committee notes that these 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.

E. Amicus Briefs on Petitions for Rehearing

Proposed Amendment:

No federal rule governs the timing and length of amicus briefs filed in connection with petitions for rehearing, and the Advisory Committee reports that most circuits have no local rule addressing such filings.[10] The Proposed Amendments seek to fill this void by re-numbering Fed. R. App. P. 29 (which is titled "Brief of an Amicus Curiae" and addresses amicus briefs generally) as Fed. R. App. P. 29(a), titling that subsection "During Initial Consideration of a Case on the Merits," adjusting the numbering of its sub-parts accordingly, and adding a new Fed. R. App. P. 29(b) entitled "During Consideration of Whether to Grant Rehearing." The provisions of the new subsection would apply only where no "local rule or order in a case provides otherwise." Thus, the rule would not require any circuit court to accept amicus briefs on such petitions or mandate any particular rules concerning the length or timing of such briefs; it would only establish default rules for timing and volume where such briefs are permitted.

The Proposed Rule sets a volume limit of 2,000 words, or 208 lines of text printed in a monospaced face – slightly more than half of the volume limit proposed for petitions for rehearing in the Proposed Amendments to Fed. R. Civ. P. 40. An amicus brief in support of a petition for rehearing (together with a motion for leave to file it if the amicus is not the United States, its officer or agency, or a state) would have to be filed no later than three days after the petition it supports. A brief in opposition to such a petition (together, again, with a motion for

[10] The Second Circuit has no such rule.

leave if required) would have to be filed no later than the date set by the court for any response to the petition.

The Committee's Comments:

The Committee generally supports this clarification, particularly in light of the room it leaves for courts to develop their own rules. Presumably any circuit that disagrees with the default approach will promulgate a local rule to address the issue; thus, in either case, there will be a rule that provides counsel with some guidance in this area. We agree with the general proposition that having no rule at all leads to confusion – and in all likelihood burdens clerks' offices with calls that would be unnecessary if there were a rule.

We do note, however, that the Advisory Committee has not explained why the deadline for an amicus brief opposing rehearing should presumptively be the same as the deadline for the opposing party's brief. A motion for leave to file an amicus brief must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). As a practical matter, this generally requires the amicus 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. It is difficult (if not impossible) for an amicus to do this until *after* the filing of the brief of the party whose ultimate position it is supporting.

We would therefore suggest that the default deadline for an amicus brief in opposition to a petition for rehearing be three days after the filing of the main brief in opposition. Although we recognize that this would require the court to wait three days to see if any amicus is filed, as a practical matter we do not believe that this will significantly lengthen the time it takes to resolve any motion for rehearing. We also note that opposition papers are permitted on such applications only where the court requests them. We respectfully submit that any application for rehearing that warrants such a request should also warrant the addition of three days to the briefing schedule to accommodate the interests of any amicus curiae.

We recognize that a three-day deadline is very short because (following the 2009 amendments) intermediate Saturdays, Sundays and holidays are no longer excluded from the counting. In some instances this could mean that a weekend represents all of the time an amicus has between the filing of the party's brief and the deadline for its own. We do not, however, suggest an expansion of that time because we recognize that as a practical matter an amicus will have to begin preparing its papers at the same time it would if it were a party; the additional time would primarily give the amicus an opportunity to see the final version of the party's brief and adjust its own accordingly. This opportunity should be available to an amicus on either side, but the default length of time need not (in our view) be any longer than what the Advisory Committee proposes.

Report prepared by:

Vincent T. Chang, Committee Co-Chair

Hon. Joseph Kevin McKay, Committee Co-Chair

Adrienne B. Koch, Committee Member

Kimo Peluso, Committee Member

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8w-oagm
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0037
Comment from Richard Stanley, NA

Submitter Information

Name: Richard Stanley
Organization: NA

General Comment

Please see the attached letter setting forth my reasons for opposing the proposed amendments to the Federal Rules of Appellate Procedure that would reduce the maximum allowed word count for briefs. Thank you for the opportunity to provide such comments and for your consideration.

Richard L. Stanley
Houston, Texas

Attachments

Attachment1--RLSCommentsonWordCountAmendment

The Law Office of Richard L. Stanley
P.O. Box 7967
Houston, TX 77270
February 17, 2015

VIA ELECTRONIC SUBMISSION

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

Re: *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure*

Dear Committee Members and any others whom it may concern:

I appreciate the opportunity to offer some reasons for my strong opposition to the pending proposal to amend Fed. R. App. P. 28.1 and 32(a)(7) so as to shorten the length of appellate briefs in federal court from 14,000 words to 12,500 words.

I have been an appellate attorney for over 25 years. My appellate practice is concentrated in appeals to the U.S. Court of Appeals for the Federal Circuit in patent litigation matters. However, I have briefed appeals to the Federal Circuit in other areas of that court's jurisdiction. I have also briefed appeals and filed amicus briefs in other U.S. Courts of Appeal as well as before the U.S. Supreme Court. I have also participated in the preparation of briefs in pro bono criminal appeals in both federal and state appellate courts.

Given that my practice is primarily focused on appeals in patent litigation matters, it would be far too convenient to rely on the premise that patent cases are inherently more complex than most federal cases, and thus appeals in patent cases justify a greater amount of words. Without venturing in that direction, I believe my briefing experiences are germane to any federal appeal involving a complex record, a lengthy trial, multiple and diverse claims, important issues of first impression or widespread interest, or other complicating factors.

To be sure, I have filed briefs in patent appeals containing substantially less than the maximum allowable number of words. However, those instances are few (and usually tied to unique circumstances such as briefing only a single issue or filing a brief in a case with multiple other parties and briefs on the same side). At various judicial conferences and CLE programs, I have heard appellate judges decry the number of briefs that appear on their desks containing just under the maximum number of words. I readily admit to having been responsible for many such briefs throughout my career. In my defense, I can attest that each of those briefs originally contained 15,000 words, or 17,000 words, or 20,000 words, or 25,000 words, or sometimes over 30,000 words before being painstakingly edited to the final sub-14,000 words in the version ultimately filed with the appellate court.

My uniform experience is 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. The primary reason that many of my briefs have been filed with just less than the allowed 14,000 words is that my brief-drafting task becomes complete at the instant that I am first able to reduce the word count to a number less than 14,000. Such an exercise in "word reduction" is not a matter of deciding which arguments to present or how to make the writing better by tightening and polishing the language for maximum clarity and persuasiveness. Those tasks have been done before I turn to the inevitably final task of removing words from the brief for no other purpose than to reduce its length—even under the existing 14,000 word limit.

My fundamental point is that it has been my experience over the past 20+ years that the extensive editing required to meet the existing word count limit is already undermining the effectiveness and usefulness of briefs filed in many complex cases. Recalling my own difficulties in reducing briefs to less than 14,000 words, I cannot imagine how an additional requirement to remove another 1,500 words from those prior briefs would have benefited either the reviewing judges or the administration of justice. Thus, it is my view that the proposed reduction from 14,000 words to 12,500 words will not turn "bad" brief writers into good ones, may turn some "good" briefs into "not so good" ones, and thus will not improve the quality of written advocacy presented to the federal courts.

As a former appellate law clerk and as a practicing appellate attorney, I have read appellate briefs containing 10,000 words or less that are redundant, unfocused, and confusing. On the other hand, briefs containing 20,000+ words that suffered from none of those flaws would still have to be reduced to the applicable 14,000 word limit. My belief is that many of those briefs as eventually filed were not as powerful or as clear or as useful to the reviewing court as might have been the longer versions that existed prior to the last few rounds of editing. If the final editing for length of briefs that are filed in complex federal cases is rendering them less clear and less useful to the appellate judges under the existing 14,000 word maximum, then such problem will be greatly exacerbated under a 12,500 word limit.

At no time in my career have I ever added words to an appellate brief merely to cause such brief to appear more substantial by approaching the applicable word count or page limit. If judges are noticing that most briefs being filed today are at or near the maximum word count, it is almost assuredly because those briefs were originally much longer when first drafted. If the maximum word count is reduced, it seems certain that the only briefs that will not be filed at or near that reduced maximum will be those briefs that would have been filed with less than 12,500 words under the current rule. The first complete draft of a brief is almost always the longest one. The iterative process of editing typically and properly causes the initial, longer draft to become clearer, tighter, and shorter. But just 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.

The sage observation to the effect that "if I had more time, I would have written less" has been attributed to countless earlier writers. However, the truth behind such adage is directly applicable to present-day appellate writing. Where a drafter of an overlong brief is working on an hourly basis, the client likely will not pay for the additional hours that would be needed to reduce the brief beyond what is required under the rules. In my experience, the client will likely have approved the contents of the brief at a point when there were still hundreds or even thousands of additional words left to be excised. Once the brief gets under the word limit, it is deemed done. Where a brief is being written for a fixed fee, the attorney or the law firm may be unable or unwilling to devote additional hours to the task of reducing the length of the brief below the maximum when such time could be more profitably devoted to other tasks.

The above adage reflects the reality that "if an attorney would be compensated for taking more time, he or she would have written less." For a legal aid attorney or a public defender, the above adage is more aptly modified to reflect the starker reality that "if I had fewer cases to handle, I would have written less." If focused and concise writing takes more time to accomplish, that is the one thing that the latter attorneys do not have in light of their extensive caseload (and they are often not being paid by the hour or by the case). Moreover, those same practical and economic disincentives may equally undermine an attorney's willingness to edit or craft a brief once it falls below the maximum word count.

The inescapable truth is that most attorneys do not have the luxury of unlimited time and budget to fashion each brief to its ultimate level of persuasiveness, readability, clarity, and brevity (even where such goals are not mutually inconsistent). Perhaps a book or law review author can wait to publish until there are no unnecessary words and each selected word is exactly right, but not a brief writer. Even the appellate judge has more ability to take as much time as is necessary to draft and craft an opinion before releasing it to the parties and the public. Needless to say, such authors and judges are also not laboring under a need to comply with a strict maximum word count. Yet, none of those authors is likely to write more than is believed necessary to convey their intended story or decision.

Under the existing rule, attorneys resort to a variety of techniques by which to wring individual words out of briefs without sacrificing substantive content. A single example may illustrate this point. I recently drafted and filed an amicus brief in a case before the U.S. Supreme Court on the opposite side of the case on which the government was an interested party. In the government's brief, I noticed that all citations to the U.S. Code and to the Code of Federal Regulations did not contain the "§" symbol, such that a citation to 15 U.S.C. § 1071 appeared as "15 U.S.C. 1071" and a citation to 37 C.F.R. § 2.120 became "37 C.F.R. 2.120." In briefs filed in other cases, I have observed a similar but less subtle modification of deleting the space between the "§" symbol and the code section in all such citations (e.g., "§1071"). Perhaps no real loss in meaning or clarity, but each dropped "§" symbol or the omitted space saved a word under the counting programs utilized within current word processing software.

Where the resulting brief as filed just barely complies with the applicable word count, omissions of that type do not seem to be accidental and would surely be more standard practice than noticeable quirk under a further reduced word count. The relevant point is that if skilled appellate attorneys (*i.e.*, those whose overlong briefs are indisputably not the product of poor

writing skills or insufficient attention to the task) are already resorting under the existing rules to such techniques in complex and important cases to eliminate single words or only a few words at a time, it is my opinion that there is no real remaining benefit to the judicial system to be gained by imposing a new rule that requires them to find a way to remove 1,500 more words. Given that attorneys have already reached the word-removal stage of having to edit their briefs with a scalpel, it is unrealistic to believe that briefs will be improved by forcing them to go back to editing with a blunt axe.

The current rule already requires appellate attorneys in complex cases to resort to word processing techniques and word counting tricks as a necessary complement to their literary, analytical, and advocacy skills. Some of those techniques are clever, some are dubious, and many are employed at a cost of clarity or readability. Quoted material in briefs is now more heavily excised through the use of ellipses to save words, which may require the reviewing court to examine the original source for its full context. Indeed, appellate attorneys have probably now discerned that use of the ellipsis symbol (…) rather than the traditional three periods separated by spaces (. . .) saves two words each time. If the proposed reduction in word count is adopted, my prediction is that attorneys will have no choice but to continue down the slippery slope of devising more pronounced shortcuts to accomplish the mandated word reductions.

As one prediction, existing citation conventions will likely cease to be followed. First, citations to cases will become more truncated. The traditional citation to a case entitled "Smith & Jones Trading Co. of Am. v. U.S. Int'l Trade Comm'n" will likely become "Smith v. USITC" in future briefs to save ten words. Because a full citation to each cited case or other authority cited in a brief will appear in the Table of Authorities at the beginning of each brief (where it is not subject to the word count), attorneys may soon realize that it will save words to employ only the short form citation to any such authority in the body of the brief. It will be slightly more inconvenient for the reader to have to refer to the Table of Authorities to find the full citation, but correspondingly less argument text will have to be excised. Eventually, case names may cease to be utilized at all outside of the Table of Authorities, such that only the unique reporter citation will appear within the brief itself.

Where a case involves a company such as "Bank of America," there will be little reason to allow the repeated references to that entity's three-word formal name in a brief where a one-word label such as "BofA" will suffice. Of course, not all such abbreviations will be so well known or readily understandable. If the opposing party in such a case were the Red River Valley National Bank, there is no doubt that such party would become "RRVNB" every time it was referenced in the appellate briefing. As such acronyms multiply and cause some future level of opaqueness, a return to the impersonal but single word designations such as "Appellant/Appellee" or "Plaintiff/Defendant" or "Petitioner/Respondent" will eventually convey more useful information and clarity.

Some appellate attorneys are including a Table of Abbreviations following the Table of Authorities in their briefs, which both tightens the text and eliminates a need to use extra words to identify such abbreviations within the brief itself. There should be no doubt that the widespread use, complexity, and substantive content of such abbreviation pages will increase in the future. For example, the "person having ordinary skill in the art" is now abbreviated in

patent cases as the "PHOSITA" where obviousness under 35 U.S.C. § 103(a) is at issue. One need only examine the proliferation of lengthy acronyms within the government to imagine how difficult future appellate briefs may be to decipher despite having a reduced length. As further proof, one might also consider the quick development of the widespread shorthand conventions utilized to comply with the 140-character limitation imposed by Twitter. Just as "judgment as a matter of law" is now written as JMOL (and saves five words each time), perhaps the Twitter-like shorthand "M4NT" will soon become widely accepted as the abbreviation for a "motion for a new trial" in order to save four more words each time.

Nevertheless, the burdens imposed by the proposed amendment will not be solved by tricks and techniques that eliminate mere words, but will require the wholesale elimination of paragraphs, background, and context. Rest assured, whole arguments will always be the last to go. They may be stripped to the bone, but they will rarely disappear. Instead, reducing the applicable word count from 14,000 words to 12,500 words will cause attorneys to excise important procedural details or to incorporate factual background and even substantive material from citation to the record as mechanisms for eliminating enough words. The resulting need to look for information in places other than within the four corners of the parties' briefs will likely increase the burden on the reviewing judge (or the judge's staff) much more than what would be saved by not having to read a possible extra ten pages per brief.

For example, procedural histories of the case on appeal might end up being a single citation to the docket. Where a brief might formerly have contained a Statement of Facts that was carefully crafted to the issues on appeal, such statement might soon be replaced by a single citation to the district court opinion or to a similar section set forth in the party's earlier district court filings. In a patent case, the underlying technology might not be explained beyond a citation to the patent itself or to an expert report. Opinions on review may never again be summarized in a brief, even when only a subset of an opinion is relevant to the issues raised on appeal. Precedent now cited with accompanying parenthetical descriptions will likely be cited in future briefs without any helpful parentheticals. Stripped of such detail and background in the briefs, there will surely be a greater burden imposed on the chambers of the particular judge who is assigned the task of drafting the resulting appellate opinion.

In closing, I offer a few more predictions that what may come to pass if 12,500 words were adopted as the maximum. I predict 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. Otherwise, I predict a sharp increase in the number of amicus briefs filed in appeals as of right, particularly those involving large corporations, high stakes, and sophisticated counsel. I predict 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). Such rule will likely also need to address when such parties can file separate briefs using the same counsel or law firm, and set forth when resort to such overlapping briefs and counsel are prohibited. Until then, while the briefs may be shorter, it is quite possible that there will be more of them. Finally, the appellate courts will surely be burdened with increased motions for relief from the new maximum, such as those seeking

additional words or asking for judicial notice, and the court will also likely have an increased need to police and referee disputes over the minute details of proper and legitimate compliance with the word count requirements.

It is thus my strong belief that the proposed elimination of 1500 additional words from briefs filed in complex federal cases will cause the loss of important information that currently makes analyzing and deciding these cases easier for the appellate judges. Due to page limits and word counts, appellate attorneys have long been unable to adhere to Aristotle's instruction (as adopted by Toastmasters) to "tell them what you are going to tell them, tell them, and then tell them what you told them." There just is not enough space. Under the current 14,000 word limit, the final editing process leaves no doubt that material is being excised from briefs in complex cases such that the appellate court is never even told once about important and useful information. In my opinion, it is preferable for appellate judges to read many briefs that might state the same thing more than once than it would be for such judges to receive briefs in a complex case that do not have enough in them to provide the complete context for understanding and resolving the issues necessary for deciding the appeal.

I respectfully submit that the maximum word count in federal appeals should not be lowered any further. While I do not object in principle to the related proposal to change all existing page limits in the federal rules to a corresponding word count limitation, I also submit without further explanation that any such change should be based on a conversion ratio of at least 280 words per page, and preferably based on 300 words per page.

With regards,

/s/ Richard L. Stanley

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8m-sbc1
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0038
Comment from WALTER K. PYLE, NA

Submitter Information

Name: WALTER K. PYLE
Organization: NA

General Comment

COMMENT BY WALTER K. PYLE, APPELLATE PRACTITIONER, BERKELEY, CALIFORNIA

I have been writing appellate briefs since 1969. I oppose the proposed 12,500 word limit on briefs (and similar reductions for other papers) as well as the elimination of the 3-day-grace rule for papers served electronically.

THE PROPOSED NEW WORD LIMIT

[Increased Complexity of Cases] Since 1998 the law has become increasingly complexsometimes really complex. For example, Supreme Court caselaw interpreting the Antiterrorism and Effective Death Penalty Act often makes it necessary to burn several thousand words just addressing the correct standard of review in a habeas corpus appeal, before even getting to the merits of the case. I do not know any field of law that is less complex now than it was 17 years ago.

[Invalid Assumption] Second, the premise for reduction of the word limit is invalid. There is no evidence that the number 14,000 was chosen by utilizing a words-per-page formula. Judge Easterbrook, who should know, says 14,000 was chosen because it was thought to be a good number. It is. The word limits for other papers is working well, too.

[Shorter Briefs Do Not Make Better Writers] Third, while arbitrarily reducing the word limit may at first blush seem a good way to make lawyers pay more attention to how they write briefs, that is an overly-simplified view of how lawyers actually write briefs. A good brief-writer will economize on his or her words regardless of the word limit, while the less-attentive lawyer will not. As a practical matter a lawyer who uses too many words with the 14,000 word limit will use too many words with a lower limit, and the brief will likely be less readable. More important, a lower limit will penalize the efficient lawyer with a complex case who actually needs those 14,000 words.

[A Comparison] 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. The study that resulted in the proposed reduction did not take into account the nature of the case or the complexity of the issues.

In short, the proposed Amendment is based on a faulty premise, lacks justification, and should be disapproved.

THE PROPOSAL TO ELIMINATE THE 3-DAY GRACE PERIOD

I also oppose eliminating the additional 3 days for responding to papers served electronically.

The reason given for eliminating the grace period is that since 2002 any concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission. I dont agree. It doesnt take much technology or skill (whatever that may include) to transmit a paper electronically; certainly nothing dramatically different from what was around in 2002. And the same concern exists todayparticularly for the small law officethat an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not.

I currently have a civil case pending where counsel for certain defendants invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve complex motion papers electronically. The proposed Amendment lends itself to game-playing like that.

I also do not buy the argument that the new rule will make it easier to compute time limits. Adding 3 shouldnt flummox anyone who works in a law office.

I believe the current 3-day rule works well and should be retained.

PUBLIC SUBMISSION

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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0039
Comment from Peter Goldberger, National Association of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger
Organization: National Association of Criminal Defense Lawyers

General Comment

The attached comments are submitted on behalf of the National Association of Criminal Defense Lawyers.

Attachments

NACDL comment App Rules 021615

NACDL
1660 L St., NW, 12th Fl.
Washington, DC 20036

February 16, 2015

To the Members of the Advisory Committee:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 4(c), 26(c), and 29, as well as the type-volume provisions of Rules 21, 27, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure.

Our organization has approximately 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public criminal defense attorneys and interested academics. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. As you know, we have a long and consistent record of submitting comments. On the basis of that history, we appreciate the close and respectful attention that our comments have always received.

APPELLATE RULES 4(c) and 25(a)(2)(C) – TIMELINESS OF INMATE-FILED NOTICES OF APPEAL

NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail. We have one suggestion, consistent with the spirit and purpose of the Rule, as explained in the proposed Advisory Committee Note. 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, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage, as otherwise required by subparagraphs 4(c)(1)(A)(i) & (ii) and 25(a)(2)(C)(i). The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

As for the related proposed amendment to Form 1 and creation of a new Form 7, we also have a suggestion. 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."

APPELLATE RULE 26(c) – COMPUTING AND EXTENDING TIME: ADDITIONAL 3 DAYS AFTER ELECTRONIC SERVICE

NACDL opposes the proposed package of amendments – including the proposed amendment to Appellate Rule 26(c) – to remove from the list of circumstances in which three days are added to otherwise stated time limits those (many) occasions when a document is due under a Rule or court order to be filed a certain number of days "after service" of another paper, and service has been made by electronic filing. Regardless of the arid logic behind the proposal, the fact is that the amendment would reduce by three days the time available to counsel to respond to an adversary's motion or brief. This small increase in the speediness of proceedings would provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners. This is particularly so as to criminal defense lawyers, whose clients may be incarcerated but who may have to be consulted before responses can be prepared. Many defense lawyers practice solo or in very small firms. Many are in court for much or all of normal working hours on most days. Many have little if any clerical or paralegal support, particularly in the digital age with its decreased demand for secretaries. For this reason, many criminal defense lawyers 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. The burdens thus placed on defense counsel (and thus indirectly on defendants) by the proposal – as well as the increased burden on appellate courts, which will be confronted with many more motions for short extensions of time, or for leave to file documents out of time – far outweigh any perceived benefit in simplicity or abstract elegance in the rules.

Relatedly, if the 3-day addition is to be retained, as we recommend, this Rule has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by 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.

APPELLATE RULES 21, 27, 28.1, 32, 35, and 40 – ACROSS-THE-BOARD 11% REDUCTION IN TYPE-VOLUME LIMITS

NACDL opposes the proposed reduction of type-volume limits and pages lengths throughout the appellate rules. The proposed reduction is based on a recalculation of the presumed type-volume per page from 280 words to 250, relative to the number of pages that was allowed for certain documents prior to 1998. We are aware that many other comments have been submitted criticizing this change for a variety of different reasons, with many of which we concur. In our view, however, the question of what was in the Committee's mind in 1998, one way or the other, when the page limit for briefs was changed to a type-volume rule, should not be given significant weight. The real question is whether there is any good reason to believe that the quality of appellate justice today would be enhanced by forcing an across-the-board 11% reduction in the maximum allowable length of briefs, motions, and other submissions from what is now permitted. We cannot imagine that it would.

We speak from the perspective of criminal defense lawyers who handle appeals for accused or convicted persons. The indictments our clients face often contain numerous counts brought under a variety of federal criminal statutes. These statutes continue to proliferate in number and in complexity. Federal criminal trials can last for weeks, generating potentially more, not fewer errors plausibly providing grounds for appeal. Moreover, error will not result in reversal if it is harmless, but we cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial. This requires more, not less space in even the best-written briefs. Federal sentencing law has also become increasingly complex since 1998, both under the Guidelines and under developing constitutional rules, as well as post-*Booker,* judge-made jurisprudence. The same is true of the law governing federal habeas corpus. Moreover, the number of potentially-applicable judicial precedents grows endlessly, multiplying each year the number of cases that might reasonably be cited, either as supportive precedent or as necessary to be distinguished. All the federal court decisions from our Nation's first hundred years (including many opinions from the bench) were published in 30 volumes of the Federal Cases. The first series of the Federal Reporter, which began approximately when the federal appellate courts were established in 1891, covered the next 44 years in 300 volumes. The Second Series ("F.2d") covered 70 years in 999 volumes. The Third Series ("F.3d") is now in its 774th volume (containing many more pages per volume, as well) after less than another 22 years. About 615 of those volumes

have appeared since 1998. Indeed, the number of precedential opinions *required* by rules of professional responsibility to be cited is ever-growing.

In this context of a burgeoning body of statutes and case law, defense lawyers are sworn to protect our clients' constitutionally-guaranteed right to effective assistance on appeal. We are committed to fulfilling this duty, but we cannot do so with one hand tied behind our back by pressure to drop potentially viable issues or to develop issues less fully. When we file amicus briefs (as NACDL often does) and are limited to one half the allowable party maximum, the significance of the proposed reduction becomes even more acute, as our opportunity to provide helpful information to the court would be severely hampered. For these particular reasons, as well as those proffered by other commenters, NACDL strongly opposes the suggested changes.

Based on the 280-words formula (and without regard to its typographical accuracy), the allowable maximum type-volume under Rule 21 for a mandamus petition should be 8400 words. For a motion under Rule 27, it should be 5600 words. For briefs under Rules 28.1 and 32(a)(7) the volume should remain at 14,000. For a rehearing petition under Rules 35 and/or 40, the maximum should be 4200.

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.

APPELLATE RULE 29(b) – TIME FOR FILING AN AMICUS BRIEF IN CONNECTION WITH A PETITION FOR REHARING

NACDL applauds the Committee for addressing this long-overlooked issue. We have two points of difference with the proposal, however. First, for the reasons discussed in the preceding section of these comments, the allowable type-volume for an amicus submission in connection with a petition for rehearing should be 2250 words under proposed Rule 29(b)(4), not 2000. Also, we strongly urge the Committee to consider allowing a more realistic five days, not just three, under proposed Rule 29(b)(5), to file a memorandum of amicus curiae in support of a petition for rehearing. This is still less than the seven days allowed for an amicus brief on the merits. But based on our experience in filing such memoranda, 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, all while producing the most useful and informative submission for the Court's consideration.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

William J. Genego
Santa Monica, CA

Co-Chairs, Committee on Rules of Procedure

Please respond to:
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PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8f-x3ot
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0040
Comment from Pennsylvania Bar Association, Pennsylvania Bar Association

Submitter Information

Name: Pennsylvania Bar Association
Organization: Pennsylvania Bar Association

General Comment

The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the attached comments in response to the proposal by the Advisory Committee on Appellate Rules.

Attachments

Comments-Appellate-FedRules

February 16, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Sir or Madam:
The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the following comments in response to the proposal by the Advisory Committee on Appellate Rules.

Respectfully,
Francis X. O'Connor, President
Pennsylvania Bar Association

COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Pennsylvania Bar Association makes the following recommendations with respect to some of the proposed Appellate Rule changes:

Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7.

- 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.

- 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.

- The PBA opposes the proposed amendments to Rule 26(c), governing time limits to respond to filings.

RE: Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules

Introduction

The proposed changes to the Appellate Rules are divided into thematic groups. First are discussed the proposed amendments to rules and forms governing inmate filings: Rule 4(c)(1), Rule 25(a)(2)(C), Form 1, Form 5, and New Form 7. Second are discussed the proposed amendments to Rule 4(a)(4), governing the time to file a notice of appeal when a post-judgment motion is filed. Third are discussed the proposed amendments to the rules and forms governing the length of filings: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6. Fourth are discussed the proposed amendments to Rule 29, governing amicus filings in connection with a petition for rehearing. And finally are discussed the proposed amendments to Rule 26(c), governing the time to respond to an electronically-served filing.

Tolling the Time to File a Notice of Appeal: Rule 4(a)(4)

Proposed Amendments

Rule 4(a)(4) extends the time in which a party must file a notice of appeal when that party files a "timely" post-judgment motion. The Rules Advisory Committee felt that the Rule should be amended in light of a circuit split on whether a post-judgment motion filed outside the non-extendable deadlines count as "timely" when the district court mistakenly authorized an extension. The proposed amendments delete the word "timely" and add that the post-judgment motion be filed "within the time allowed by those rules."

Comments

The Committee recommends that the PBA oppose this change. This proposed amendment would adopt the position of the Third Circuit in Lizardo v. United States, 619 F.3d 273 (3d Cir. 2010), and three other circuits that the filing of a post-judgment motion beyond the deadlines permitted by the Civil Rules will not toll the time for filing an appeal even where a district court considers and decides the untimely post-judgment motion, thus effectively extending the time for such a post-judgment motion, as the district courts apparently have discretion to do. Although providing greater clarity to Rule 4(a)(4) is highly desirable in light of the consequences of filing a late appeal, the proposed new text may not go as far as it should in making clear that an order extending the time for filing a post-judgment motion will not extend the time for filing an appeal. It is also 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). The amendments as drafted should not be approved without greater clarification because they simply substitute a new trap for the unwary in place of the current trap for the unwary.

Length Limits: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6

Proposed Amendments

The Rules Advisory Committee believed that the current length limits have been overtaken by technological advances and invite gamesmanship by attorneys. Therefore, the Rules Advisory Committee has proposed amending the rules and forms governing the length of filings when those filings are prepared by computer. The proposed amendments do not change length limits for filings prepared without the aid of a computer. The proposed amendments assume that one page should contain approximately 250 words and 26 lines of text. The Rules Advisory Committee also amended Form 6 as part of a new length certification requirement. Additionally, the proposed amendments contain a list of items that can be excluded when computing a document's length. The proposed changes are as follows:

Rule 5 (Appeal by Permission):
- not more than 5,000 words or 520 lines of monospaced text
- previously 20 pages

Rule 21 (Writs):
- not more than 7,500 words or 780 lines of monospaced text
- previously 30 pages

Rule 27 (Motions):
- a motion or response must not exceed 5,000 words or 520 lines of monospaced text
- previously 20 pages
- a reply must not exceed 2,500 words or 260 lines of monospaced text
- previously 10 pages

Rule 28.1 (Cross-Appeals):
- appellant's principal brief and response and reply brief must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- appellee's principal and response brief must not exceed 14,700 words or 1,500 lines of monospaced text
- previously 16,500 words
- appellee's reply brief must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 32 (Form of Briefs):
- principal briefs must not exceed 12,500 words or 1,300 lines of monospaced text
- previously 14,000 words
- reply briefs must not exceed 6,250 words or 650 lines of monospaced text
- previously 7,000 words

Rule 35 (En Banc):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Rule 40 (Panel Rehearing):
- not more than 3,750 words or 390 lines of monospaced text
- previously 15 pages

Comments

The Committee recommends seeking the views of the judges of the Third Circuit before deciding on a position. No one would dispute the goal of encouraging greater precision and brevity in appellate filings, but the current limits may work well and seem not to be a problem. In addition, shortening these limits is likely to result in a greater number of motions for enlargement. These amendments may fall into the category of fixing something that is not broken. However, the views of the judges of the Third Circuit would be helpful.

The Committee did not dispute the goal of encouraging greater precision and brevity in appellate filings. They felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement. It was suggested that the views of judges on the Third Circuit should be solicited and the Chair of the FPC did so. Judge Michael Chagares is a member of the Advisory Committee on Appellate Rules and 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.

Extension for Electronic Filings: Rule 26(c)

Proposed Amendments

As currently worded, Rule 26(c) allows a party who must respond to a filing that has been electronically served three more days in addition to the response time prescribed by the Rules. Under the current version of Rule 26(c), a document that is delivered on the date listed in the proof of service does not get the three-day additional period. However, the Rule assumes that documents that are electronically served are not delivered on the date listed in the proof of service, thereby entitling electronically-served documents to the additional three days. The proposed amendments remove that assumption. The Rules Advisory Committee suggests that the original wording of Rule 26(c) was due to fears that electronic service would be delayed, and that those concerns have abated.

Comments

The Committee recommends that this amendment be opposed. The Committee is concerned that electronic service may happen at any time of day or any day of the week. Therefore, 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.

PUBLIC SUBMISSION

As of: February 19, 2015
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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0041
Comment from David Tennant, ABA Council of Appellate Lawyers

Submitter Information

Name: David Tennant
Organization: ABA Council of Appellate Lawyers

General Comment

Please see the attached comments submitted by the American Bar Association's Council of Appellate Lawyers.

Attachments

ABA CAL final comments re proposed FRAP amendments(with member comments) 4833-2898-5890 v

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

Comments on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules February 13, 2015

Statement of Interest

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

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

Comments on Length Limits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 *Id.* at 2.

9 *Id.* at 3.

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

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

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

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

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

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

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

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

The current 14,000 word count limit in Rule 32 fits the needs of experienced appellate practitioners and should be maintained. The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count. (We have collected comments in an attachment.)

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

Conclusion

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

The Council of Appellate Lawyers

Bradley S. Pauley
Chair

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

A. Comments opposing word count reduction

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1. I think this is a six page reduction. I find it difficult to believe that the reduction, if enacted, will reduce the burden on the judges. The good lawyers write well in 12,500 words, and the others cannot say anything in 14,000. Having said that, sometimes the statement of facts requires more words even from good lawyers. I suspect that the reduction in word count will be met by an increase in motions for over length brief. Whom does that help?

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2. Although I generally write briefs much shorter than 14,000/7,000 words – as brevity is not just the soul of wit but really appreciated by courts – the problem with lowering the word counts coupled with all the formalistic requirements imposed on the appellant is that there are often cases where you just don't have enough space to articulate arguments. In bankruptcy, which is my area of practice, courts are often less than knowledgeable and the advocate often needs to educate his or her audience. I oppose the reduction.

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3. Having clerked at both the district court and federal court of appeals, I understand the bench's desire for brevity and the frustration many judges experience when they often encounter verbose motions and briefs. As an appellate litigator, I also appreciate that a reduction in word count of both principal and reply briefs might encourage more succinct and effective writing by attorneys. That said, I find myself in the same camp as those appellate litigators who seek to retain the flexibility to go to 14,000 words if necessary (and certainly some complex issues require it) without seeking the court's permission to file an oversized brief. The additional motion practice adds unnecessary time and expense to the briefing process.

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4. I oppose lowering the word limit because—in the high-dollar, multi-party, multi-issue commercial appeals that I work on—it is hard enough to adhere to the 14,000-word limit. Further reducing the word limit would seriously compromise the advocate's ability to properly present essential appellate issues. I understand the need to write succinctly and effectively, but complex appeals warrant full treatment, just as simpler ones do.

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5. Reducing word counts in briefs is a lousy idea. Just another example of the bad chasing out the good. There is no substantive explanation in the Committee's explanation of the reduction, other than the attempt to correlate the pre-1998 50-page limit to a word count limitation based on a calculation of how many words typically fit on a page under that old regime. Not a word about the experiences with the 14,000 word limit and why it is bad, just more anti-lawyer commentary that the old page regime "invite[d] gamesmanship by

lawyers." So because of the bad ones, do we want to limit brief length in cases in which a lawyer believes the length justified? Apparently so.

What have been the average word counts under the 14,000 word limit? How do greater or smaller word counts break down between the types of appeals, areas of law, nature of practitioner? Are there regional differences, i.e. are brief writers on the Coasts, more or less verbose than those in the middle of the country? I guess the Committee did not see the need to trouble itself with any empirical evidence.

And what problems do the extra 1,500 word create for the Judges and their Clerks? Not a word about that either. Any appellate practitioner is well aware of the axiom that in brief writing less is better. Here's what the Seventh Circuit's Practitioner's Briefing Handbook says:

> The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded. Except in unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious. http://www.ca7.uscourts.gov/rules/handbook.pdf, at p. 122.

But there is another side to this problem. Some cases justify length. Take a look at Moglin, Raising Issues on Appeal: Fewer Is Not Always Better (November 3, 2014) at http://www.americanbar.org/groups/litigation/committees/appellate/news-analysis/articles-2014/open/fall2014-1114-raising-issues-appeal-fewer-is-not-always-better.html, including the following point: As Judge E. Barrett Prettyman wrote more than 60 years ago, "although there may be one or two outstanding contentions, which to counsel seem conclusive, there may be several other sound contentions of comparatively lesser moment. It is good practice to put them in the brief."
"Some Observations Concerning Appellate Advocacy," 39 Va. L. Rev. 285, 294 (1953).

This means you need to have the room, the extra words. Adding additional motion practice to seek an expanded word count is no solution; it's just more hazing of lawyers.

Let's take a deep breath and expect that the vast majority of lawyers will do their best to make briefs concise and readable, and not let the few who can't or won't create additional artificial barriers to justice.

By the way, the "brevity is the soul of wit" allusion is misplaced. Polonius was a windbag, "a tedious old fool" who was wrong about everything.

Should briefs be witty and brief, or, lawyerly and assembled with care?

Thanks for the opportunity to vent a little, anonymously, as you promised.

6. I agree that, generally, "brevity is the soul of wit." As an appellate lawyer handling often complex cases before the U.S. Courts of Appeals, however, I am against the Rules Committee's proposed change limiting the ordinary maximum word limits in federal appellate briefs. While, in many cases, I use less than 14,000 words, sometimes – especially in complex commercial cases in which the facts alone take up a large part of the brief – the full word limit is simply necessary.

   I agree with those LinkedIn commenters who state they "want to retain the flexibility to go to 14,000 words without needing to seek permission to file an oversized brief." In many circuits, including the two I practice in the most (the 8th and the 10th), obtaining permission to file an overlength brief is (rightly) nearly impossible. To require going through that to reach merely 14,000 words would be overly burdensome and unfair. The present Rule 32 word limit is short enough.

   Thank you for the opportunity to voice my concerns.

---

7. Most of my appellate practice is in state court where the word-length limits are shorter, so I feel I am able to get the job done in fewer than 14,000 words. In my briefs in federal court, I don't recall ever going to the length limit, and the briefs that I have read that approach the limit generally seem bloated to me. Granted, there are appeals that need the length, but my garden-variety appellate work rarely if ever includes those. So I do not see the word length reduction as an impediment -- and it may make for crisper, tighter briefs.

   That said, I would prefer that the length limit remain unchanged. I say this because it's comforting to know that I have the space should I need it for a brief. My experience has been that requests for length extensions are not welcomed by federal appellate courts (nor by my state courts). If the length limit is reduced, I would hope the federal appellate courts would take a more liberal approach to considering length extension requests thereafter.

   Thanks for asking.

---

8. This one is easy for me – I want the 14,000 words. No reason to use it if I don't need to, but sometimes in a complex case those extra words are important. I want to retain the flexibility.

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9. I would oppose this change. While brevity may be a virtue, the change does not recognize the difference between a simple single issue appeal and some of the complex multi-issue appeals confronted regularly in Federal Courts of Appeal. Experienced appellate attorneys know not to use the full word limit in the former, but need the

flexibility to use it all in the later complex cases. Counsel should not be placed in the position of asking for permission to file an oversized brief, which can make the lawyer look bad and can often be denied even in deserving cases.

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10. I also concur in the opposition to the rule change. A few notes:

I don't know whether you wish to point this out, but I think the 250/280-word discrepancy may have its roots in the lack of consensus over what it means to be double-spaced. (Pardon the following explanation, but my father and grandfather were printers, and I learned to typeset from a job case in junior high and using an AM Varityper in college.) Double spacing usually means twice the leading of single spacing (leading is the distance between the baselines of successive lines of type, and is derived from the strips of lead once used). In one traditional convention, the ratio of leading to font size is 1:1; in other words, if the type size is 14 point, the leading is 14 point. If you follow that convention, double spacing gives you leading (or line spacing) of 28 points for 14-point fonts. Microsoft Word follows a different convention: As I recall, the ratio for Single is 1.15:1, and I assume (without checking) that the leading in Word for Double follows that ratio, consuming 15% more space. Over time, I have used both a 28-point setting and the Double setting; I generally prefer 28 points because Double gets very little on a page.

I tested my most recent Ninth Circuit brief, the body of which had 11,816 words. With the setting at Double, the text (with footnotes) took up exactly 47 pages; with the setting at 28 points, it took up approximately 42.5 pages. When I did the math, the average was 251 for Double, and 278 for 28 points. In fact, if you multiply 250 by 1.15, you get 287. I don't think 280 was an accident; I believe the testers were doubling 14 points to get the line spacing.

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11. There are mixed views on the proposed rule amendment within our appellate firm. The most vocal advocate for defending the proposal to decrease the word limit is probably [X], who believes that parties can and should be more efficient in their briefing.

But there are those in our firm who strongly oppose it the proposed rule amendment and thus would be in favor of CAL's position. The strongest voice in that regard is [Y]. She strongly opposed and submitted her views to the rule drafters here in Texas when the Texas Supreme Court was promulgating the rule to take us from page limits to word limits and proposed word limits along the lines in the current version of the FRAPs. She and others convinced the court that 14,000 words for a principal brief was too stingy; the current Texas rule on word limits permit 15,000 words for principal briefs.

From the Fifth Circuit perspective, that court has a crushing its criminal docket. But I feel pretty confident in saying that only a small fraction of the criminal cases would be impacted by a change in the word count. Thus, the proposed amendment is largely unnecessary when it comes to the criminal and habeas docket. The same could likely be said for the employment and immigration cases.

But many of the civil cases that come to the Fifth Circuit are complex—civil diversity cases, antitrust, environmental, bankruptcy, constitutional litigation. For those cases, my experience has been that we frequently need more than the proposed 12,500 word limit will permit. We sometimes need more than the 14,000 word limit, but we are forced to spend an inordinate amount of the client's money cutting our briefs down to size. And our circuit pretty routinely denies motions to exceed the word limits and did so recently in a complex antitrust case. Worse yet, we are sometimes forced to cut issues that had already been thoroughly vetted and had survived the issue-triage process, or we have to cut the briefing down so severely on some issues that the end product is a decrease in comprehensibility.

On balance, I think the proposed change is unnecessary to curb unedited and ineffective prose that goes on too long, and the proposed change is potentially harmful in complex cases that require more generous briefing limits.

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12. Many thanks to the drafters, and well done! I concur in the proposed opposition.

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13. One other thought on the comment--one area where 14,000 words even is not enough is bankruptcy appeals. There was some appeal that I helped out with in the third circuit in a bankruptcy case where you had several different creditor groups arguing differing issues and if I recall correctly we got one brief to respond to a lot of that stuff (the court may have had some separate appeals on other issues arising out of the confirmation but a lot was crammed into one round of briefing). There may be some other examples you could come up with to say something like the rule change is forgetting about these special cases -- and while you don't need 14000 in every appeal there are some that you almost certainly do (maybe patent cases are another example where there are always a lot of issues/highly technical that you need to explain). I am sure you don't need 14000 words in the routine immigration appeal (or criminal case), but those are not the only cases in the federal appellate courts.

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14. I also concur.

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15. I concur in the opposition to the proposed amendment.

B. **Comments supporting word count reduction**

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1. Not only do I favor the proposed amendments, I don't think they go far enough. For a principal brief, a 10,000-word limit is plenty, as is a 5,000-word limit for a reply brief. If there's a single complaint shared by appellate judges at all levels of the judiciary and at all levels of experience, it's that far too many briefs are much, much too long. Not only are such briefs generally not helpful, they're an imposition on the court and on opposing counsel. If I must be one of the few who stand athwart history, yelling "Stop," I take comfort in the fact that, with Roger Townsend, I'm in good company. I do not agree with the proposed comment that David submitted. To me, the issue is not whether someone was right or wrong in estimating how many words fit on a page. Who cares? The problem that ought to be addressed is the proliferation of verbose, repetitive briefs that are cursed by both the judges and law clerks, who must read them, and opposing counsel who must slog through them in an effort to distill and streamline an effective response. The job of a good appellate advocate is to make the complex easy to understand, to say in 20 words what it took a less-talented advocate 100 to say. Judges don't see advocates as treatise-writers. They want to know what this particular case is about and what they need to know to resolve the issue or two (not twenty) that one side says amounts to reversible error. Boredom, and irritability, set in well before page 40. To hide behind the excuse that cases are more complicated these days does not address why more effective advocates seem able to work within the rules while at the same time producing superior products. Should there arise a truly unusual case that might require even the bests writer to exceed the word limit, a court will be far less likely to summarily deny the request if the writer has the reputation with the court for writing concise, effective briefs in general.

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2. Responding to the solicitation for comments re the proposed reduction in page limits for principal briefs and reply briefs, I have been an appellate lawyer or appellate judge for about ¾ of my 50 year legal career. I share that to give context for my opinions. I found as a judge the appellate briefs seemed to be as long as the rules permitted (in some cases, without regard to complexity of the subject matter or procedural problems. My court (from which I have been retired 11 years next month) endured for its first 20 years without page limitations but by the early 1980s it enacted a 35 page brief limit for principal briefs, which continues today though it translates to 8750 words now. That 8750 word limit is fine for all but the occasional extraordinarily complex, fact intensive which demands more discussion. The most complex cases can merit an expanded page/word limitation on motion addressed to the discretion of the Chief Judge. That discretion is not lightly exercised but it is the safety vale that assures that the Court gets all the briefing that it needs.

   In my judicial experience, most briefs, even now, are written right up to the page/word limitation in the applicable appellate Rules. If the rules limit briefs to X number of words, the majority of the briefs will be filled at X pages or x minus 1 page or x number of words or x number minus 50 words.

A collateral benefit to page/word limitations is that the limit requires diligent editing in preparation which produces a better and more readable brief.

##END##

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h6i-mkms
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0042
Comment from Anne Small, Securities and Exchange Commission

Submitter Information

Name: Anne Small
Organization: Securities and Exchange Commission

General Comment

The Office of General Counsel of the Securities and Exchange Commission appreciates this opportunity to express its views on the word limits for appellate briefs in Proposed Rules 28.1, 29 and 32. As explained below, we believe that the proposed word limits should not be adopted.

Our office, acting on behalf of the SEC, files numerous briefs in the federal courts of appeals addressing the federal securities laws and other issues. These briefs are filed in appeals in civil enforcement actions brought in district court, appeals from administrative actions, and challenges to agency rules and regulations. Our office also files amicus curiae briefs, generally in private securities law actions.

We are concerned that the word limitations in the proposed amendments to the Federal Rules of Appellate Procedure 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 in order to present the factual and legal arguments to the court in full.

Further, many appellate matters in which the SEC participates 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 in deciding the case.

Please feel free to contact me if there is any additional information that we can provide.

Sincerely,
Anne K. Small

General Counsel
Securities and Exchange Commission
202-551-5001
SmallA@sec.gov

See attached file.

Attachments

Securities and Exchange Commission comments on proposed FRAP amendments

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F STREET, N.E.
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

ANNE K. SMALL
202-551-5001
SMALLA@SEC.GOV

February 13, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Word Limitations in Proposed Rules 28.1, 29 and 32.

Dear Judge Sutton:

The Office of General Counsel of the Securities and Exchange Commission appreciates this opportunity to express its views on the word limits for appellate briefs in Proposed Rules 28.1, 29 and 32. As explained below, we believe that the proposed word limits should not be adopted.

Our office, acting on behalf of the SEC, files numerous briefs in the federal courts of appeals addressing the federal securities laws and other issues. These briefs are filed in appeals in civil enforcement actions brought in district court, appeals from administrative actions, and challenges to agency rules and regulations. Our office also files *amicus curiae* briefs, generally in private securities law actions.

We are concerned that the word limitations in the proposed amendments to the Federal Rules of Appellate Procedure 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 in order to present the factual and legal arguments to the court in full.

Further, many appellate matters in which the SEC participates 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 in deciding the case.

Please feel free to contact me if there is any additional information that we can provide.

Sincerely,

Anne K. Small
General Counsel
Securities and Exchange Commission

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h6h-os78
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0043
Comment from Jonathan Block, NA

Submitter Information

Name: Jonathan Block
Organization: NA

General Comment

I have been practicing environmental law since 1993. In my experience, beginning with work in the nuclear regulatory law arena, then some practice in federal energy regulatory law, and currently in a practice covering a wide variety of environmental laws and regulations, often the complexity of the underlying law and technical issues requires a larger number of words in a brief than the existing rules permit. Reasonable development of arguments on significant issues is already compromised in attempting to meet existing word limits. Further truncating the available number of words in a brief will subject the Court system to additional stress, as it will increase the time required for the Court to analyze complex legal and technical issues that would have been better presented but for the word limit. The same situation will also lead to inferior and/or incorrect judicial opinions, particularly in complex legal and technical cases where the reviewing Court relies upon the briefs for a thorough explanation of the technical issues.

The bottom line is that providing appellate litigants with a lesser opportunity to fully present arguments on all relevant issues deprives the reviewing Court -- and ultimately the People who the Courts are supposed to serve -- of a robust, healthy and evolving jurisprudence that carries forward the ideals of our Constitution and Bill of Rights. The proposed change to the rules of appellate procedure 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.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h93-7isu
Comments Due: February 17, 2015

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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0044
Comment from Caitlin Halligan, Gibson, Dunn & Crutcher LLP

Submitter Information

Name: Caitlin Halligan
Organization: Gibson, Dunn & Crutcher LLP

General Comment

See attached file(s)

Attachments

Comment Letter_GDC

GIBSON DUNN

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www.gibsondunn.com

February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP appreciates this opportunity to comment on the pending proposal of the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). As one of the leading appellate practices in the United States, we have broad experience in all manner of cases, particularly complex civil litigation, before the federal courts of appeals. Based on this experience, we respectfully oppose the proposed amendment to reduce the word limits on appellate briefs under Rule 32. We do not oppose the proposal to eliminate the "three-additional-days" rule for electronic service under Rule 26(c); in the event the Committee repeals that rule, however, we urge the Committee to adopt an accompanying amendment to preserve the existing *de facto* seventeen-day deadline for filing a reply brief.

Rule 32: Word Limits

We respectfully submit that the proposal to reduce the word limits for appellate briefs from 14,000 words to 12,500 words for opening briefs, and from 7,000 words to 6,250 words for reply briefs, should not be adopted. The current word limits, which have functioned

effectively for the last sixteen years, strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions. As explained below, a reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits.

We appreciate the importance of brevity and concision in appellate briefing and strive to achieve those goals in our work. We also understand the concern that some advocates unfortunately fail to embrace these principles and submit unnecessarily long briefs. *See, e.g.*, Comments of Hon. Laurence H. Silberman, at 1 (Jan. 13, 2015) ("Silberman Comments"). But the proposed word limits, we believe, would unduly constrain all litigants in their ability to submit sufficiently informative and comprehensive briefs across cases. Litigants already face a strong disincentive against submitting unduly long briefs—such briefs are simply not effective. *See* Silberman Comments, at 1. And while there may be *some* cases that can be well briefed in less than 14,000 words, that is not true for *all* cases, in our experience.

Indeed, a substantial number of cases in the courts of appeals today are highly complex—involving, for example, intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law. Proper exposition of these cases requires *at least* the existing word limit to adequately present the facts and legal issues for the benefit of the court. As other commenters have observed, *see e.g.*, Comments of American Academy of Appellate Lawyers, at Section D(5) (Dec. 2, 2014), this complexity is only growing. Thus, although the proposed amendment might lead to

shorter briefs, we, like other commenters, are skeptical of the premise that it would actually produce better or more helpful briefs. *See* Comments of Reed Smith, at 3 (Feb. 10, 2015).

Moreover, a reduced word limit 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. *See, e.g.*, United States Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 37 (explaining that "[p]arties with common interests in consolidated or joint appeals must join in a single brief where feasible" and that the court "looks with extreme disfavor on the filing of duplicative briefs"). The parties must often make difficult compromises in determining how best to present the legal issues. Moreover, such cases often involve a challenge by multiple parties to agency action. The Government, as the opposing party, does not share such challenges and can benefit from a divided opposition. Reducing the word limits would only exacerbate this disparity.

A reduced word limit would lead to other problems. It would increase administrative burdens on the appellate courts because there would surely be an increased number of motions to exceed the word limit. A reduced word limit also could force litigants to abandon or drastically shorten meritorious arguments; the appellate courts would increasingly need to resolve questions of waiver.

Finally, we note that appeals court filings have decreased by fifteen percent over the past ten years. *See* Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014, Caseload Analysis, U.S. Court of Appeals (Feb. 17, 2015), *available at*

http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx. 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.

In sum, the existing word limits have worked well over the past sixteen years, striking a proper balance in the vast majority of cases. The proposed reduction in word limits would have undesirable consequences that outweigh the purported benefit of having shorter—but not necessarily better—briefs. We respectfully suggest that the current word limits in Rule 32 be retained.

Rule 26(c): The "Three-Additional-Days" Rule

The Committee also proposed eliminating the three additional days to file a response provided under Rule 26(c) for a party receiving electronic service. We agree that this rule is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously, and that such service is today the prevailing mode of service.

We note, however, that because most litigants do opt for electronic service, the proposed change would effectively reduce the time for filing a reply brief from the current *de facto* period of seventeen days (fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)) to fourteen days. Maintaining the existing seventeen-day period for reply briefs would allow 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.

We therefore urge the Committee to accompany any elimination of Rule 26(c) with an offsetting amendment to preserve the existing seventeen-day period for filing a reply brief.

Sincerely yours,

/s/ Theodore J. Boutrous Jr.	/s/ Thomas G. Hungar	/s/ Caitlin J. Halligan
Theodore J. Boutrous Jr.	Thomas G. Hungar	Caitlin J. Halligan

Practice Leaders, Appellate and Constitutional Law Practice Group
Gibson, Dunn & Crutcher LLP

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h96-zw6b
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0045
Comment from Donald Verrilli, Jr., U.S. Department of Justice

Submitter Information

Name: Donald Verrilli, Jr.
Organization: U.S. Department of Justice

General Comment

Comments are attached from Donald B. Verrilli, Jr., Solicitor General of the United States, expressing the views of the United States Department of Justice concerning the proposed amendments to the Federal Rules of Appellate Procedure (FRAP), including the proposed length-limit amendments (FRAP 5, 21, 27, 28.1, 32, 35, and 40, and Form 6) and the proposed amendment to the three-day rule (FRAP 26(c)).

Attachments

2015 FRAP amendments SG comments final

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530 Dc`ps_pw /5*0./3

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

The Department of Justice provides the following comments on two sets of proposed amendments to the appellate rules:

Proposed Length-Limit Amendments (FRAP 5, 21, 27, 28.1, 32, 35, and 40, and Form 6)

These proposed amendments would make two major changes to the length limits on filings in the federal courts of appeals. First, they would change the length-limit calculation for filings other than briefs from page limits to word limits for documents prepared using a computer. The Department of Justice defers to the views of the FRAP Committee concerning the need for such a change and whether it is more likely to reduce or to exacerbate the burden on clerks' offices in monitoring compliance with the rules. If the amended rules are adopted, we urge the FRAP Committee to include an observation in the Committee Notes, that courts should grant leave to exceed the word limits where circumstances warrant. Some courts, including the First and D.C. Circuits, resolve many appeals by summary disposition; such substantive motions may require more than the 5,000 words provided in the proposed amended FRAP 27. Similarly, other substantive filings—such as petitions for a writ of mandamus—may require more words than the amended rules would provide, especially to the extent that the estimated equivalence of 250 words per page results in a reduction of the length of filings from current practice. The following language could be added to the (uniform) Committee Note accompanying FRAP 5, 21, 27, 35, and 40:

> "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."

Second, the proposed amendments to FRAP 28.1 and 32 would reduce the word limits for briefs prepared using a computer. Principal briefs would be reduced from 14,000 words to 12,500 words, reflecting the assumption in the type-volume limits for other filings that computer-prepared documents can be expected to average about 250 words per page. Reply briefs, amicus briefs, and cross-appeal briefs would also be reduced correspondingly, based on the same assumption.

The Department of Justice 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. Based on the extensive experience our attorneys have compiled over the years in representing the Federal Government as the primary litigant in the federal courts of appeals, we agree that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit. But that same experience requires us to caution that in some cases parties will justifiably need to file longer briefs, and those situations arise with some frequency when the United States is a party. For example, in criminal appeals, the Government must often respond in one consolidated brief to briefs filed by multiple criminal defendants raising a plethora of issues. Similarly, in some criminal appeals a defendant will raise a multitude of arguments without providing the context necessary to allow for a proper evaluation of those arguments, requiring the Government to respond in considerable depth by giving the courts the details of the applicable background facts and proceedings, as well as the law necessary for understanding these issues. Some cases—such as challenges to government programs—attract the interests of multiple amici curiae, and the Government may therefore need to respond to arguments raised in multiple briefs. In these and other situations where parties are expected to include additional detail or address multiple arguments, it is important that the courts of appeals recognize the need to permit an over-length brief, as necessary. For those reasons, we urge the FRAP Committee to note, either in the rule text or in the Committee Note, that courts should grant leave to file an over-length brief where circumstances warrant.

We recommend that the amendment add the following provision (or similar language) as FRAP 32(h):

> "(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."

The Committee Notes accompanying FRAP 28.1, 29, and 32 should also include an observation along the following lines:

> "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."

Proposed Amendment to the Three-Day Rule (FRAP 26(c))

The proposed amendment to FRAP 26(c), like similar proposed amendments to the Civil, Criminal, and Bankruptcy Rules governing service, would implement a recommendation that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The Department of Justice recognizes that electronic communications are overwhelmingly completed without significant delay (although there are some exceptions due to technological problems that can and should be addressed on a case-by-case basis). And electronic service has now become widespread, to the point that it is now the default, required means of service for all represented parties with access to the electronic case filing and case management system. Thus, in most cases, there may no longer be a need to treat electronic service with any uncertainty about reliability or the likelihood of timely delivery and receipt.

On the other hand, electronic service has also created circumstances in which a party that must respond to a filing would be substantially disadvantaged in the absence of the three-day rule. Because electronic filings may be made after normal business hours, and courts generally allow filings up to midnight of the due date, a filing in a different time zone could be made as late as 3:00 a.m. (or later) the following day for lawyers on the East Coast of the United States. In addition, a

filing could be made late in the evening on a Friday, or on a day before a holiday. Where that happens before a holiday weekend, the result (absent the three-day rule) could be a reduction, in practice, from the ten calendar days to respond to as little as five business days, which may not suffice to respond to substantive or complicated jurisdictional motions. This situation raises concerns because government attorneys typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases. Accordingly, a longer period may be required in certain special circumstances if the three-day rule has been eliminated for electronic service.

If FRAP 26(c)—and the corresponding provisions in the Civil, Criminal, and Bankruptcy Rules—are amended as proposed, to eliminate the three-day rule for electronic service, we urge the Committee to include language in the Committee Note recognizing that certain circumstances may warrant additional time where electronic service creates difficulties like those described above. The following or similar language could be included:

> "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."

The Committee Notes accompanying the proposed amendments to Civil Rule 6(d), Bankruptcy Rule 9006(f), and Criminal Rule 45(c) should be consistent with the Committee Note for Appellate Rule 26(c). For that reason, comparable language should be included in all four Committee Notes.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h96-bnge
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0046
Comment from Richard Samp, NA

Submitter Information

Name: Richard Samp
Organization: NA

General Comment

My comments are attached.

Attachments

Judicial Conference- Proposed Word-Limit Changes

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
202-588-0302
rsamp@wlf.org

February 17, 2015

Via Electronic Submission

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

Thank you for this opportunity to comment on the proposed amendments to the Federal Rules of Appellate Procedure. My litigation practice includes the drafting of a considerable number of amicus curiae briefs in the federal appellate courts. These comments focus on proposed changes to Rules 29 and 32, with a particular focus on the effects of proposed changes on amicus curiae filings.

The Advisory Committee has recommended that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words. Although unmentioned by the Advisory Committee, 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. For the reasons stated below, I oppose both word-limit reductions.

Party Briefs. A number of federal judges have submitted comments in support of the proposed change to Rule 32(a)(7)(B). A common theme of those comments is that many briefs are "much too long" and would be more effective if they were more concise. I fully agree with that sentiment, and for that reason, briefs I have submitted on behalf of parties rarely approach the 14,000-word limit. But there will often be occasions on which the complex subject matter of a case requires a 14,000-word brief, and in those instances a word-limit reduction will have one or both of the following results: (1) counsel will be prevented from fully developing important legal arguments; and/or (2) courts will be burdened by a significant increase in the number of motions requesting permission to file briefs in excess of the word limit.

Moreover, I rarely find that an attorney whose lengthy briefs are unpersuasive suddenly becomes more persuasive when he or she submits a shorter brief. Rather, my experience is that all the briefs submitted by some lawyers are poorly drafted and unpersuasive without regard to

length, while the appellate specialists whose work I most admire file lengthy briefs (when necessary) that are just as persuasive as their shorter briefs.

Some supporters of the proposed amendment have bemoaned a perceived increase in the number of pages in a typical brief; they note that briefs now often exceed 60 pages. But while page length has increased since 1998, the principal cause is unrelated to verbosity. Rather, page length has increased due largely to the 1998 amendment to Rule 32, which mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font. The increase in type size rendered briefs far more easily readable, but it also added six or seven pages to the typical brief.

Amicus Curiae Briefs. Rule 29(d) provides that "an amicus curiae brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Accordingly, a word-limit reduction for the brief of a party will have the effect of reducing the maximum words in an amicus brief from 7,000 words to 6,250 words. The Advisory Committee has supplied no explanation for that proposed reduction, which I oppose. While Rule 29(d) permits amicus filers to file a motion for leave to file a brief in excess of the normal word limit, I am unaware of any instance in which a federal appeals court granted such a motion.

I note initially 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 than does the current 14,000-word limit—is inapplicable to amicus briefs. Before 1998, the page limit on amicus briefs was 30 pages. So if one uses the Advisory Committee's estimate that the average pre-1998 page included 250 words, the Committee's rationale would support a 7,500-word limit (250 words/page x 30 pages) for amicus briefs, not the reduction to 6,250 words that the Committee is proposing.

More importantly, the most plausible argument raised by supporters of a word-limit reduction for a party's brief is inapplicable to amicus briefs. Many federal judges feel obliged to read a party's brief in its entirety, no matter how unpersuasive or poorly written. Some complain, however, that their time is wasted when they are forced to read overly long, unpersuasive briefs; and they thus support a measure that would tend to reduce the average length of party briefs. But I am unaware of federal judges who feel obliged to read all amicus briefs submitted in a case. Indeed, my understanding is that most judges do not read an amicus brief (or read nothing more than the summary of argument) unless the amicus filer has a track record of filing uniformly well-drafted briefs or a law clerk has recommended that the brief be read.

As a result, drafters of amicus briefs already have a large incentive to file concise briefs that include no more words than they deem absolutely necessary. If they hope to have their briefs read by the judge, they need to submit briefs that are no longer than is necessary to make the legal arguments they seek to convey. A 7,000-word amicus brief that is unpersuasive

because it is overly long will not result in a waste of judicial resources because it will not be read.

Accordingly, if the Committee on Rules goes ahead with the proposed amendment to Rule 32, I recommend that Rule 29 be amended to state explicitly that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words.

Amicus Curiae Briefs in Support of Rehearing Petitions. I largely support the proposed Rule 29(b), which would govern amicus filings "during consideration of whether to grant rehearing." I support creation of a nationwide rule governing such filings. Nationwide uniformity in filing rules would be a significant improvement over the current system, under which every circuit has its own set of rules, some of which are not written. Proposed Rule 29(b)(5) states that amicus briefs must be submitted no later than three days after the petition for rehearing is filed. I concur; that period is sufficient to allow the amicus filer to review the petition before filing but at the same time does not unduly interfere with the petition-review process. However, for the same reasons that I endorse continuation of the 7,000-word limit on amicus briefs in support of a party's principal brief, I suggest that proposed Rule 29(b)(4) be amended to increase the word limit on rehearing amicus briefs from 2,000 words to 2,500 words. A 2,500-word limit better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages.

Rule 26(c)'s "Three-Day Rule." The Advisory Committee proposes that the "three-day rule"—under which the time period for responding to a court filing is extended for three days when service of the paper is accomplished by certain methods—be amended so that it is no longer applicable to electronic service. I largely support the change; the three-day rule was designed with service by U.S. Mail in mind and makes little sense in the context of electronic service. However, my experience is that most lawyers, when they file and serve briefs, do so late in the day. Very often, the lawyer receiving electronic service will have gone home for the evening when the service email arrives. Accordingly, I recommend that the proposed amendment to Rule 26(c) be revised to make clear 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.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h97-bchb
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0047
Comment from Alan Pierce, NYSBA Committee on Courts of Appellate Jurisdiction

Submitter Information

Name: Alan Pierce
Organization: NYSBA Committee on Courts of Appellate Jurisdiction

General Comment

As Chair of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction I submit these comments on behalf of the Committee. 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.

Sincerely, Alan J. Pierce, Esq.

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Document: USC-RULES-AP-2014-0002-0048
Comment from Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Submitter Information

Name: Seth Waxman
Organization: Wilmer Cutler Pickering Hale and Dorr LLP

General Comment

Please see the attached comments 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, OMelveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP.

Attachments

Comment - Wilmer Cutler Pickering Hale and Dorr LLP

February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

We submit these comments 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 appreciate this opportunity to address the proposal by the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). Our groups have extensive experience before the federal courts of appeals, and we draw on that experience to respectfully oppose the proposal to reduce the word limits for appellate briefs. We also suggest that eliminating the three additional days for electronic service provides an opportunity to consider whether the default deadline for filing a reply brief should be increased. Both of these suggestions reflect the increasing complexity of cases handled in the courts of appeals and would help avoid burdening courts with motions to extend the word limits or the time to file a reply brief.

RULE 32: WORD LIMITS

We oppose the proposal to reduce the word limits for opening and response briefs from 14,000 words to 12,500 words and to reduce the word limits for reply briefs from 7,000 words to

6,250 words. There is no compelling reason to change course after seventeen years under the current word limits, and there are good reasons to preserve the status quo.

As noted in other comments, the cases heard by the courts of appeals are complex and, if anything, only increasing in complexity. *E.g.*, American Academy of Appellate Lawyers, Cmt. § D(5) (Dec. 2, 2014); Joshua Lee, Cmt. (Sept. 16, 2014). Litigants on appeal must frequently address 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, and complicated technologies or business arrangements.

For many appeals, 1,500 words in an opening brief or 750 words on reply can mean the difference between including or excising a meritorious argument. It can also substantially affect the depth of treatment that each argument receives. Advocates understand that their objective is always to be helpful to the court as it works to understand their case and its salient points. While some advocates submit unnecessarily long briefs, there is already a penalty for going on longer than required: Such briefs tend to be less persuasive. At the same time, a shorter brief is not always possible or helpful to the court, lest the court not understand the context in which the case arises. We thus strive to submit shorter briefs whenever possible, but often find that the existing word limits constrain the substance of the arguments we can make. This is especially true in cases involving statutes with complicated common-law backgrounds or legislative histories, areas of law where the courts have issued conflicting rulings or decisions that require close distinctions, cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand.

The proposal to reduce the word limits contrasts with the Supreme Court's rule, which gives advocates 15,000 words for opening briefs on the merits. S. Ct. R. 33.1(g). Although the Supreme Court and the courts of appeals hear a different mix of cases, the number of words that the Supreme Court considers appropriate for addressing what is often a single question of law (and usually in a clean vehicle) should give the Committee pause about reducing the number of words litigants are given to develop multiple issues in an appeal from a case that may have involved numerous issues, many parties, or a complex trial record.

Moreover, it is not clear that the courts of appeals will benefit from reducing the word limits. Advocates forced to make cuts are likely to preserve substantive arguments at the expense of discussing some of the supporting authorities and record materials, such as details regarding the trial record and procedural history. This would require courts to spend more time tracking down cases and examining the record to analyze arguments that cross-reference those materials but that counsel do not have room to elaborate. The concern in such circumstances is not that litigants on appeal had to excise arguments completely, but that their briefs will fail to provide a complete understanding of what is at issue in the case and thus will be less helpful to the courts.

Lower word limits will also increase the number of motions seeking additional words. Office of General Counsel, EEOC, Cmt. at 1 (Feb. 5, 2015). Based on our experience, the current limits appear sufficient to accommodate the substantial majority of cases; requests for additional words appear relatively rare at present, and granted requests even more so. Tighter

limits would likely upset this balance, causing an uptick in the frequency of requests for more words and imposing an additional burden on the courts.

Additionally, many cases involve more than one party on each side. In some instances—including some of the most complex appeals from agency determinations—parties are presumptively required to file a joint brief. *See* D.C. Cir. R. 28(d) (providing that "[i]ntervenors on the same side must join a single brief to the extent practicable"). A single brief of 12,500 words may prove difficult in such cases, resulting in an ineffective joint submission, or multiple briefs where a single 14,000-word brief would have been "practicable." Even where joinder is not required, moreover, parties often work together to file joint briefs. Fed. R. App. P. 28(i); *see also, e.g.*, *Classen Immunotherapies, Inc. v. Shionogi, Inc., Merz Pharm., LLC, Merz Pharm., GmbH*, No. 2014-1364 (Fed. Cir. Aug. 8, 2014) (joint brief filed for all defendants). But the willingness to participate in a joint brief depends on the assurance that all issues will be fairly covered by that one submission. Again, then, the proposed reduction in word limits would reduce the attractiveness of such arrangements, with the unfortunate result that courts may receive *more* briefs in complex multi-party appeals than they currently do.

In the face of these reasons to stay the course, there is no compelling justification for changing direction after seventeen years of practice. The Committee points to what it believes was an "inadvertent[] increase[]" in the length limits as the reason for its proposed reduction. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 48 (Aug. 2014). The newly proposed conversion ratio, however, is based on a tiny sample of only fifteen opening briefs and thirteen reply briefs filed before

1993. *Id*. at 18, 20-24. Even within that small sample, eleven briefs—more than a third—would have exceeded the proposed new limits. *Id*. at 23-24. In addition, Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio and reported that, in a pre-1998 study of fifty briefs that he conducted for purposes of amending the Seventh Circuit Rules, the average word count was only "a little under 14,000." Easterbrook, Cmt. (Sept. 11, 2014). The premise that briefs have gotten longer as the result of a 1998 mistake therefore cannot justify the proposed change.

Nor would a change be warranted even if there had been a mistake. Litigants and courts have been operating under the current word limits for seventeen years. Although some briefs filed during that time undoubtedly should have been shorter, there is no evidence that the current limits have proved unworkable for the average case or that there is any other pressing reason to change them. The burden should be on those who would change the status quo, and there has been no showing that a nationwide reduction in the word limits is warranted.[1]

RULE 26(C): THE "THREE-DAY RULE"

Rule 26(c) currently gives a party receiving a brief by electronic service three extra days to respond. The Committee proposes to eliminate this extra time. We agree that a paper served electronically should be treated as delivered on the date of service. However, the proposed change would reduce the time for filing a reply brief from what is typically seventeen days to

[1] 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.

fourteen days. We suggest that rather than reduce the de facto seventeen-day deadline for reply briefs that has existed under Rule 26(c), the Committee should adopt an offsetting amendment that would set a seventeen-day deadline for filing a reply brief or, better yet, increase the deadline to twenty-one days.

The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread. This extra time can be critical for advocates juggling competing deadlines or representing incarcerated (and thus hard to reach) clients and is particularly important as litigation grows more complex. A longer deadline also allows more time for client review and feedback and benefits the courts by reducing the number of extension requests.

By comparison to the current proposal, the Supreme Court sets a thirty-day deadline for merits reply briefs. S. Ct. Rule 25.3. Even when that deadline is cut short because it would fall too close to oral argument, *see id.*, it is longer than the current de facto deadline in the courts of appeals and will typically be more than double the proposed new deadline.

Although there is no need to link the extra time to electronic service, we suggest that the Committee adopt an offsetting amendment that would set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting. This time could, of course, be shortened when there is a case-specific need to expedite an appeal. But an across-the-board contraction of the de facto deadline for filing reply briefs should not be adopted without considering whether a longer default period for reply briefs is warranted.

Respectfully yours,

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0049
Comment from Gregory Sisk, NA

Submitter Information

Name: Gregory Sisk
Organization: NA

General Comment

Since last summer, Professor Michael Heise of Cornell Law School and I have been engaged in an empirical study of appellate advocacy, focusing on whether there is any association between appellate success in federal civil appeals and such factors as brief length and appellate attorney experience. As we completed our work over the last several weeks and prepared a draft law journal article to report on our findings, we discovered that the Advisory Committee on Rules of Appellate Procedure had circulated a proposed rule to reduce the word limits for principal briefs.

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.

We attach a draft report of our study, which is slated for publication in the Journal of Empirical Legal Studies at Cornell. This draft report is still subject to revisions, which will be regularly uploaded to the SSRN posting: http://ssrn.com/abstract=2564870

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Attachments

Sisk.Heise.Study.App.Adv.2.17.15

[Draft: February 17, 2015]

"Too Many Notes"?* An Empirical Study of Advocacy in Federal Appeals

Gregory C. Sisk**

Michael Heise****

The warp and woof of American law are threaded by the appellate courts, generating precedents on constitutional provisions, statutory texts, and common-law doctrines. While the product of the appellate courts is regularly the subject of empirical study, less attention has been given to the sources and methods of appellate advocacy.

Given the central role of written briefs in the process, we should examine seriously the frequent complaint by appellate judges that briefs are too long and that prolixity weakens persuasive power. In a study of civil appeals in the United States Court of Appeals for the Ninth Circuit, we discover that, for appellants, briefs of greater length are strongly correlated with success on appeal. For the party challenging an adverse decision below, persuasive completeness may be more important than condensed succinctness. 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, the current proposal to reduce the limits on number of words in federal appellate briefs may cut more sharply against appellants.

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* *See* AMADEUS (Orion Pictures Corp. 1984). On the apocryphal "too many notes" exchange between Emperor Joseph and Mozart on the premiere of the composer's new opera, see the conclusion of this Article.

** Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota).

The authors wish to thank Valerie Aggerbeck of the University of St. Thomas Law Library, for her unflagging work in finding necessary data, including numerous calls to the clerk's office for information on briefs in Social Security cases, where the records are sealed; University of St. Thomas law student Colin Seaborg for research assistance; and St. Thomas law students Rachel Davis, Caitlin Drogemuller, Nicholas Lebbin, Chloe O'Neill, Tony Schmit, and Heidi Van De Berg for work in coding sampled decisions.

*** Professor of Law, Cornell Law School.

Experienced appellate advocates submit that familiarity with appellate courts, the honed ability to craft the right arguments with the appropriate style in briefing, and expertise in navigating the appellate system provide superior legal representation to clients. Our study lends support to this claim. We found a positive correlation between success and experience for lawyers representing appellees, thus warranting further study of lawyer specialization.

Introduction

The warp and woof of American law are threaded by the appellate courts, generating precedents on constitutional provisions, statutory texts, and common-law doctrines. The channeling of the course of the law through the appellate courts is directed by appellate lawyers who advocate cases primarily through the vehicle of written briefs. While the product of appellate courts is regularly the subject of empirical study — exploring such influences as judicial background and ideology, the nature of the parties, and such legal factors such as standard of review and precedential regimes on substantive outcomes — less attention has been given to the sources and methods of appellate advocacy.[1]

Given the central role of written briefs in the appellate process,[2] we should examine seriously the frequent complaint by appellate judges that appellate briefs are too long. Judges warn appellate litigators that they approach the maximum length

[1] Some of the most interesting and important empirical work on the persons, methods, and forms of appellate advocacy — the "in-puts" — in the federal Courts of appeals is being conducted by a group of five political science scholars, Professors Susan Haire, Laura Moyer, Todd Collins, Stefanie Lindquist, and Roger Hartley. *See, e.g.*, Laura P. Moyer, Todd A. Collins & Susan B. Haire, *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals*, 34 JUST. SYS. J. 62 (2013); Susan B. Haire & Laura P. Moyer, *Advocacy Through Briefs in the U.S. Courts of Appeals*, 32 SO. ILL. U. L.J. 593 (2008); Susan Brodie Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667, 684 (2006). We have benefitted greatly from their work and cite to it regularly in this Article.

[2] *See* Moyer, Collins & Haire, *supra* note 2, at 63 ("[J]udges largely rely on attorneys' written arguments as a basis for evaluating the dispute before them.").

allowed by the rules at the peril of undermining persuasive force. Former Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit warns lawyers that an over-long brief "telegraph[s] that you haven't got much of a case."[3] Former Chief Judge Patricia Wald of the District of Columbia Circuit advises "the shorter and punchier the brief the better."[4] But, in some contrast, leading appellate lawyers Andrew Frey and Roy Englert suggest that, "'write short' is not a panacea," as "[r]elatively extended treatment may be necessary because the case involves an especially complex issue or because a number of issues must be presented."[5]

In addition, attorneys who specialize in litigating appeals contend that appellate work is different in nature than other litigation work.[6] Consequently, experienced appellate advocates submit that greater familiarity with appellate courts, the honed ability to craft the right arguments with the appropriate style in briefing, and expertise in navigating the appellate process bring considerable value-added to clients.[7] The veteran appellate specialist, therefore, should provide superior legal representation (and superior results), compared to the rookie or the practitioner who appears before an appellate tribunal once in a blue moon.

Moving beyond anecdote to empirical analysis, this study of civil appeals in the United States Court of Appeals for the Ninth Circuit investigates whether there is a systematic relationship between either the length of appellate briefs or the number of appellate cases handled by a particular lawyer and success on appeal.[8] Our study focuses on brief length, as measured by number of words, and on attorney appellate experience, as measured by number of federal appellate court appearances in

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[3] Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325, 326.

[4] Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 10 (1999).

[5] Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, 20 No. 2 LITIGATION 6, 8 (1994).

[6] *See* David Cardone, *The Art of Cathedral Building: Why Appellate Advocacy is Different*, PA. LAWYER, Mar.-Apr. 2006, at 24.

[7] 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 66:4 (2014) [hereinafter SUCCESSFUL PARTNERING] ("[A]ppellate specialists are often important to success on appeal.")

[8] *See infra* Part I.

the preceding ten years.[9] Because many factors enter into the disposition of an appeal, this study develops a more fully specified model of variables. Included in our model are such proxy measures of importance or complexity as whether the decision was published and the appeal was argued,[10] variables for the main issue decided, the procedural posture of the case as it arose on appeal, and the nature of the parties.[11]

Brief length proved powerfully significant in our study and with substantial effect, for appellants.[12] However, the direction of correlation was the opposite of the conventional judicial wisdom. Longer briefs by appellants were associated with a greater probability in achieving reversal, while exceptionally short briefs were much more likely to be filed in losing appeals. For this set of civil appeals, persuasive completeness may be more important than to condensed succinctness. The complexity of the civil appeal in which error below is most likely to be identified by an appellate panel may serve as the cause of both a reversal and an extended discussion in the appellant's brief.[13]

These findings have direct implications for a current proposal to reduce the maximum length allowed for principal appellate briefs in the federal courts.[14]

In addition, the variable for appellee lawyer was statistically significant in our primary model and in the anticipated direction, that is, greater experience in appellate work was correlated with success on appeal.[15] In light of prior work by others on lawyer experience in appellate work and the intriguing finding in this study, the question of lawyer experience and litigation success warrants continuing study.

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9 *See infra* Part I.A.
10 *See infra* Part I.A, C.
11 *See infra* Part I.A, C.
12 *See infra* Part II.A.
13 *See infra* Part II.A.3.
14 *See infra* Part II.A.4.
15 *See infra* Part II.B.

I. Civil Appeals in the U.S. Court of Appeals for the Ninth Circuit, 2010-2013

A. Development of Model, Identification of Variables, and Collection of Data

For this study, we conducted an analysis of civil appellate decisions, both published and unpublished, made by judges hearing appeals on the United States Court of Appeals for the Ninth Circuit from the beginning of 2010 through the end of 2013.

Source of Decisions: The Ninth Circuit reports dispositions of appeals on its website, with separate datasets for published opinions[16] and unpublished memoranda.[17] Each set of a decisions may be analyzed by year (with complete sets running from 2010 forward) and by case type. For our study, we explored the "Civil" case type, a category that excludes not only criminal cases but also prisoner claims, bankruptcy cases, habeas corpus petitions, agency appeals (including immigration cases), and Tax Court cases. Thus, the "Civil" appeals under study here are those taken from District Court judgments that do not fall into one of the other specialized case types.

Random Selection of Sample: For each of the four years of our study (2010, 2011, 2012, and 2013), we randomly selected fifty (50) decisions for coding from each set of published and unpublished decisions. If a randomly-selected decision fell outside the scope of our study, because it involved a pro se appeal (so that lawyers were not filing briefs on both sides of the case) or less frequently because the Ninth Circuit did not address the merits (such as a dismissal for lack of appellate jurisdiction or intervening mootness), then we randomly selected another case as a replacement.[18] For published opinions, few cases selected initially at random fell outside of the study, while for unpublished

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[16] http://www.ca9.uscourts.gov/opinions.

[17] http://www.ca9.uscourts.gov/memoranda.

[18] To ensure inclusion only of dispositive decisions and to avoid duplication, we excluded at the outset all non-decisional orders and orders amending prior decisions, although we took later amendments to decisions into account in coding the outcome and main issue on appeal for cases included in our sample.

decisions, approximately one-third had to be replaced by another random draw.

Primary Mixed Model:[19] A combined model was created that included both published and unpublished decisions. This primary model— the **Mixed Model** — includes both published and unpublished decisions at the same proportion as they appear in the full population of decisions for the year. For our Mixed Model, then, we included all 50 of the unpublished decisions drawn at random from each of the four years of study and then randomly added published decisions from our previously selected random sample of 50 published decisions for that year until the correct proportion was reached.

For example, in 2013, for the "Civil" type of case in the Ninth Circuit, unpublished memoranda recorded the disposition of 77.1 percent of those appeals, with 22.9 percent resulting in published opinions. For 2013, then, all 50 of the randomly-selected unpublished decisions were included in the Mixed Model, along with 15 randomly selected published decisions. In this way, the decisions included in the Mixed Model were weighted to reflect the distribution in the full population of Ninth Circuit dispositions between published and unpublished decisions.

Dependent Variable: As the outcome variable of interest, a reversal by the judge sitting on the Ninth Circuit of the District Court judgment was coded as "1", with affirmance being coded as "0". If the deciding judge voted to reverse or vacate and remand on any issue presented, the decision was coded as a reversal, even if the judge voted to affirm on other issues presented in the appeal. Given that the substantial majority of the appeals were affirmed in entirety, a reversal on any issue is at least a partial victory for the appellant.[20] Note that the coding is by each

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[19] An Excel spreadsheet showing the coding for the primary model is available at: http://courseweb.stthomas.edu/gcsisk/brief.study/cover.html. The sampled Ninth Circuit decisions were coded by two law students working independently from each other. The teams of student coders were trained, provided a written coding book, and worked under supervision by one of the authors. Each coding decision reflects the independent evaluations of at least two persons.

[20] To avoid double-counting of sampled cases, when cross-appeals were presented, we coded for only the first appellant's appeal, thus recording a reversal only if the appellant (rather than the appellee-cross-appellant) succeeded. To the address the possibility that inclusion of cross-appeals might distort the model, we

individual participating judge, who ordinarily sat on a panel of three-judges, although two en banc panels of 11 judges were randomly selected for the Mixed Model as well.

Independent Variables:[21] Our independent variables for each model consisted of the following:[22]

Brief Length: Measured by number of words, the length of the opening briefs for appellants and appellees was recorded for sampled cases where parties were represented on both sides by lawyers. In most instances, we were able to rely on the lawyer's certification appearing near the end of the brief as to the number of words. When that certification was missing, we pasted the pertinent argument sections of the brief (excluding tables, certifications, and addenda) into a word-processing document to determine the number of words. Most Ninth Circuit briefs were available on Westlaw or Bloomberg Law, but we had to verify brief length with the Ninth Circuit clerk's office for a number of briefs that were under seal (for example, briefs in Social Security disability appeals are not publicly available). In cases in which there was more than one appellant or appellee who filed separate briefs, the longest brief was coded.

Attorney Experience:[23] The experience of the lead attorney for each side, measured by number of prior appearances in federal appeals in the preceding ten years, was recorded. The lead attorney was the one who argued the case orally (which was identified by designation in the opinion, by reviewing docket

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also conducted an alternative regression run excluding the twenty-two (22) cross-appeals and found no material differences in the results, other than the variable for Appellee Lawyer Experience moving to marginal significance (at .06).

[21] Because we included a broad array of civil appeals in our study, not limited by subject matter or identified as having ideological salience, and because our focus was on the lawyers through brief-writing and experience, we did not include background variables on judges such as party-of-appointing president. Judges were individually identified in our coding, and, in the regression analysis, standard errors were clustered at the judge level.

[22] In addition, for the primary Mixed Model, we included a variable for whether the decision was published or not, which was significant (at .05) and in the anticipated direction of being associated with a greater likelihood of reversal.

[23] Our exploration of lawyer experience as measured by litigation history on Westlaw was inspired by Haire, Lindquist & Hartley Moyer, *supra* note 1, and Collins & Haire, *supra* note 1, although we developed our own definition of lead attorney and focused on federal appellate experience generally and not only for the Ninth Circuit.

records, or by listening to the recording of the oral argument from the Ninth Circuit website).[24] If the appeal was not argued, the lead attorney was the one who signed the brief. Number of appearances in federal appeals was determined through the Westlaw "Litigation History" database for the attorney, by counting the number of appearances in a United States Court of Appeals or the United States Supreme Court.

Argued: As a proxy for the importance or complexity of the appeal, we coded whether it had been orally argued or instead submitted on the briefs.

Issue Type:[25] Each appeal was coded for issue type as Constitutional, Federal Statute, Diversity, Civil Procedure, or Other. In cases involving multiple issues, the main issue decided by the Court of Appeals was coded.

Procedural Stage: The procedural posture at which the case was resolved by the District Court was coded for the main issue decided by the Court of Appeals: Trial Judgment, Summary Judgment, Dismissal at Pleading/Preliminary Stage, Postjudgment Ruling, or Administrative Review.

Parties: The nature of the party on each side (or the lead party if there were multiple parties) was coded as a Person, Business Entity, Association, State or Local Government, Federal Government, or Other.

In terms of raw frequencies, the following table describes the summary statistics for the primary Mixed Model:

[24] Audio files of oral arguments of Ninth Circuit appeals are available here: http://www.ca9.uscourts.gov/media.

[25] The issue type, procedural stage, and party type variables we used were adapted in substantial part from Professor Frank Cross's comprehensive empirical study of decision making in the federal appellate courts. CROSS, *supra* note 27, at 28, 50-52, 134-38.

Table 1: Descriptive Summary (Mixed Model)

Variable:	*Mean*	*S.D.*
Outcome (reversal)	0.34	0.48
Appellant brief length (words)	9,320	3,727
Winning appellant briefs (N=281)	10,355	3,313
Losing appellant briefs (N=535)	8,776	3,819
Appellee brief length (words)	10,007	3,664
Winning appellee briefs (N=535)	9,752	3,574
Losing appellee briefs (N=281)	10,491	3,789
Orally argued	0.79	0.41
Published opinion	0.27	0.44
Appellant lawyer experience	30.11	51.37
Winning appellant lawyer experience (N=281)	31.51	53.20
Losing appellant lawyer experience (N=535)	29.38	50.41
Appellee lawyer experience[26]	26.97	42.61
Winning appellee lawyer experience (N=532)	27.09	43.06
Losing appellee lawyer experience (N=281)	26.75	41.81
	Freq.	*%*
Issue types:		
Constitutional	132	16.18
Federal statute	389	47.67
Diversity	194	23.77
Civil procedure	68	8.33
(other)	33	4.04
Procedural stage:		
Trial court judgment	89	10.91
Summary judgment	333	40.81
Dismissal at pleading-preliminary stage	274	33.58
Post-judgment ruling	30	3.68
Administrative review	90	11.03

[26] For summary descriptive purposes, we excluded as an outlier a single appellee lawyer (involved in three judicial observations) who had appeared as counsel in more than 16,000 federal appeals during the preceding ten years (because he had held a government position making him responsible for all appeals filed in a large public litigation office).

Party type:		
Appellants:		
Individual	537	65.81
Business	201	24.63
Association	21	2.57
State-local government	36	4.41
Federal government	18	2.21
(other)	3	0.37
Appellee:		
Individual	93	11.40
Business	362	44.36
Association	12	1.47
State-local government	167	20.47
Federal government	179	21.94
(other)	3	0.37

B. Regression Analysis

The dependent variable was the direction of the individual judge's vote in each Court of Appeals civil case, coded as "1" when the judge voted to reverse the District Court, at least in part, and as "0" when the judge voted to affirm the District Court. In the primary Mixed Model — which was randomly weighted to achieve the same proportion of published to unpublished decisions as in the full universe of Ninth Circuit decisions for the years under study — the overall reversal rate was 34.4 percent. This rate closely parallels the results reported by Professor Frank Cross in his comprehensive empirical study of federal appellate decisions, in which he found (for the 1990s) that 64.4 percent of appeals were affirmed.[27]

[27] FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 48 (2007).

We adopted multiple regression models to analyze the influences of multiple variables. Because the dependent variable was dichotomous, we applied logistic regression.[28]

Recognizing that judicial observations (judge votes) in our models are not fully independent from one another — because the same judges participated multiple times in our sample of cases — we adjusted the standard errors by clustering. Mindful that "[c]lustering helps mitigate the underestimation of standard errors . . . and reduces the risk of rejecting a true null,"[29] following the path of other researchers in judicial decision-making, and appreciating that a larger number of clusters enhances accurate inference, we have adopted clustering at the judge level as the first of our primary models here.

Table 2: Logistic Regression Model of CA9 Reversals, 2009-13
Mixed Model (Published and Unpublished Decisions)

Appellant brief length	0.00** (0.00)
Appellee brief length	0.00 (0.00)
Orally argued	1.19** (0.29)
Published opinion	0.55* (0.26)
Appellant lawyer experience	-0.00 (0.00)
Appellee lawyer experience	-0.00* (0.00)
Issue types:	
Constitutional	(ref.)
Federal statute	0.31 (0.28)
Diversity	0.56 (0.37)
Civil procedure	1.60** (0.35)
(other)	0.80 (0.44)

[28] *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 553-54 (2004).

[29] Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 837 n.168 (2009).

Procedural stage:	
Trial court judgment	(ref.)
Summary judgment	0.25 (0.27)
Dismissal at pleading-preliminary stage	0.23 (0.30)
Post-judgment ruling	0.36 (0.56)
Administrative review	0.43 (0.37)
Party type:	
Appellants:	
Individual	(ref.)
Business	-0.36 (0.23)
Association	-0.55 (0.54)
State-local government	-0.75 (0.45)
Federal government	1.13 (0.76)
(other)	---
Appellee:	
Individual	(ref.)
Business	-0.95** (0.27)
Association	0.10 (0.73)
State-local government	-0.09 (0.29)
Federal government	0.32 (0.38)
(other)	---
Constant	-3.00** (0.60)
N	810

Notes: Decision reversed on appeal=1. Robust standard errors, clustered on judge. Unreported results from an alternative specification of the model that excludes an attorney listed as counsel in more than 16,000 prior appeals do not materially differ from the reported results.* $p < 0.05$; ** $p < 0.01$.

C. Summary of Findings of Statistical Significance

Statistical Significance: By convention among social scientists, statistical significance is traditionally set at the .05 level (or 95 percent probability level).[30] Roughly, this significance level means that the probability is less than 1 in 20 that the

[30] *See* ALAN AGRESTI & BARBARA FINLEY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES (3rd ed., 1997) (explaining that researchers generally "do not regard the evidence against [the null hypothesis] are strong unless *P* is very small, say, $P < .05$ or $P < .01$").

reported association between an independent variable and the dependent variable is a product of random variation. When the probability level reaches 99 percent, the result is highly significant, meaning the probability that the association is a random error is less than 1 in a 100.

Brief Length: As discussed in greater detail below,[31] Appellant Brief Length proved highly significant and in a positive direction (that is, correlated with a higher probability of reversal) in our primary Mixed Model (at .01). Appellee Brief Length did not approach statistical significance in this model (at .652).

Lawyer Experience: As also discussed in greater detail below,[32] Appellee Lawyer Experience was significant (at .05) and in the expected direction (that is, more experience for an appellee's lawyer was negatively correlated with a reversal) in the primary Mixed Model.

Control Variables: In addition, we included a number of control variables for a more fully specified model, as earlier outlined in the summary statistics table (Table 1). Certain findings of note are outlined below.

Oral Argument: Of particular interest, Oral Argument was highly significant as an independent variable (at .01) with a large positive coefficient. For this particular set of civil cases, the oral argument rate was high. In 2002, the Ninth Circuit heard oral argument in 38.7 percent of appeals.[33] Ten years later, oral argument was heard in under 20 percent of appeals in this circuit.[34] In our primary Mixed Model that combines both published and unpublished decisions, nearly 79 percent of the civil appeals had been argued for the years in question. Given that the "Civil" category of appeals under study here excludes not only criminal cases but also prisoner cases, habeas corpus, and immigration reviews, as well as any case involving a pro se appellant, the higher argument rate is less remarkable.

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[31] *See infra* Part II.A of this Article.

[32] *See infra* Part II.B of this Article.

[33] RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 15 (2d ed. 2003).

[34] Table S-1, U.S. Courts of Appeals - Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2012, U. S. Courts, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S01Sep12.pdf.

Although highly correlated with reversal, oral argument being obtained was hardly a guarantee of success for an appellant. While nearly 79 percent of the appeals had been argued, the reversal rate was about 34.4 percent. Still, while being granted oral argument does not lead ineluctably to victory for an appellant, being denied oral argument may be devastating. The chance of success for an appellant (based on raw numbers) fell from 34.4 to 16.4 percent when the case was not argued.

Importantly, the reader should understand that correlation here does not mean causation. The panel's decision not to hear oral argument in an appeal does not so much "cause" a loss for the appellant as offer an early signal that such a loss is likely impending. In an appellate guide prepared by Ninth Circuit attorney representatives, the appellate advocate is assured that submission of the case without oral argument "should not be taken as any kind of negative comment on the case or the advocacy."[35] The empirical data suggests otherwise for civil appeals in which both parties are represented by counsel, at least in terms of giving an early hint on outcome.

The appellant's lawyer should recognize the vital importance of presenting the appeal in the written brief in a sufficiently compelling manner as to convince the panel of judges to hear argument in the case.[36] And an appellant's lawyer who succeeds in being placed on the argument calendar should never fail to appear. An appeal that otherwise might be destined for defeat may be turned around by the additional persuasive opportunity afforded to the appellant's attorney who is allowed to present argument to the panel.[37]

Issue Type, Procedural Stage, and Party Type Variables: We included Issue Type, Procedural Stage, and Party Type control variables to ensure that any relationship discovered between other

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[35] THE APPELLATE LAWYER REPRESENTATIVES' GUIDE TO PRACTICE IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 70 (2014).

[36] *See* Solomon L. Wisenberg, *Federal Criminal Appeals: 10 Things You Should Know*, FINDLAW ¶ 5 (Jan. 8, 2015), http://corporate.findlaw.com/litigation-disputes/federal-criminal-appeals-10-things-you-should-know.html ("I have, in my career, won appeals without oral argument, but that is not the norm.").

[37] *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 17 (1986) (discussing potential of oral arguments to change a judge's view on the merits of a case).

independent variables and the dependent variable was not an "artifact" of some correlation between that variable and a general category of case, process, or party.[38] We briefly note a couple of these variables that proved significant.

Civil Procedure Issue Type Variable:[39] In the primary Mixed Model, the only Issue Type to achieve significance was Civil Procedure (at .01). An appeal pivoting on a procedural question was much more likely to result in reversal of the District Court. Compared with the overall reversal rate of 36 percent in this model, appeals focused on procedural questions were reversed at a 47 percent rate. Given that procedural questions rising to the Court of Appeals typically involve legal questions reviewable de novo, and speculating that parties choose to highlight procedural rather than substantive legal questions on appeal only when there is a particularly strong argument for procedural error below, this correlation is not surprising.

Business Party: In the primary Mixed Model, only one party type emerged as significant — Business Appellees (at .01) and in the anticipated direction of being negatively correlated with a reversal. In other words, a business entity that had succeeded below was more likely to hold on to that trial court victory on appeal. Looking to raw numbers in the Mixed Model, a Business Appellee being in the case lowered the rate of reversal from 34.4 percent to just under 27 percent.

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[38] *See* Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 517 (1999) (explaining that, in a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases, "[t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases").

[39] While the other issue type categories turn on the source of the law giving rise to the claim considered by the court on the merits and are self-explanatory, the "Civil Procedure" category included appeals addressing primarily procedural matters that did not go directly to the merits, such as class action certification, jurisdictional errors, pleading mistakes, service of process objections, or sanctions.

III. Brief Length and Lawyer Experience as Correlated With Appellate Success

A. Correlation of Greater Brief Length with Appellate Success for Appellants

1. Advice of Judges and Lawyers on Brief Length

"Brevity" for brief-writing is the clarion call sounding from the federal appellate bench.[40] In listing common criticisms of briefs by judges, Judge Ruggero Aldisert places in prominent first place: "Too long. Too long. Too long."[41] In a recent question-and-answer session at a law school, Chief Justice John Roberts responded to a question on persuasive brief-writing by saying: "I know that every judge in this room will agree with me: Be brief! Be concise."[42]

Prolixity — the opposite of brevity — is described by judges as injurious to the case. By waxing long, the author of the brief may lose the attention of a busy judicial audience. Moreover, by failing to focus in like a laser on the key issue and making short-shrift of it, the lawyer is said to signal a lack of confidence in the strength of the appeal. In blunt terms, former Chief Judge Alex Kozinski reports that "when judges see a lot of words they immediately think: LOSER, LOSER."[43]

Somewhat in contrast, although no one argues for verbosity as a positive good, practicing lawyers argue that brevity cannot be a

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[40] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008) ("The power of brevity is not to be underestimated."); RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 9.8, at 139 (2d ed. 2003) (saying that judges "send this very loud message to the appellate bar: *You write too much. Prepare better and write less.*" (emphasis in origina)l).

[41] ALDISERT, *supra* note 40, § 2.4, at 25; *see also* Interview by Bryan A. Garner with Antonin Scalia, Associate Justice, United States Supreme Court, Washington, D.C. (2006-07), available at https://www.lawprose.org/interviews/supreme-court.php ("[P]rolixity is probably the worse offense that most unskilled briefs writers are guilty of.")

[42] Inadmissible, *Roberts: 'Be Brief!'*, NAT'L L.J., Sept. 29, 2014, at 24.

[43] Kozinski, *supra* note 3, at 327.

talisman for good brief-writing.[44] Appellate specialists Andrew Frey and Roy Englert do encourage lawyers to "write lean prose that makes the necessary points and avoids excessive repetition," while explaining that "[r]elatively extended treatment may be necessary because the case involves an especially complex issue or because a number of issues must be presented."[45] James Martin, the president of the American Academy of Appellate Lawyers, explains that "counsel in complex cases" must have sufficient brief space "to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal."[46]

Appellate expert Martin Siegel acknowledges the "valid temptation to keep briefs as lean as humanly possible," but explains that a lawyer sometimes must decide whether to add another issue — "one that will lengthen the brief and thereby annoy its readers but that just might win the case."[47] As Siegel emphasizes, the lawyer's "first job is to win, even if that inevitably leads to a little more reading by judges or results in a loss of style points."[48]

2. Findings on Brief Length and Appellate Success

In our study of civil appeals decided between 2010 and 2013 by the United States Court of Appeals for the Ninth Circuit, Appellant Brief Length measured by words proved highly significant in our primary Mixed Model that included both published and unpublished decisions (at .01). Moreover, Appellant Brief Length had a positive coefficient as an independent variable, meaning that greater brief length was correlated with a heightened probability of a reversal of the District Court

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[44] *See* Fry & Englert, *supra* note 5, at 8 ("'Write short' is not a panacea.").

[45] *Id.*

[46] American Academy of Appellate Lawyers' Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Letter by James C. Martin, President, Nov. 24, 2014 [hereinafter American Academy of Appellate Lawyers], available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0013.

[47] Martin J. Siegel, *How to Winnow Arguments on Appeal*, 40:2 LITIGATION 30, 31, 32.

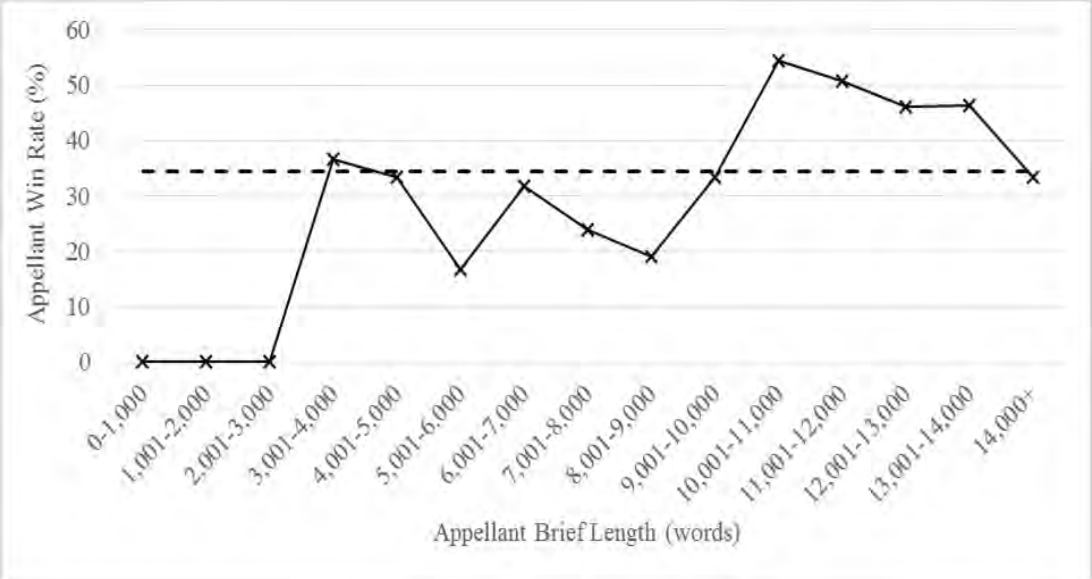
[48] *Id.* at 34.

judgment (or, to state it in opposite terms, shorter brief length was correlated with a greater chance of affirmance). Importantly, as part of the regression analysis, we controlled for such factors as whether the appeal was argued, the type of case, procedural stage, and lawyer experience, so the brief length finding stands independent of these variations in case and litigation personnel characteristics.

In sum, as the length of an appellant's brief increased by number of words, the rate of reversal increased as well. Greater brief length ran parallel to appellate success.

Figure 1 below illustrates this escalating correlation using raw frequencies in the primary model (unadjusted by multivariate regression), by comparing brief length in 1000-word increments and reversal rate percentage:

Figure 1: Appellant Brief Length by 1,000-Word Increments Compared to Reversal Rate by Percentage



NOTE: The dashed line indicates the overall appellant win rate (that is, reversal) at 34.4 percent.

As shown in this chart, appellant briefs that were under 3000 words were filed in appeals that uniformly failed. Appellant briefs between 10,001 and 14,000 were filed in appeals that succeeded at rates well above the average of 34.4 percent, rising to nearly 55 percent for those between 10,001 and 11,000 words and holding at around 45 percent for those between 12,001 and 14,000 words. In this chart, the most pronounced association (in opposite directions) between brief length and reversal rate is at the lower and higher ends of the spectrum of brief length by word.

Appellee Brief Length did not approach statistical significance in our primary model (at .652). Interestingly, the variable was significant (at .01) in an alternate regression run of published decisions considered separately. Greater brief length for appellees was negatively correlated with reversal by published opinion. Given that publication of an opinion is an indicator of importance,[49] appellees in these substantial appeals may face the same need for more space to make winning arguments that appellants face in civil appeals generally.[50] Again, however, in the larger universe of published and unpublished decisions, the length of the brief filed by the lawyer for the appellee was not significantly correlated with the outcome of the appeal.

3. Possible Interpretations of the Findings

Contrary to the conventional wisdom emanating in powerful terms from the bench, and frankly to our initial surprise as researchers, the most powerful correlation in our study between briefs filed and disposition of the appeal is that longer briefs by appellants were significantly more likely to be linked with reversal. Examined empirically and systematically, brevity did not appear to be the key to appellate success across the breadth of civil appeals. Rather, for appellants, more extended exposition in briefs was correlated with winning the appeal, while briefs on the shortest end of the scale were presented in appeals that failed at a significantly greater rate.

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[49] *See* Ninth Circuit Rule 36-2 (listing among other "criteria for publication" that the disposition "[e]stablishes, alters, modifies or clarifies a rule of federal law." "[c]riticizes existing law," or "[i]nvolves a legal or factual issue of unique interest or substantial public importance").

[50] *See infra* Part II.A.3.

As illustrated above by Figure 1, for appellants in the set of civil appeals under study here, briefs that were painfully short fell uniformly on the losing side. But the story doesn't end there. Charting appellant success rates by 1,000-word increments confirms that those briefs on the longer end of the scale had been filed in appeals that achieved a higher than average reversal rate. In sum, for clients and their lawyers prosecuting civil appeals from District Court judgments, there is a robust and generally escalating correlation between greater brief length and greater success, especially at the high and low ends of the brief length spectrum.

Nonetheless, we think it absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal. We do not think that the take-away from this study could be that prolixity is the ticket to appellate victory. It is foolish to believe that a strong brief could be strengthened even further by padding it with excess verbiage to elevate the number of words right up the maximum allowed. Rather, clear and economical writing surely is most effective. Repetition diminishes persuasive power. Wordiness dissipates focus. Digressions distract. String citations interrupt. Embellishment annoys.

Rather, we suggest that the findings in this study point to something more nuanced, but still very important, which is that the right length of a brief should turn on the substance of the individual case and the nature of the winning argument. While brevity has its place and tighter writing remains an essential part of the set of skills for a persuasive writer, the greater priority for the civil appellate brief-writer is persuasive completeness.

On the one hand, Chief Judge Wald's pointed warning that "[t]he more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes"[51] should not be ignored. But on the other hand, Chief Judge Wald immediately qualifies her call for "the shorter and punchier" brief by insisting that "everything that counts has to be in" the brief, which she acknowledges "may seem

[51] Wald, *supra* note 4, at 9.

inconsistent."[52] The tension here is between the judge's understandable preference for terse writing against the conceded need for completeness in the lawyer's communication to the court.

The most straightforward explanation for this study's findings may be that, at least within the relatively limited space of up to 14,000 words, the thorough explication often is the more powerful explication. Judges understandably wish for a shorter document given the demands on their time and are less than delighted by the prospect of trudging through a longer dissertation. Nonetheless, the merits of the appeal may call for a more expansive and ultimately more persuasive treatment by the lawyer for a party challenging an adverse decision below.

Martin Siegel makes the salient point very well, in a manner consistent with our empirical findings:

> At bottom, the problem is that lawyers' and judges' interests don't perfectly align. Judges naturally want the shortest brief and the quickest route to a correct decision, while lawyers are paid to maximize the odds of victory with necessarily limited information about that route's location.[53]

Along these same lines, Andrew Frey and Roy Englert observe that "[j]udges may always grumble about the length of briefs, but, if you stay within the rules and write briefs that tell them what they need to know in economical prose, they usually will come around."[54] Indeed, our findings suggest judges are more likely to "come around" to appreciate the meticulous brief that shows the path to a resolution in the appellant's favor.

By analogy, we draw on our own experiences in reading and grading final examinations in law school classes, which is universally regarded as one of the least enjoyable (albeit most important) aspects of law teaching. When we pick up a very short written answer from the exam pile at the end of the semester, we selfishly celebrate that the time spent in reviewing that exam will now be short as well. Nonetheless, the sharply abbreviated exam

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[52] *Id.* at 10; *see also id.* at 12 (admitting that her "advice on short, punchy briefs clearly raises a dilemma" for attorneys who are handling "the mammoth regulatory cases" with voluminous records and considerable complexity).

[53] Siegel, *supra* note 47, at 34.

[54] Fry & Englert, *supra* note 5, at 8.

almost certainly will be marked near the bottom of the grading scale. A student cannot do justice in a few paragraphs to thorough analysis of the complex legal problem set out in the exam question. By contrast, when the next exam in the pile is on the longer side, we sigh as we realize that our momentum in plowing through the exams will be slowed. On the merits, however, the top exam in the course invariably is on the expansive side, as the student who truly knows not only the details of the law but appreciates the complexity of the problem presented and the appropriate nuances in analysis will need more space.

Stressing again that brief length standing alone surely is not the *cause* of appellate success, the correlation we have uncovered in our study instead may reflect the nature of the reversible judgment. In other words, the source for both enhanced appellate success and expansive briefs by appellants may lie in the complexity of the underlying case and lower court disposition that sets the stage for reversal on appeal.

In the particular context of civil appeals in federal court, a successful argument for reversal may be more likely to arise in a case of greater complexity. If so, then the greater difficulty of the legal issues and the intricacies of the factual scenario presented in such a case may simultaneously offer a greater chance for appellate victory and demand a more extended discussion in the appellant's brief. As James Martin of the American Academic of Appellate Lawyers suggests, "[i]f the average civil-case brief is longer today [2014] than in 1988, the reason could be that appeals in civil cases are more complex."[55]

4. Implications for Proposals to Reduce Brief Length Maximum for Federal Appeals

When the Federal Rules of Appellate Procedure were first adopted in 1967, principal briefs by appellants and appellees in the federal Courts of Appeals were limited to fifty (50) pages of standard typographic printing, which was the equivalent of seventy (70) pages of typewritten text.[56] In 1979, the rule was

[55] American Academy of Appellate Lawyers, *supra* note 46, at 9.
[56] Fed. R. App. P. 28, advisory committee's note (1967).

revised to eliminate any distinction between printed and typewritten briefs, setting a single limit for principal briefs of fifty (50) pages.[57]

In 1998, with the advent of the personal computer and the end of typewritten legal documents, the maximum length of briefs was restated in terms of number of words.[58] Under Rule 32(g) of the Federal Rules of Appellate Procedure, a principal brief may "contain[] no more than 14,000 words."[59] A brief that is no more than thirty (30) double-spaced pages in length need not include a certificate of compliance with the word-limit.[60]

In 2014, nearly twenty years later, the Advisory Committee on Appellate Rules has circulated for public comment a proposal to reduce the number of words allowed to 12,500.[61] The committee explained the proposed reduction as based on a mistake in 1998 when the number of pages was "transmuted" into words.[62] In the committee's understanding, the 1998 adoption of 14,000 words as the maximum length for the brief "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)."[63] Based on a study of pre-1998 briefs which found that 250 words per page "is closer to the mark," the Advisory Committee proposal would lower the permitted words for principal briefs to 12,500 (that is, 250 times 50).[64]

In public commentary in response to the proposed change, Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit, who was a member of the rules committee in 1998, recalled that the 14,000-word limit was adopted as an appropriate measure, not because of a

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[57] Advisory Committee Note to 1979 Amendments to Federal Rules of Appellate Procedure, Fed. R. App. P. 28(g).

[58] Advisory Committee Note to 1998 Amendments to Federal Rules of Appellate Procedure, Fed. R. App. P. 32.

[59] Fed. R. App. P. 32(a)(7)(B)(i).

[60] *Id.* 32(a)(7)(A).

[61] Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure at 49 (Aug. 2014, available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. (proposed amendment to Fed. R. App. P. 32).

[62] *Id.* at 18.

[63] *Id.*

[64] *Id.* at 18, 54.

miscalculation of words per page in Court of Appeals briefs.[65] Instead, he explained, the word limit adopted in 1998 was based on a count of words in Supreme Court briefs and on an earlier Seventh Circuit rule.[66] Judge Easterbrook stated that he "continued to think [14,000 words] a suitable cap for a brief that can be filed without special permission."[67]

Whatever may be the provenance of the word limits on principal briefs, our study suggests that a downward adjustment could cut most sharply against appellants in counseled civil appeals. The American Academy of Appellate Lawyers argues in its public comment opposing the proposed rule, "reducing the word limits would impair appropriate development of difficult and controversial legal issues."[68] Civil cases that go to trial "tend to be the most complex and to involve the highest stakes."[69] The Academy fears that the proposed reduction in the word limits "will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most."[70]

Based on the results of our study, the appellant lawyer challenging the District Court ruling in a civil case may be in greater need of space to present a winning argument on appeal. The appellant lawyer has the burden of overcoming general appellate court deference to trial court judgments, providing the full factual and legal context to demonstrate error, and anticipating which route to reversal is most likely to appeal to the appellate judges. Given "the sequential process of filings briefs," the appellant has "more of the burden of transforming a case from the trial posture" to the appellate context.[71]

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[65] Frank Easterbrook, Comment on Proposed Rule, Sept. 11, 2014, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0006; *see also* American Academy of Appellate Lawyers, *supra* note 46, at 5 (saying their "research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken.").

[66] Easterbrook, *supra* note 65.

[67] *Id.*

[68] American Academy of Appellate Lawyers, *supra* note 46, at 8-9.

[69] *Id.* at 9.

[70] *Id.*

[71] *See* Moyer, Collins & Haire, *supra* note 1, at 73.

As shown above in Figure 1, appellant briefs from 10,001 to 14,000 words were correlated with higher than average rates of reversal. A point of diminishing returns in brief length obviously exists for persuasive value, busy judges necessarily need to impose limits, and reasonable people will disagree as to the right balance. Our study suggests that, for appellants in complex civil appeals, the mark of marginal utility might not be reached under 14,000 words.

Moreover, our study hints that plaintiffs are more likely to be appellants, as nearly three-quarters of the appeals in our model were from judgments entered before trial at either the pleading or summary judgment stages (see Table 1). Accordingly, reducing the space available to make the winning argument is likely to have more negative impact on plaintiffs than defendants.

As we suggested earlier, the point here is not that longer briefs causally bring about appellate success for appellants, but rather that the kind of civil cases in which reversal is most warranted may also be of the sufficiently complicated variety to justify a more extended treatment of in the appellant's brief.

B. Evidence of Correlation Between Lawyer Experience and Appellate Success

Building on the successful example of appellate specialization before the Supreme Court in the Solicitor General's office for the federal government,[72] many private law firms in the last few decades have established separate appellate practices as a distinct specialty.[73] A growing number of state governments have also consolidated appellate work in a State Solicitor General, especially for Supreme Court advocacy.[74]

Premised on the view that "[a]ppellate advocacy *is* a different area of the law," appellate practitioners contend such work is

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[72] George B. Brunt & Laurie Webb Daniel, *Appellate Counsel: Why Hiring Them Early Pays Off*, 22:1 ACC DOCKET 64, 66 (2004).

[73] Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 511 (2010). On the rise of appellate litigators in private practice, *see generally* Symposium Transcript, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 552-83 (2010) [hereinafter *Rise of Appellate Litigators*].

[74] *Rise of Appellate Litigators*, *supra* note 73, at 633-700.

"best left to those who know what they're doing in the appellate courts."[75] In addition to skills in legal analysis, research, and writing for "crafting an effective appellate brief," the appellate specialist is called on "to provide an independent perspective on the relative merits of the case and the potential issues for appeal."[76] Indeed, some now urge that a "legal team should have an appellate specialist on board from day one."[77]

Beyond the benefits of greater skill in appellate advocacy and specialization in appellate process and standards, changes in the economics of legal practice have accelerated development of appellate practices in major corporate law firms. Thomas Hungar and Nikesh Jindal contend that, given a "newly competitive market for legal services, law firms scrambled to find ways to distinguish themselves from their peers"—one of which was to create new appellate practice groups.[78] With higher stakes today in civil litigation because of greater risks of liability and the possibility of large punitive damage awards, sophisticated business clients now anticipate the need for appeal and want to have the best appellate practitioners on retainer.[79]

The question still remains whether "there is indeed an advantage to engaging a seasoned appellate attorney."[80] As the American Academy of Appellate Lawyers bemoans, there has been a "dearth of literature about the effects of [appellate] lawyers' activities on appellate justice."[81] Fortunately, while still receiving lesser attention than empirical studies of influences on the legal substantive products of the appellate courts, a few important studies have begun to shed light on the value-added of lawyer experience in the appellate courts.

Early empirical work by Professor Kevin McGuire indicated that "lawyers who litigate in [the Supreme Court] more

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[75] Cardone, *supra* note 6, at 25-26; *see also* SUCCESSFUL PARTNERING, *supra* note 7, § 66:4 ("If the case is worth appealing, or defending on appeal, it is worth using someone skilled in dealing with appeals.").

[76] Hungar & Jindal, *supra* note 73, at 530-31.

[77] Brunt & Daniel, *supra* note 72, at 64.

[78] Hungar & Jindal, *supra* note 73, at 521-22.

[79] *Id.* at 525-26.

[80] *See* Cardone, *supra* note 6, at 29.

[81] American Academy of Appellate Lawyers, Statement on the Functions and Future of Appellate Lawyers, 8 J. App. Prac. & Process 1, 1 (2006).

frequently than their opponents prevail substantially more often."[82] A very recent study by Professors Ryan Owens and Patrick Wolfarth confirmed the value of appellate experts for states litigating in the high court, suggesting that "if states want to enhance their batting averages before the Supreme Court, they should create formal, professionalized [Solicitor General] offices with appellate specialists who argue their cases."[83]

For the federal Courts of Appeals, which is the venue for our study as well, Professors Susan Haire, Stefanie Lindquist, and Roger Hartley found a "minimum threshold" of experience to be important for success in product liability appeals.[84] Examining "the impact of attorney expertise in appellate litigation" by number of prior appearances before the particular Court of Appeals under study (the Seventh Circuit), they found no evidence that increasing levels of lawyer experience directly corresponded to increasing rates of appellate success.[85] They did find, however, that counsel who did not meet a "minimum level of expertise" were at a disadvantage.[86] When measuring experience in two tiers between those with and without experience, attorneys who had never before appeared in the Seventh Circuit were more likely to encounter procedural questions of timeliness in preserving the appeal and, when representing plaintiffs in product liability cases, were significantly less likely to attract judicial support for their position.[87]

In a subsequent study of the impact of precedent-citation in federal appellate briefs on the judges' employment of precedent in the decision, Professors Laura Moyer, Todd Collins, and Susan Haire found that lawyer experience counts significantly in judicial receptivity.[88] They found that neophyte lawyers were less likely to influence the court's framing of precedents, even when they won the appeal, while experienced lawyers succeeded "in

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[82] Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. OF POLITICS 187, 188 (1995).

[83] Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657, 659 (2014).

[84] Haire, Lindquist & Hartley, *supra* note 1, at 667.

[85] *Id.* at 682.

[86] *Id.*

[87] *Id.* at 683-84.

[88] Moyer, Collins & Haire, *supra* note 1.

getting the court to adopt their use of precedent even when their clients lose."[89]

In our study, Appellee Lawyer Experience was significant (at .05) in the primary Mixed Model that included both published and unpublished decisions. And the regression coefficients were in the expected direction — that is, more experience for an appellee's lawyer was negatively correlated with a reversal and thus with a win in the Court of Appeals. (Appellant Lawyer Experience did not approach significance.) Thus, appellees fortunate to hire more experienced lawyers appeared to enjoy some advantage in preserving trial court victories against appeal.

Conclusion

Does greater experience in federal appellate work by a lawyer make that lawyer's client more likely to prevail on appeal? The short answer from our study of civil appeals appears to be "yes," at least for one side of the adversarial divide (appellees). Based on this intriguing finding and prior work by other scholars, the evidence grows that attorney experience matters in general and attorney experience in appellate work matters in particular.

Does setting out to write the most succinct brief pave the way to appellate success? The short answer from our study, for appellants in civil appeals where both sides are represented by counsel, appears to be "no." But that cannot mean that fattening an appellate brief with more words is a promising strategy for appellate victory. The results are better understood as indicating that an appellant must do a thorough briefing job and not truncate necessary points for brevity's sake alone. Rather than bolstering a foolish entreaty for wordiness, the results indicate that the appellate advocate needs to be given some breathing room to make the tailored argument, calibrating the necessary length of the brief to the underlying complexity of the case.

An apocryphal story is told about an exchange in 1782 between Emperor Joseph II of Austria and Wolfgang Amadeus Mozart upon the premiere of the composer's new opera, "The

[89] *Id*. at 79.

Abduction from the Seraglio."[90] The emperor is said to have complained about the length of the composition, muttering that it contained "monstrous many notes."[91] Mozart famously replied that there were "exactly as many as are necessary, your Majesty."[92]

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[90] Matthew Gurewitsch, *Too Many Notes and Too Few Ears*, N.Y. TIMES, Apr. 28, 2002.

[91] *Id.*

[92] *Id.* In the 1984 Academy Award-winning film, *Amadeus*, the emperor not only objects that "there are simply too many notes" in the opera, but proceeds to tell Mozart to "[j]ust cut a few and it will be perfect." AMADEUS (Orion Pictures Corp. 1984). Mozart returns, "[w]hich few did you have in mind, Majesty?" *Id.*

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Document: USC-RULES-AP-2014-0002-0050
Comment from Miriam Nemetz, Mayer Brown LLP

Submitter Information

Name: Miriam Nemetz
Organization: Mayer Brown LLP

General Comment

Please see the attached comment submitted by the Supreme Court and Appellate Practice of Mayer Brown LLP.

Attachments

Mayer Brown LLP Letter Commenting on Proposed Changes To The Rules of Appellate Procedure

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February 17, 2015

VIA ONLINE SUBMISSION

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington DC 20544

Re: Comments on Proposed Revisions to the Rules of Appellate Procedure

Dear Mr. Rose:

This letter is submitted on behalf of the members of the Supreme Court and Appellate Practice of Mayer Brown LLP. Mayer Brown has the Nation's oldest and largest appellate practice. The members of our group include four former Deputy Solicitors General and three former Assistants to the Solicitor General, as well as numerous former Supreme Court and federal appellate clerks. Collectively, we have written thousands of federal appellate briefs. We also are the authors of the BNA treatise FEDERAL APPELLATE PRACTICE, and four Mayer Brown appellate partners are among the five co-authors of SUPREME COURT PRACTICE. We offer these comments based on our shared experiences representing our clients in appeals in all the federal courts of appeals.

To summarize our comments, we oppose both the proposal to reduce the word limits for briefs and the proposed deadline for amicus briefs in support of rehearing petitions.

1. Proposed Reduction To Word Limits For Briefs.

We respectfully urge the Committee to retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs. In our view, the 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.

According to its Note on the proposed rule change, "the Committee believes that the 1998 amendments," which replaced the 50-page limit for principal briefs with the current 14,000-word limit, "inadvertently increased the length limits for briefs." The Note further suggests that this inadvertent increase resulted from mistaken assumptions about the number of words contained in a typical 50-page brief. We understand there to be some debate about the

basis for the Committee's selection of 14,000 words as an appropriate word limit. Whatever the Committee's rationale for that number, however, it is unlikely that in adopting a 14,000-word limit the Committee actually increased the permissible length of briefs. Most briefs filed prior to the 1998 amendments used 12-point type. A 50-page brief in that type size could easily contain 14,000 words, even before considering the word-expansive effects of typeface, line spacing, and other formatting choices. Indeed, in adopting the new word limit the Committee observed that the "widespread use of personal computers" had "made the 50-page limit virtually meaningless." *See* Fed. R. App. P. 32(a)(7), Advisory Committee Note to 1998 Amendment. Thus, 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.

Equally important, of course, is whether the 14,000-word limit that has now governed for more than 16 years is reasonable or should be changed. We agree with the observation of several commenters that appellate briefs in simple cases can and should contain fewer than 14,000 words. A *maximum* word limit, however, should be sufficient to accommodate appeals involving a detailed factual record and multiple issues of moderate complexity. In our experience, it is often challenging in such cases to provide a sufficient factual recitation, argue the issues raised with appropriate references to the pertinent evidence and legal authorities, and include all required parts of the brief (such as the summary of argument) within the currently allotted 14,000 words. Given the various components that an appellant's opening brief (though not necessarily the appellee's answering brief) must contain, a 1,500-word reduction—more than 10%—would substantially cut into the space available for the Statement of Facts and the Argument. Consequently, it is inevitable that brief writers—especially those who do not specialize in appellate advocacy—would sacrifice readability and clarity in an effort to excise the necessary number of words. (Consider the ambiguities created by the ever-increasing tendency to drop the conjunction "that" following verbs.[1]) Reducing the maximum word limit would discourage punctilious citation to the record and inclusion of parentheticals describing cited cases and other sources—adding a burden for the judges and clerks that surely exceeds that of reading (or glossing over) such citations and parentheticals. At the same time, it would encourage overuse of acronyms, "cheating" on citation format, and other attempts at shortening without actually cutting substance.[2] Worst of all, in some cases parties would be forced to choose between making scattered cuts that render the brief less effective overall and omitting meritorious issues altogether.

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[1] For examples, see GARNER'S MODERN AMERICAN USAGE 808 (3d ed. 2009); MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE 298 (2d ed. 2013).

[2] Ironically, one of the commenters who favors reducing the word limit is also one of the strongest critics of overuse of acronyms. *See Nat'l Ass'n of Reg. Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012) (Silberman, J.).

We respectfully disagree with the suggestion that appellants—upon whom the practical effects of this proposed change would fall disproportionately—can address the proposed word-limit reduction by excising issues on which they are less likely to prevail. Certainly, it is wise to leave weak or superfluous arguments on the cutting-room floor. But selecting between meritorious alternatives is risky, because it is difficult to predict which issues an appellate panel will find persuasive. 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.

To illustrate, members of our group routinely handle appeals from large jury verdicts (often including punitive damages). The potential issues on appeal in these cases include challenges to the sufficiency of the evidence supporting the finding of liability for the underlying causes of action, a challenge to the sufficiency of the evidence supporting the finding of liability for punitive damages, challenges to evidentiary and instructional rulings, and arguments that the compensatory and punitive damages are excessive. When we are drafting the opening brief, there is no way for us to know which of these arguments might carry the day with a panel of three judges (especially because the identity of the panel members is unknown at the time of briefing except in the D.C. Circuit). Indeed, in some cases in which we have briefed each of these categories of issues, we prevailed on the sufficiency of the evidence for the underlying tort, winning the case outright; in others, we prevailed on the sufficiency of the evidence for punitive liability, thereby eliminating the punitive damages; in still others, we prevailed on evidentiary or instructional issues resulting in a new trial on part or all of the case and, in a subset of those, also prevailed on the sufficiency of evidence supporting the finding of punitive liability; and in still others, we lost on all of these antecedent issues, but prevailed on our argument that the damages were excessive. To require litigants to engage in ruthless culling so that they can satisfy a strict word limit therefore could exact a very high price by requiring elimination of a potentially winning argument.

A reduction of the word limit in complex cases would likely disadvantage not only parties but also the courts and the administration of justice. When deciding particular cases, the courts of appeals announce or explain general rules of law that will apply in future cases. It is therefore important that appellate courts have a full understanding of the practical and legal context in which a particular dispute arises. If forced to comply with reduced word limits, practitioners will be inclined to eliminate discussions of important contextual issues—for example, related statutory or regulatory provisions—that may not be directly at issue in the case at bar, but which should nevertheless be considered when resolving the parties' dispute. If the courts are deprived of such discussions, as they likely will be if the word limit is reduced, there is a significant risk that appellate decisions will have unanticipated (and undesirable) consequences.

Finally, the potential availability of a word-limit extension is no substitute for a reasonable default word limit. For at least the last 30 years, the presumption has been that requests for extensions are reserved for unusual cases. It is hard to imagine that presumption changing. Thus, although reducing the limit to 12,500 words is sure to increase the number and

frequency of extension requests—a new burden for Clerk's offices, judges, and their clerks—it is far from certain that such requests would be granted more generously than they currently are. And in cases of great complexity that are today seen as warranting extensions beyond current word limits, the extensions are likely to be materially stingier, even though the cases will be no less complex. Moreover, the predictable increase in extension requests would add uncertainty and inefficiency to the appellate process. Courts do not typically rule on such requests immediately, and appellants facing tight deadlines would likely be forced to begin preparing briefs before knowing how many words will be allowed. And in courts like the Ninth Circuit that allow parties to tender a proposed brief with the motion for an extension of the due date of the brief, the appeal could be delayed if the motion is denied and the party is forced to shorten the brief. Either way, the burden on counsel and the cost to the client would increase.

For these reasons, we think that a reduction of the word limits would create more problems than it would solve. We thus respectfully request that the Committee retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs.

2. Proposed Deadline For Amicus Briefs In Support Of Petitions For Rehearing.

We also urge the Committee to modify its proposed revision to Rule 29, which would establish a specific deadline for an amicus brief in support of a petition for rehearing. With some notable exceptions, it is generally recognized among federal appellate judges that amicus briefs can be enormously helpful by, among other things, providing "expertise not possessed by any party," explaining "the impact a potential holding might have" beyond the parties to the case, or addressing "points deemed too far-reaching" by the parties. *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers) (internal quotation marks omitted). That is all the more true when it comes to the weighty determination whether to grant rehearing en banc.

Under the proposed rule, an amicus brief in support of a petition for rehearing would be due three days after the filing of the petition. If that deadline were adopted, 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. Such a short deadline would make it extremely difficult for most organizations to file amicus briefs at this important stage. We therefore suggest 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. Such a procedure would enable the court to move expeditiously in the majority of cases in which no amicus brief is being filed, while making it feasible for the amicus to prepare an adequate brief in those few cases of particular public importance where such briefs are most likely to be of value. If that proposal is not acceptable, then we suggest that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed.

Sincerely,

Timothy S. Bishop	Richard B. Katskee	Kevin S. Ranlett
Craig W. Canetti	Michael E. Lackey, Jr.	Charles A. Rothfeld
Hannah Y.S. Chanoine	Philip Allen Lacovara	Jeffrey W. Sarles
Scott A. Chesin	Demetrios G. Metropoulos	James C. Schroeder
Donald M. Falk	John E. Muench	Stephen M. Shapiro
Andrew L. Frey	Miriam R. Nemetz	Adam C. Sloane
Kenneth S. Geller	Brian Netter	John Sullivan
Lauren R. Goldman	Michele L. Odorizzi	Carl J. Summers
Dan Himmelfarb	Archis A. Parasharami	Evan M. Tager
Erika Z. Jones	Eileen Penner	Andrew E. Tauber
Stephen J. Kane	Andrew J. Pincus	Joshua Yount

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Comment from Amy Adelson, Dershowitz, Eiger & Adelson, P.C.

Submitter Information

Name: Amy Adelson
Organization: Dershowitz, Eiger & Adelson, P.C.

General Comment

The attached comments are submitted on behalf of Dershowitz, Eiger & Adelson, P.C.

Attachments

Advisory Committee Letter

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February 17, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, D.C. 20036

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Members of the Advisory Committee:

Dershowitz, Eiger & Adelson submits these comments on the proposed amendments to the Federal Rules of Appellate Procedure currently being considered by the Committee, and appreciate the opportunity for comment. Members of our firm have been practicing in federal appellate courts across the country since 1968, and we have filed hundreds of briefs in those forums on behalf of our appellant clients, in primarily criminal matters. We write to share our deep concerns about the proposed reductions in the word limitations.

Some of our cases have involved a one-count indictment, presenting one or two narrow issues on appeal. But far more 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.

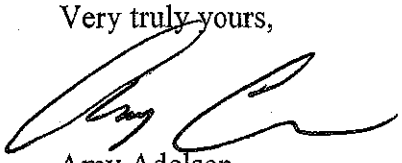
As appellate counsel, we strive for clean and to-the-point briefs, being conscious of the constraints on the time and resources of the appellate courts. However, when the facts are complex and the legal issues manifold, we struggle to square a concise presentation with an analysis that is thorough and comprehensive. 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 also be sure to satisfy our obligations to preserve issues or risk waiver -- particularly given that, in our experience, the government's claims of waiver by appellants seem to have increased substantially. The consequences of an appellate waiver can be severe: the client may lose the right to assert, in a subsequent collateral proceeding, a newly-decided issue that is not adequately preserved on direct appeal.

Additionally, courts of appeals do not limit their analysis of issues just to materials presented in the parties' briefs. On too many occasions, decisions have been written relying upon a proposition which we as appellate counsel intended to address and dispose of but which we were compelled to eliminate due to space constraints. Further, appellate courts are more frequently finding harmless error, a claim that is difficult to address under severe word limitations.

In short, we do our best to weed out repetitious material and to present a brief that will facilitate the Court's review, but the current word limits frequently make that a challenge; imposing still narrower word limits will mean a substantially greater burden on appellate counsel, and will work a grave detriment to our clients. We urge the Committee to withdraw the current proposals for a blanket reduction in word limits.

Very truly yours,



Amy Adelson
Nathan Z. Dershowitz
Daniela Elliott

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Comment from Howard Bashman, NA

Submitter Information

Name: Howard Bashman
Organization: NA

General Comment

I respectfully oppose the proposed briefing word limit reductions for the reasons expressed in the attached memorandum.

Attachments

HJBashman_FRAP_Word_Limit_Reduction_Opp-021715

M E M O R A N D U M

TO: Advisory Committee on Federal Appellate Rules

FROM: Howard J. Bashman

RE: Proposed Word Limit Reduction for Federal Appellate Briefs

DATE: February 17, 2015

The observation "if it ain't broke, don't fix it" properly appears to inform this Committee's approach to amending the Federal Rules of Appellate Procedure. As the Committee's draft minutes from its April 2014 meeting reflect, "Mr. Letter suggested [that] traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so."

I am submitting this public comment because in my view "a very good reason" does not exist for reducing the FRAP principal brief word count limit from 14,000 words to 12,500 words, nor should any of the corresponding briefing word limits be reduced by that ratio.

As members of the Committee are aware, in addition to my own appellate practice, I devote a substantial amount of my time to drawing public attention to the very best examples of appellate advocacy. In my own writings, both on my widely read appellate blog and in my monthly columns published in *The Legal Intelligencer*, I have repeatedly urged attorneys who brief and argue appeals to strive for concision and to pursue the fewest and strongest issues possible.

As reflected in my own work as an appellate attorney, I am fervently of the view that shorter appellate briefs are ordinarily far more effective than longer briefs and that focusing on stronger issues to the exclusion of weaker ones ordinarily will achieve greater success for the client when I am representing the party taking the appeal. Moreover, when I represent the

appellee, I have not hesitated to observe that an appellant has raised far too many issues, thereby calling into question the strength of each and every of the appellant's claims of error.

To be sure, any page limit or word limit is arbitrary in some respect. Moreover, no size limit is proper for every case. But a size limit is not a size requirement. One need not write a brief that approaches the existing word limit to demonstrate the seriousness of an appeal. Indeed, the opposite may be true. When an appellant raises too many issues or drudges on too long about a claim of error, an appeal may become easier to decide. After all, useless parts of an appellate brief need be read at most only once. And what appellate court has failed to write in an opinion, "We have reviewed all of the appellant's remaining claims of error and find them to be without merit"?

Regrettably, the Advisory Committee's explanation offered for the proposed word limit reduction appears to be erroneous. As Judge Easterbrook asserts in his public comment opposing the reduction, 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. The very first Third Circuit appeal on which I worked in private practice involved a commercial tort case between two corporations in which my law firm's client won a $54 million judgment. Given the high stakes, my client — the appellee — ended up filing a professionally typeset printed booklet style brief for appellee whose 49 pages contained far more than what a 50–page brief prepared on 8 1/2 by 11 inch paper would have allowed. In retrospect, it could reasonably be argued that the earlier regime in which 50–page briefs were permitted regardless of the manner of preparation created an unfair disparity in favor of those litigants who could afford to secure more briefing space by incurring the costs of a professionally typeset printed brief.

Regardless of whether the decision to adopt a 14,000–word limit on principal appellate briefs was originally based on a miscalculation, it would have been preferable for the Advisory Committee's comment to instead have focused from the outset on what should have been the chief concern: are federal appellate briefs now too long, and is the best way to address any such problem an 11–percent across–the–board reduction in maximum brief size?

As demonstrated in recent posts at my "How Appealing" blog, even the most highly regarded appellate advocates in particularly complex cases regularly find it necessary to file briefs that approach the current word limits. One week ago, on February 10, 2015, the Second Circuit decided a class action appeal captioned *Sykes* v. *Harris*, No. 13–2742 (2d Cir.), and the Federal Circuit decided a patent law appeal captioned *Helferich Patent Licensing, LLC* v. *The New York Times Co.*, No. 14–1196 (Fed. Cir.). In *Sykes*, the opening brief that Paul D. Clement filed on behalf of his clients contained 13,758 words according to its certificate of compliance. And the opening brief that Miguel A. Estrada filed on behalf of his clients contained 13,975 words according to its certificate of compliance. In *Helferich*, the Brief for Appellant that Aaron M. Panner filed contained 13,515 words, the Brief for Appellees that Daryl Joseffer filed (and in which Edward R. Reines representing other appellees joined) contained 13,973 words, and the Reply Brief for Appellant contained 6,884 words. All of these briefs were considerably in excess of the new word limits now under consideration for the Federal Rules of Appellate Procedure.

One other example is also worth mentioning. Last year, I briefed and argued on behalf of the plaintiff an appeal from a district court's granting of a Federal Rule of Civil Procedure 12(b)(6) dismissal on statute of limitations grounds. Because the district court's dismissal rested solely on that basis, my client's opening brief focused entirely on demonstrating error in that ruling. That opening brief contained only 7,560 words.

Six different, separately represented defendants filed briefs for appellees in that 3rd Circuit case. Those defendants argued not only that the district court's statute of limitations-based dismissal should be affirmed, but they also appropriately argued that the district court should have dismissed the case on numerous alternative grounds that the parties had briefed in the district court but the district court never reached.

By my calculation, the briefs for appellees devoted a combined 20,000 words to arguing additional alternate grounds for dismissal. In my client's reply brief, I needed a total of 6,871 words to respond to the greatest extent possible to each and every alternate ground for dismissal that the defendants had raised. Had my reply brief been limited to 6,250 words in that case, I seriously doubt that I could have adequately begun to address and oppose the various supposed alternate grounds for affirmance.

The Third Circuit reversed the statute of limitations dismissal and remanded to allow the district court in the first instance to consider any additional grounds for dismissal. Yet the Third Circuit surely had the power itself to reach those other grounds in the first instance, and if I had been deprived of the ability to adequately address those grounds in my client's reply brief, who knows how the Third Circuit would have resolved the appeal.

Appeals frequently present complex factual and legal issues. Appeals can involve the laws of foreign nations or law from jurisdictions outside the geographical boundaries of the circuit in which the case is pending. Good appellate advocates recognize that most federal appellate judges are generalists who may lack extensive expertise in the particular factual and legal issues that an appeal may present. There is perhaps no better feeling for judge or advocate alike than an oral argument at which the judges understand what the advocates have argued in the briefs. In cases of sufficient complexity, the ability to achieve that understanding will be lost if the proposed word limit reduction takes effect.

Lastly, I fear the unintended consequences that may arise if the word limit reduction proposal is adopted. For example, briefs that fail to adequately develop issues (albeit not to the point of waiver) will necessitate that judges themselves bear more of the research burden that the parties currently shoulder. Secondly, in cases with parties on the same side of an appeal, a brief size limit of only 12,500 words is likely to cause more separately represented parties to file separate briefs instead of joining in a single submission. In such instances, shorter briefs may translate into even more reading for judges. Next, as counter–intuitive as it may seem, judges know that briefs that unnecessarily raise too many issues can make a case easier to decide, by reducing the effectiveness of all the claims of error. And appellate briefs larded with excess verbiage can likewise undermine a party's likelihood of success on appeal.

Putting everything that I and the numerous other opponents of the word limit reduction proposal have said to one side, on the other side of this issue is the fact that many appellate judges apparently are of the view that briefs are often unnecessarily long. I accept that complaint as true. But the question remains whether determining the word limit for appellate briefs — which is not a length that any advocate is required to reach — should be based on the worst the profession has to offer or the very best. My concern, simply stated, is that the word limit reduction proposal 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.

In nearly every case that a federal court of appeals decides, the court's ruling will represent not only the first appellate review that a case will receive on the merits, but it will also be the last. Depriving many litigants of the opportunity to say what needs to be said in their only appeal as of right — an opportunity the current word limit surely facilitates — must require a justification more compelling than the "oops, we made a mistake" rationale being offered or the desire of federal judges for at most

an eleven–percent lighter reading burden in whatever percentage of cases the rule change actually would impact.

For these reasons, and for the many other cogent and persuasive reasons that my colleagues in the appellate bar have submitted for opposing the word limit reduction, I respectfully urge the committee to withdraw the proposed word limit reduction amendment from further active consideration.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9a-ptgj
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0053
Comment from Saul Bercovitch, NA

Submitter Information

Name: Saul Bercovitch
Organization: NA

General Comment

Please see the attached comments from the State Bar of Californias Committee on Federal Courts.

Attachments

proposed FRAP amendments-02-2015-CFC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Federal Courts respectfully opposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure. In our view, the proposed reductions are more likely to harm appellate court efficiency and decision-making than they are to help.

We acknowledge that many appellate briefs are longer than they need to be. The problem is that determining an appropriate brief length depends on the case—it requires comparing the brief's length to the complexity of the legal and factual issues involved. While short briefs usually suffice for cases governed by clear legal authority and limited factual records, longer briefs may be necessary when cases turn on novel legal issues or divergent precedents, or when it is necessary to explain a complex factual record.

Judges do not benefit when lawyers present an overgeneralized and incomplete portrayal of legal precedent or of the factual record. Some briefs are short because they substitute generalities for specifically cited record facts, or because they fail to acknowledge that a case may be subject to two lines of authority which must be reconciled. Indeed, responsive briefs are sometimes longer precisely because an opponent's overly summary opening brief contains legal and factual errors, requiring correction, or omits necessary law and facts, requiring augmentation. In such cases, a longer brief may serve judicial accuracy and efficiency alike. Given appellate caseloads and the structure of our adversary system, counsel must bring the facts and governing law to the court's attention with appropriate citations, rather than relying on the court to review the entire factual record or conduct new legal research.

The proposed change to Rule 32 would decrease word limits by roughly 10.7%, reducing main briefs from 14,000 to 12,500 words, and reducing reply briefs from 7,000 to 6,250 words. Most

appellate briefs (including most briefs that are longer than they should be) are already under the 12,500 and 6,250 word limits, and would not be affected by the change. Instead, the reductions are likely to disproportionately affect cases that actually require long briefs—incentivizing counsel to cut back on factual nuance and citations, or to refrain from alerting courts to the complexity of governing precedent. That would result in less accurate judicial decision-making, while doing little to lessen judges' overall burden from overlong briefs.

These problems will not be fixed by relying on motions to file oversized briefs. First, requiring litigants to file, and courts to decide, such motions will create burdens out of proportion to any efficiency savings achieved by the word count reductions. As stated above, most briefs (whether appropriately sized or overlong) will be unaffected by the change; the briefs affected will be, disproportionately, those requiring extended treatment. Second, because appropriate brief size depends on each case's legal issues and factual record, a motions judge who has not immersed himself or herself in the case is unlikely to know whether or not extra words are necessary. Either judges will have to engage in substantial legal research and record review at the motions stage, or they will risk inappropriately refusing extensions to briefs that really deserve them. For similar reasons, we object to the proposed word limit changes to Rule 32, and also to the proposed changes to Rule 28.1 reducing word limits for briefs in cross-appeals.

We also believe that the word limit for petitions for rehearing or rehearing en banc, under Rules 35 and 40, should be set at 4,200 words, not 3,750. Requests for appellate rehearing are supposed to be limited to cases where the legal issues are exceptional, 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. Requiring lawyers to explain such factors in 3,750 words will save judges virtually nothing in time or effort; yet the reduction in an already short pleading is likely to severely curtail lawyers' ability to explain why a panel opinion has led to the unusual step of seeking rehearing. Similar reasoning leads us to recommend setting Rule 29(b)(4)'s word limit for amicus briefs relating to petitions for rehearing at 2,240 words rather than 2,000, setting Rule 21's word count limits for papers relating to extraordinary writs at 8,400 words, rather than 7,500, and setting Rule 5(c)'s limit for petitions requesting discretionary appeal at 5,600 words, rather than 5,000 – all of which are based on the current conversion rate of 280 words per page.

We take no position on the other aspects of the proposed changes to the Federal Rules of Appellate Procedure, 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.

We appreciate your consideration of our comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Trustees or overall

membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

Esther L. Klisura
Chair, 2014-2015
The State Bar of California
Committee on Federal Courts

PUBLIC SUBMISSION

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0054
Comment from James Azadian, NA

Submitter Information

Name: James Azadian
Organization: NA

General Comment

Please see the attached four-page comment letter addressing the proposed amendment to FRAP 32.

Attachments

2015 02 17 Letter from J. Azadian to Jonathan Rose

ENTERPRISE
COUNSEL GROUP
A Law Corporation

James S. Azadian, Esq.
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February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of
the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: *Comments on Proposed Amendment to Rule of Appellate Procedure 32*

Dear Mr. Rose:

I submit this letter on behalf of the members of the Appellate, Writs, and Constitutional Law Practice of Enterprise Counsel Group ALC. Thank you for providing the opportunity to comment on the proposal to reduce the maximum size for principal briefs. I oppose the proposal mainly for the following four reasons.

First, reducing the maximum size for principal appellate briefs by more than ten percent (from 14,000 to 12,500 words) is likely to result in the proliferation of principal briefs as well as motions to file oversized briefs, thereby significantly increasing the administrative workload of both chambers and clerks' offices and unnecessarily extending the life of an appeal. One unavoidable consequence of the proposed reduction will be the motivation for separately represented parties to file their own principal briefs rather than simply joining in a single principal brief, meaning much more reading for judges, law clerks, and staff attorneys. As is the case with nearly all oversized-briefing motions, practitioners will file them on the eve or day of the principal brief's deadline (along with the proposed oversized brief), thus calling on the clerk's office, appellate commissioner, motions panel, merits panel, or some combination thereof to resolve the motion probably after allowing the opposing party/ies a reasonable amount of time to respond. At that later juncture, the court will either grant the motion and direct the clerk's office to accept and process the lodged oversized brief, or deny the motion and grant additional time for the filing of a brief that does not exceed the maximum word count. While certain of those motions will be the product of prolixity, others will be necessitated by the complexity of a given case. In either event, appellate litigation proceedings will be

multiplied and the circuit courts will be saddled with the burden of reviewing and resolving additional motions.

Many state appellate courts follow the federal rules, specifically when it comes to the size of briefs. Appellate practitioners in states, including California, New York, Pennsylvania, and Texas, are familiar with size limitations of at least 14,000 words for principal briefs. Accordingly, if the proposed amendment to Rule 32 is approved, appellate practitioners who do not relegate their practice to federal courts and agencies are likely to more frequently file oversized-briefing motions.

Second, more complex or multiple-issue appeals presenting, for example, challenges to multiple trial court rulings or agency determinations typically warrant principal briefs in excess of 12,500 words. Not only would the proposed rule change essentially require practitioners in such cases to bear the burden of preparing additional paper in the form of an oversized-briefing motion and supporting declaration, but it would disadvantage the litigants before the various circuit courts that have expressed a stringent policy disfavoring such oversized-briefing motions.

For instance, Circuit Rule 32-2 of the United States Court of Appeals for the Ninth Circuit states in part: "The Court looks with disfavor on motions to exceed the applicable page or type-volume limitations." Similarly, Local Rule 27.1(e)(1) of the United States Court of Appeals for the Second Circuit states: "The court disfavors motions to file a brief exceeding the length permitted by FRAP 32(a)(7)." The Third Circuit's standing order likewise warns that oversized briefs are "strongly disfavored" and will be granted "only upon demonstration of extraordinary circumstances." While disfavor is deserved for unduly excessive briefing, a litigant in a truly complex or multi-issue appeal should not be disadvantaged in presenting appellate challenges and concomitant background explications and legal analysis solely on the basis of brief length.

Third Circuit Chief Judge Theodore A. McKee shared the findings of an informal survey of 12 circuit courts conducted by the Clerk of the Third Circuit. Hon. Theodore A. McKee, *Permission to Exceed the Page or Word Limitations for Briefs is Now the Exception, Not the Rule*, On Appeal, Mar. 2012, at 1 (accessible at http://thirdcircuitbar.org/newsletters/ThirdCircuitBarAssociationNewsletter_6-1_March_2012.pdf). Nine of those circuits reported they "rarely" or "almost never" grant motions to file oversized briefs. *Id.* A concern had arisen among Third Circuit judges that the Third Circuit was routinely permitting oversized briefs

without a thorough review of the merits supporting such requests. *Id.* at 2. Subsequently, Chief Judge McKee explained, the Third Circuit issued its standing order to "severely limit the number of over-length briefs that are filed" despite the fact that "compliance with the Order may sometimes be difficult and will almost always take more time than submitting a longer brief." *Id.* In other words, there is nothing to suggest that circuit courts are prepared to dispense with the current policy reserving oversized briefing only for the *most* extraordinary cases.

Third, there is a dearth of data indicating any need for the proposed rule change. Rather than repeating what other commenters have articulated in greater detail, I would respectfully draw the Committee's attention to the data recently compiled by the Clerk of the United States Court of Appeals for the Eighth Circuit, which places the debate in its proper context. Clerk Michael E. Gans Sept. 3, 2013 Letter to Hon. Steven M. Colloton at 1-2 (accessible at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/2014-04-Appeals-Agenda-Book.pdf). More specifically, the compiled data 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. *Id.* Moreover, the proposed rule change would do nothing to help mitigate the problem of unnecessarily lengthy appellate briefs (that remain at or under 12,500 words).

The actual problem this Committee is commendably attempting to address is wordiness, which is born out of poor written advocacy, *not* maximum word limitations. Circuit judges certainly have reason to complain that many briefs are unjustifiably lengthy. Circuit judges know the effectiveness of concise and cogent written advocacy (short, persuasive sentences accessible to lay person and scholar alike) and the presentation of only the strongest issues (as opposed to every possible issue). We teach associate attorneys and law students that shorter appellate briefs are more effective in securing better results for clients. The problem of wordiness can be effectively addressed only within the unique context of law school writing courses, continuing legal education for practitioners, and the practice of law. That principle has always been the wisdom guiding our venerable discipline of appellate advocacy, and perhaps with greater force than in other legal disciplines. If we were to now retreat from this core wisdom for the hope of enticing a few shorter briefs, the only expected result will be a few shorter briefs that still suffer from a lack of proper craftsmanship, and at the (greater) cost of limiting good advocacy in complex appeals that need the extra space to adequately address the appellate challenges at play. *See* Committee's Draft Apr. 2014 Minutes ("traditionally the Rules

Committees do not amend a rule unless there is a *very good* reason to do so" (emphasis added)).

Fourth, aside from the burden placed on courts, advocates, and litigants, the stated rationale for the proposed rule change merits reconsideration. The Committee noted that the proposal is aimed at correcting an inadvertent increase to the length of principal briefs that occurred in 1998. It appears that the rationale of the Committee is to preserve status quo. Hon. Frank H. Easterbrook, the American Academy of Appellate Lawyers, the Appellate Section of the State Bar of Texas, and the Committee on Federal Courts of the Association of the Bar of the City of New York each submitted comments providing compelling evidence that the length of principal briefs was not mistakenly increased in 1998. And even if one were to assume the length of principal briefs did mistakenly increase in 1998, a correction after approximately 17 years can no longer be said to preserve the state of affairs of appellate *procedure.*

For these additional reasons, I urge the Committee to retain the current maximum word count for appellate briefs.

Respectfully submitted,

James S. Azadian

Shareholder and Chair of Appellate, Writs, and Constitutional Law Practice

cc: Molly Dwyer (Ninth Circuit Clerk)

PUBLIC SUBMISSION

As of: February 19, 2015
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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0055
Comment from Matthew Dowd, Wiley Rein LLP

Submitter Information

Name: Matthew Dowd
Organization: Wiley Rein LLP

General Comment

Please see the attached

Attachments

Letter to Hon Jeffrey Sutton

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February 17, 2015

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The Honorable Jeffrey Sutton, Chair
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Thurgood Marshall Federal Judiciary Building
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Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

We write in response to the Advisory Committee's proposed amendments to Rules 28.1 and 32 of the Federal Rules of Appellate Procedure.

The undersigned attorneys at Wiley Rein are active litigators in the federal courts of appeals. Wiley Rein's appellate litigators handle appeals concerning a wide variety of legal matters. Our appellate practitioners are particularly experienced in handling technically complex issues in the areas of telecommunications and patent law. Our attorneys also represent pro bono clients throughout the various courts of appeals. Based on our experience, we hereby recommend that the proposed reduction in brief length be rejected.

The proposed amendments to Rules 28.1 and 32 would reduce the word limit from 14,000 words to 12,500 words. We strongly urge the Rules Committee to reject the proposed amendments because they would not substantially improve appellate advocacy. Any potential improvement would be outweighed by the detriment to briefing in complex appeals, particularly in patent and telecommunications appeals.

At a minimum, there appears to be a dispute about the actual basis for the 1998 amendments to the Federal Rules of Appellate Procedure that introduced the 14,000-word limit for briefs. Prior to the 1998 amendments, the rules imposed a 50-page limit for briefs. The Advisory Committee's June 6, 2014 Report concludes that the change from 50 pages to 14,000 words was based on an erroneous "conversion rate" of 280 words per pages. The Advisory Committee submits that the more accurate number should have been 250 words per page.

Judge Frank Easterbrook concludes otherwise. Judge Easterbrook explains that he "drafted Rule 32" and that "[t]he 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."

We are certainly in no position to quarrel with Judge Easterbrook's explanation of the genesis of the 1998 amendments. At a minimum, the apparent disagreement about the 1998 amendments should give the Committee pause about adopting the current amendments to Rules 28.1 and 32. The only rationale provided by the Advisory Committee for reducing the word limit on briefs is the Advisory Committee's conclusion about the supposed error in the "conversion rate." But Judge Easterbrook's explanation casts serious doubt on the correctness of the Advisory Committee's conclusion.

More importantly, the Advisory Committee's focus on a possible "error" some seventeen years ago misses the mark. The key inquiry should examine whether the current 14,000-word limit—a rule that has been in place for almost two decades—permits attorneys to sufficiently and effectively present the facts and legal issues on appeal. We submit that the current word limit is working well and should not be altered.

Furthermore, the current word limit is important to ensure that complex appeals involving patent and telecommunications issues are properly presented to the appellate courts for review. Wiley Rein's appellate practice handles many appeals in the areas of patents and telecommunications. Disputes involving patents can be extraordinarily complex, ranging from the latest developments in smartphone technology to stem cell therapies for treating cancer. Indeed, patent appeals from decisions of the U.S. International Trade Commission routinely concern agency decisions on the merits that are hundreds of pages long.

Similarly, appeals concerning telecommunications disputes can likewise be complex. The statutory schemes are frequently convoluted. Many appeals implicate lengthy administrative hearings or rulemaking proceedings. In such cases, a party on appeal often faces a challenging task to cogently present the facts and issues to the reviewing court within the current word limit.

Every skilled appellate litigator knows the value of conciseness. Our goal with every appeal is to ensure that every word in an appeal brief has a purpose. If it does not, it is cut. The shorter the brief we present to the court, the more persuasive it likely will be, and thus the better we advocate for our clients before the courts. We

have every incentive to make briefs as short as possible. Unfortunately, in our experience, certain appeals—particularly patent and telecommunications appeals—cannot be completely briefed in 12,500 words.

We recognize that the rules permit parties to ask for enlarged briefing. In comments submitted on February 3, 2015, Chief Judge Briscoe of the Tenth Circuit noted that "counsel may move for leave to exceed the word limit." In our experience, courts of appeals are generally parsimonious with respect to granting such motions. We must therefore respectfully disagree with Judge Briscoe's statement that "[t]he flexibility provided by such motions will mitigate any potentially adverse effects of the rule change." Moreover, even if such motions are granted, the fact that such motions will have to be made more frequently will only add to the cost of appeals and to the burden on the courts in deciding the motions. Absent a sufficient justification for amending the current rules, the possibility of filing a motion for leave to exceed the word limit is not a sufficient safeguard.

Finally, the Advisory Committee's primary impetus for the proposed change to the word limit on briefs is a decision to impose a word limit, as opposed to a page limit, on other submissions, such as motions. There are valid reasons to use word limits instead of page limits for all submissions to the courts, but the Advisory Committee has not identified a sufficient reason to reduce the existing word limits on briefs. Indeed, the Advisory Committee itself noted that "there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs." *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure Report, at 18 (Aug. 2014).

Given the lack of any strong rationale to reduce the current word limits, and the apparent divide within the Advisory Committee itself, we respectfully submit that the proposed amendments to Rules 28.1 and 32 should be rejected.

Respectfully Submitted,

/s/ Andrew G. McBride

Andrew G. McBride
Matthew J. Dowd
Kevin P. Anderson

PUBLIC SUBMISSION

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0056
Comment from Patrick Bryant, NA

Submitter Information

Name: Patrick Bryant
Organization: NA

General Comment

I write to oppose the proposed word-limit reductions to the Federal Rules of Appellate Procedure. I am an appellate attorney in the Federal Public Defender's Office for the Eastern District of Virginia, but I write only on my own behalf. I have written over 100 federal appellate briefs, and as part of an appellate team and previously as a law clerk and staff attorney, I have read many hundreds more. I oppose the word-limit reduction because it is a blunt instrument that will do little to improve the overall quality of briefs. In addition, the proposed rule may add to the workload of judges and court staff as they deal with ancillary motions.

I won't repeat the numerous comments describing the constant increase in complexity in federal law, but I concur with them. In recent years, our district has seen examples of some of the most difficult types of federal cases, everything from capital murder to international terrorism and piracy to public corruption to large drug and gang conspiracy cases. Even a "routine" robbery or fraud case may present several appellate issues requiring lengthy explication. Moreover, the Fourth Circuit hears so few oral arguments that counsel know the briefs must fully present every issue, with no guarantee of fleshing out an issue at oral argument.

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. In the Fourth Circuit, a motion to exceed the word limit must be filed 10 days in advance. The Fourth Circuit also imposes shortened deadlines for briefs in criminal cases: 35 days for opening briefs, 10 days for reply briefs. Therefore, in a complex case -- the type most likely to warrant a lengthy brief -- counsel would have only 25 days to assess the record and prepare enough of the brief to know a motion to exceed word limits is necessary. I believe that motions for extension of time and motions to exceed word limits will become much more common if the proposed rules go into effect. (It would seem that, in an abundance of caution, one or the other would almost always be necessary when counsel only has 10 days to file a reply to a lengthy appellee's brief.) The end result is that judges and court staff will spend more time on motions than they would on the small number of briefs containing between 12500 and 14000 words.

I agree with the Virginia Supreme Court's admonition in its Rule 1:4(j) that "Brevity is enjoined as the outstanding characteristic of good pleading." But editing takes time. As Mark Twain is attributed with telling a friend, "If I had more time, I would've written you a shorter letter." Unfortunately, the

interaction between the proposed word limits and briefing deadlines will inevitably lead to an increase in either motions for extensions of time or motions to exceed word limits. In my opinion, the Committee has not demonstrated a sufficient justification for the word-limit reduction, especially in light of these unintended, but likely, consequences. For these reasons, as well as those presented in other submissions, I oppose the proposed word-limit reductions. Thank you for your consideration of this comment.

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0057
Comment from Steven Finell, NA

Submitter Information

Name: Steven Finell
Organization: NA

General Comment

Please see the attached letter of comment.

Attachments

2015-02-17.Letter Of Comment on Type Volume Limits

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NEW YORK, NY 10005–2205

February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of
the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Proposed Amendments to Federal Rules of Appellate Procedure:
Type Volume Limits and Typography

Dear Mr. Rose:

I join 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. I write separately to address additional issues.

Rule 32(a)(7)(A)

The proposed amendments would not change Fed. R. App. P. 32(a)(7)(A), which retains page limits as the default rule for a merits brief "unless it complies with Rule 32(a)(7)(B) and (C)." The 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)."

An Amended Rule Can Simplify Type Volume Limits

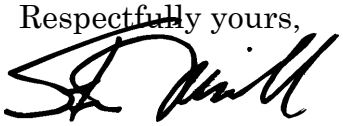
I support the proposal to adopt type volume limits for all length limits in the Federal Rules of Appellate Procedure. I believe everyone agrees that type volume limits are fair and avoid gamesmanship. However, the structure of the proposed amendments is unnecessarily complex.

For briefs and other papers prepared on a computer, a word limit suffices. All word processing programs give a word count. Therefore, having a line limit for monospaced fonts adds unnecessary complication. Also, no reason exists to give computer users an alternative page limit. If someone is determined to exceed the

type volume limit, hideously narrow, hard-to-read, condensed serif fonts exist to satisfy the page limit while exceeding the word limit. To cram even more words into the page limit, one can reduce letter and word spacing to, say, 80%–85% of normal, which further reduces legibility.[1]

Since type volume limits are now the rule rather than the exception, the rule should not be structured to make type volume limits an exception to page limits, as Rule 32(a)(7)(A) now does. In my opinion, 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.

Respectfully yours,



[1]In a lawyer's email list that I subscribe to, a lawyer asked for advice on "Font-cramming best practices for maximum words per page." My reply began, "There is no best practice for a worst practice," and recommended some sources on concise legal writing.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9c-8s0y
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0058
Comment from Saul Bercovitch, The State Bar of Californias Committee on Appellate Courts

Submitter Information

Name: Saul Bercovitch
Organization: The State Bar of Californias Committee on Appellate Courts

General Comment

Please see the attached comments from the State Bar of Californias Committee on Appellate Courts.

Attachments

proposed FRAP amendments-02-2015-CAC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment 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." The 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)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address 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. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(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 25(a)(2)(c)(ii), as further amended, would provide:

(ii) 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 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes 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. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports 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.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length 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. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that 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. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9d-jjhs
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0059
Comment from James Pew, Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center

Submitter Information

Name: James Pew
Organization: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center

General Comment

See attached file(s)

Attachments

Ex. A - U.S. Sugar Corp v. EPA Order

Ex. B - Solvay USA v. EPA Order

FRAP Amendment Comments

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

EPA-76FR15608
EPA-78FR7138

Filed On: May 15, 2014

United States Sugar Corporation,
Petitioner
v.

Environmental Protection Agency,
Respondent

National Environmental Development
Association's Clean Air Project, et al.,
Intervenors

Consolidated with 11-1124, 11-1134, 11-1142, 11-1145, 11-1159, 11-1165, 11-1172, 11-1174, 11-1181, 13-1086, 13-1087, 13-1091, 13-1092, 13-1096, 13-1097, 13-1098, 13-1099, 13-1100, 13-1103

BEFORE: Griffith, Srinivasan, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for remand of the record, for partial voluntary remand without vacatur, and for revision of the briefing schedule, the responses thereto, and the reply; the motion for affirmative relief, the response thereto, and the reply; and the motion for remand of the case, the responses thereto, and the replies, it is

ORDERED that the motion for remand of the record, for partial voluntary remand without vacatur, and for revision of the briefing schedule be granted, and the motion for affirmative relief and the motion for remand of the case be denied. The numeric standards identified by EPA on pages 10-13 of its remand motion, set forth in "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters," 78 Fed. Reg. 7138 (Jan. 31, 2013), are hereby remanded to EPA for further proceedings. The Clerk is directed to issue forthwith a certified copy of this order to the agency in lieu of partial formal mandate. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

FURTHER ORDERED that the record be remanded to EPA for a period of 60 days from the date of this order to permit EPA to provide further explanation, in light of National Association of Clean Water Agencies v. EPA, 734 F.3d 1115 (D.C. Cir. 2013), for its upper prediction limit and variability analysis. It is

FURTHER ORDERED that the following briefing format and schedule apply to the remainder of these consolidated cases:

Industry Petitioners' Brief (not to exceed 11,200 words)	August 12, 2014
Environmental Petitioners' Brief (not to exceed 11,200 words)	August 12, 2014
Respondent's Brief (not to exceed 22,400 words)	November 10, 2014
Industry Intervenor-Respondents' Brief (not to exceed 7,000 words)	December 10, 2014
Environmental Intervenor-Respondents' Brief (not to exceed 7,000 words)	December 10, 2014
Industry Petitioners' Reply Brief (not to exceed 5,600 words)	December 24, 2014
Environmental Petitioners' Reply Brief (not to exceed 5,600 words)	December 24, 2014
Deferred Appendix	January 7, 2015
Final Briefs	January 21, 2015

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1108 **September Term, 2013**

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Procedures 41 (2013); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

Exhibit B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1189 **September Term, 2013**

EPA-76FR15456

Filed On: January 31, 2014

Solvay USA Inc.,
Petitioner

v.

Environmental Protection Agency,
Respondent

Metals Industries Recycling Coalition, et al.,
Intervenors

Consolidated with 11-1192, 11-1202, 11-1214, 11-1216, 11-1217, 11-1220, 11-1221, 11-1223, 11-1224, 11-1226, 11-1227, 11-1228, 11-1230, 11-1232, 11-1233, 11-1235, 11-1238, 13-1152, 13-1156, 13-1157, 13-1158, 13-1159, 13-1160, 13-1162, 13-1164, 13-1165, 13-1167

BEFORE: Tatel and Brown, Circuit Judges

O R D E R

Upon consideration of the joint motion to set briefing format and schedule, it is

ORDERED that the following briefing format and schedule shall apply:

Industry Petitioners' Brief (not to exceed 11,200 words)	April 28, 2014
Environmental Petitioners' Brief (not to exceed 11,200 words)	April 28, 2014
Respondent's Brief (not to exceed 22,400 words)	August 4, 2014

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1189 **September Term, 2013**

Industry Intervenor-Respondents' Brief (not to exceed 7,000 words)	September 2, 2014
Environmental Intervenor-Respondents' Brief (not to exceed 7,000 words)	September 2, 2014
Industry Petitioners' Reply Brief (not to exceed 5,600 words)	September 15, 2014
Environmental Petitioners' Reply Brief (not to exceed 5,600 words)	September 15, 2014
Deferred Appendix	September 29, 2014
Final Briefs	October 14, 2014

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

COMMENTS OF EARTHJUSTICE, SIERRA CLUB, DEFENDERS OF WILDLIFE, AND WESTERN ENVIRONMENTAL LAW CENER ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center very much appreciate the opportunity to comment on the proposed changes to the Federal Rules of Appellate Procedure. We respectfully urge the Advisory Committee not to adopt the proposed changes to the word limits for appellate briefs and to the rules regarding the computation and extension of time.

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

The proposed changes to Rule 32 would shorten the length for opening briefs from 14,000 words to 12,500 words and the length for reply briefs from 7,000 words to 6,250 words. As explained in detail below, these 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. This dilemma is especially pointed 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. *See, e.g.*, 42 U.S.C. § 7607(b) (providing that petitions for review of many final actions taken by the Environmental Protection Agency under the Clean Air Act must be brought within 60 days in the D.C. Circuit); 33 U.S.C. § 1369(b) (requiring petitions for review of regulations issued under the Clean Water Act to be brought in federal courts of appeals); 42 U.S.C. § 6976 (providing that petitions for review of regulations promulgated under the Solid Waste Disposal Act must be brought in the D.C. Circuit). In these cases, a decision not to raise a valid claim – or the failure to adequately brief a valid claim – can have long term adverse impacts not only on a litigant but on the public.

The records for judicial review in these cases 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. The proposed reduction in the word limits would affect attorneys' ability to bring important issues before the courts and to successfully challenge unlawful action.

Cases challenging government action are often multiparty cases where petitioners with different (and often adverse) interests present different and conflicting claims to the court. In environmental cases, for example, courts may be presented with arguments by regulated entities who claim that a regulation is too stringent and by environmental groups who claim it is insufficiently stringent. *See Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013). In such cases, the D.C. Circuit typically receives two or more petitioner briefs. *See id.* at 1118. Faced with the prospect of multiple briefs, the D.C. Circuit usually reduces the number of words allowed in any individual brief substantially. *See, e.g.*, Ex. A, Order, U.S. Sugar Corp. v. EPA, No. 11-1108 (D.C. Cir. May 15, 2014); Ex. B, Order, Solvay, USA, Inc. v. EPA, No. 11-1189 (D.C. Cir. Jan. 31, 2014).

In judicial review cases, courts generally defer to agency statutory interpretations so long as they do not contravene Congress's plainly expressed intent and are reasonable. *See Chevron v.*

Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). Similarly, they defer to agencies' factual determinations so long as they are not arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Thus, petitioners in such cases must be able to brief issues that are often both complex and numerous in sufficient detail to overcome significant deference. Notably, the D.C. Circuit has ruled that arguments raised too briefly are waived. *See e.g.*, *Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999); *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013*)*; *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 340 (D.C. Cir. 2007) (*quoting Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005)); *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 173 (D.C. Cir. 2013).

Even where the courts consider arguments that have not been developed in sufficient length, they may still reject such arguments if the briefs do not sufficiently explicate why the government's action was unlawful or arbitrary. Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing valid claims. The goal of inducing attorneys to present their claims succinctly is certainly worthwhile, but word limits should not act to cap the number of valid issues that parties can raise. Such a result would not only be unfortunate from a public policy point of view, but would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions.

Some may believe that if word limits are shortened, parties who truly need additional words can obtain them by submitting a motion to the court. As a practical matter, such motions are hardly ever granted. *See* D.C. Cir. R. 28(e)(1) ("The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons."). Further, it is neither in the interest of litigants nor judicial economy to create a situation in which parties are forced to file motions to exceed the word limits more frequently.

Moreover, if the word limits are shortened as proposed, it is likely that courts will continue to shorten them further in multi-party cases. It is understandable that courts would want to reduce word limits in multi-party cases, as the amount of material that judges and clerks need to read increases substantially with each additional brief. However, the impetus for reducing word limits for each brief in these cases will not cease to exist just because the default word limit is reduced from 14,000 to 12,500; rather, the result will be to simply lower the starting point for further reducing word limits.

Finally, 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) now provides that "[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing." It further provides that, "[w]hen the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." *Id.* When the Committee determined that briefs of 50 pages (and later 14,000 words) were appropriate, it did not contemplate the need to include such additional sections, which can substantially reduce the number of words available for merits arguments.

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

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

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

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

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

Nor is it the case that these shorter times always applied before the widespread adoption of electronic service. As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus, intermediate Saturdays, Sundays, and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule 27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4). Rather, under previous rules, a response to a motion filed on the Friday before a holiday weekend would have been due 16 calendar days (10 working days later) – even without the additional 3 days provided by the 3-day rule. Similarly, replies to a response filed the Friday

before a holiday weekend would have been due 12 calendar days (7 working days) later without an additional 3 days. In short, 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.

TAB 5E

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-B: amicus briefs on rehearing

Among the proposals published for comment in summer 2014 were proposed amendments to Rule 29 that would address amicus filings in connection with petitions for panel and/or en banc rehearing. The amendments 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.

Part I of this memo sets out the proposed amendments and Committee Note as published. Part II summarizes the public comments. Part III analyzes those comments, and Part IV summarizes the choices presented to the Committee.

I. Text of Rule and Committee Note as published

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 comply with Rule 32(g) and not exceed:

(i) 2,000 words; or

(ii) 208 lines of text printed in a monospaced face.

(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 3 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.

II. 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,[1] 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

[1] See my memorandum on length limits (Item No. 12-AP-E).

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."[2]

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."[3]

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

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[2] Reporter's note: This comment does not specify whether the reference to Rule 29 focuses on existing Rule 29's limit for amicus filings in connection with initial merits briefing, or on proposed Rule 29(b)'s limit for amicus filings in connection with rehearing petitions, or both.

[3] Reporter's note: See also the separate summary, in the collection of comments on the length-limits proposal, of Mr. Samp's comments concerning the length of amicus briefs in connection with initial hearing on the merits.

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.

III. Analysis of comments

A number of commentators generally support the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the two key issues of length and timing; a third suggestion concerns amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. I address each of these matters in turn.

A. Length

As published, proposed Rule 29(b)(4) would set a default rule that amicus filings in connection with a petition for rehearing be limited to 2,000 words or 208 lines of monospaced text. The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit; though not all of these commentators stated a preferred alternative, the specific proposals ranged from 2,240 words to 4,200 words.[4]

[4] Those who specified an alternate limit offered 2,240 words (the State Bar of California's Committee on Federal Courts); 2,250 words (NACDL); 2,500 words (Richard A. Samp, Chief Counsel, Washington Legal Foundation); 3,000 words (Charles Roth, Director of Litigation at the National Immigrant Justice Center); 4,200 words (the American Academy of Appellate Lawyers and the Committee on Appellate Courts of the State Bar of California); and the same as for a party's petition (P. David Lopez, General Counsel to the EEOC). Others

The arguments in favor of a longer limit relate 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 developed the proposed limit of 2,000 words in light of the fact that current Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the length of "a party's principal brief." Members favored adopting a similar approach for amicus filings in connection with a rehearing petition. Half of 15 pages was 7 ½ pages; rounding up to 8 pages and multiplying by 250 words per page, the Committee arrived at the 2,000-word limit.

One question for the Committee is whether the commentators' concerns warrant amending proposed Rule 29(b)(4) to set a default limit greater than 2,000 words. As two commentators noted, circuits that have addressed the matter in local provisions afford more than 2,000 words.[5] Prior interim discussions within the Committee had revealed some support for a 10-page limit, and it might be worthwhile to revisit the question. If there is doubt about the choice of an optimal default limit, it might also be worthwhile to ask whether a court of appeals is more likely to tailor its own local rules to correct an unduly-long limit or an unduly-short limit.

Another question is whether the Committee should retain the alternative of line limits. In a separate memo I discuss Steven Finell's proposal to eliminate the use of line limits as an

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suggested using a conversion ratio of 280 words per page (the Committee on Federal Courts of the Association of the Bar of the City of New York) or generally suggested that the 2,000-word limit was too short (Jeffrey R. White, Center for Constitutional Litigation, noting with approval the Ninth Circuit's 4,200-word limit; Anne K. Small, General Counsel of the SEC, expressing opposition to the proposed "word limits for appellate briefs in Proposed Rules 28.1, 29 and 32").

[5] Mr. Lopez states that "the word limits for amicus briefs and party petitions should be the same. That is the rule in most circuits now ...." Mr. Samp refers to "current rules in most circuits, which generally allow amicus briefs of up to 10 pages."

My own understanding of existing local circuit provisions falls somewhere in between these two descriptions. Of the four circuits that address the question, two give amici essentially the same length limit as parties but the other two give amici a shorter length limit (though more than one-half the length limit for parties). *See* Ninth Circuit Rule 29-2(c)(2) (15 pages, or 4,200 words, or 390 lines); Tenth Circuit Rule 29.1 (3,000 words); Eleventh Circuit Rules 35-6 and 40-6 (15 pages); Federal Circuit Rules 35(g) and 40(g) (10 pages).

alternative to word limits.[6] Mr. Finell points out that "[a]ll word processing programs give a word count. Therefore, having a line limit for monospaced fonts adds unnecessary complication." If the Committee were to adopt Mr. Finell's proposal in connection with the Appellate Rules' length limits generally, the question of whether to retain a line limit in proposed Rule 29(b)(4) might merit separate consideration. Unlike other proposed length limits published for comment, Rule 29(b)(4) does not distinguish between briefs prepared with a computer and briefs prepared without one. The Committee felt that it was unlikely that an amicus would prepare a brief on a typewriter or in longhand, and believed that the access-to-court concerns that generally justify the provision of an alternative page limit for other documents do not apply with equal strength in the case of amicus filings. Accordingly, proposed Rule 29(b)(4) does not include an alternative limit set in pages. In the (admittedly unlikely) event that a would-be amicus sought to file a brief prepared on a typewriter, counting words would be labor-intensive but counting lines would be practicable. For that reason, perhaps it might be worthwhile to retain the alternative limit set in lines in Rule 29(b)(4) even if the line limits are deleted from other provisions. On the other hand, the same reasons that led the Committee to omit a page limit from proposed Rule 29(b)(4) might also justify deleting the line limit.

B. Timing

As published, proposed Rule 29(b)(5) 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. It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Both of these deadlines would be default rules that could be altered by local rule or order in a case. Of the fourteen commentators who discussed the Rule 29 proposal, ten commented on the proposed rule's timing feature.

Two of the commentators expressed support for the proposed timing rules.[7] Eight commentators believe that one or both of the periods would be too short. Seven of those commentators propose lengthening the period for filings in support of a rehearing petition, with

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[6] See my memorandum on length limits (Item No. 12-AP-E).

[7] Both Charles Roth, Director of Litigation at the National Immigrant Justice Center, and Richard A. Samp, Chief Counsel of the Washington Legal Foundation, state support for the published rule's proposed three-day time lag between the petition's filing and the due date for amicus filings in support of the petition.

two commentators favoring a ten-day period,[8] four proposing a seven-day period,[9] and one proposing a five-day period.[10] For one of those commentators, a seven-day period would be a second-best approach; the Supreme Court and Appellate Practice of Mayer Brown LLP ("Mayer Brown") advocates the adoption, instead, of a two-step process. Under the Mayer Brown proposal, the rule would "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."[11] Four of the commentators propose lengthening the deadline for amicus filings in opposition to a rehearing petition, with the proposed time lag ranging from three days to ten days.[12]

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[8] Support for the national adoption of the Ninth Circuit's approach (ten days after the filing or due date of the party supported) was expressed both by 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), and by John Derrick on behalf of the State Bar of California's Committee on Appellate Courts.

[9] Both Mr. White (of the Center for Constitutional Litigation) and the Supreme Court and Appellate Practice of Mayer Brown LLP would use the party's filing date as the trigger for the seven-day period; it appears that same is true of the Committee on Federal Courts of the Association of the Bar of the City of New York. Mr. Lopez did not specify explicitly, but it seems likely that he too had in mind the filing date (rather than the due date); he states that "the EEOC recommends that amici be permitted to file briefs one week after the party's rehearing petition."

[10] NACDL urges "allowing a more realistic five days, not just three, under proposed Rule 29(b)(5)." I read this to indicate that NACDL's proposal, like the published proposal, would use the party's filing date as the trigger for the amicus's time period.

[11] *Cf.* Supreme Court Rule 37.2(a) ("An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. ").

[12] The Federal Courts Committee of the New York County Lawyers Association suggests a due date of "three days after the filing of the main brief in opposition."

The Federal Courts Committee of the Association of the Bar of the City of New York advocates mirroring current Rule 29(e) – i.e., a deadline of seven days after the filing by the party supported.

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), and John Derrick (on behalf of the State Bar of California's Committee on Appellate Courts) favor the Ninth Circuit's approach, which affords ten days after the filing or due date of the party supported.

The commentators who advocate longer deadlines suggest that the published proposal's deadlines will generate motions for extensions of time and will decrease the quality of amicus filings. They assert that it may not be practicable for an amicus to coordinate with the party whose position it supports. Given that fact, they state, a time lag is necessary in order for the would-be amicus to review the party's filing, determine whether that filing adequately presents the relevant issues, and draft an amicus brief. Mr. Lopez, on behalf of the EEOC, notes that government lawyers need time to seek relevant approvals before filing an amicus brief. In four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time period ranges from seven to 14 days.[13]

In adopting the default rules for timing set out in the published proposal, the Committee was not unaware of these considerations. But, against those considerations, it balanced various countervailing factors, including the need to avoid delay in processing rehearing petitions; the fact that different circuits tend to process such petitions at different rates of speed; the risk that giving amici too generous a deadline for filings in support of the petition would burden the party opposing the petition with the need to revise a draft response after belatedly receiving the amicus brief; and members' impression that it is common for amici to coordinate with counsel for the party whose position they support. Participants also thought it appropriate to set a default rule that amicus filings in opposition to the petition are due on the date set for the response because responses will occur only at the court's request; since there will be a court order, the court can readily direct a different due date for the amicus filing if it prefers.

In addition to considering whether the timing default rules in the published proposal have struck the right balance, the Committee should also consider the costs and benefits of Mayer Brown's proposed alternate mechanism (setting a three-day deadine for a notice of intent and then affording a further seven-to-ten-day period within which to draft the brief). Mayer Brown notes that this mechanism "would enable the court to move expeditiously in the majority of cases in which no amicus brief is being filed, while making it feasible for the amicus to prepare an adequate brief in those few cases of particular public importance where such briefs are most likely to be of value." As Mayer Brown points out, such a mechanism would give the parties and the court prompt notice that an amicus intended to seek leave to file a brief. And the additional time would allow the would-be amicus to improve its filing (including, perhaps, by making it more concise). But the mechanism would result in an aggregate time lag of 10 to 13 days between the party's filing and the amicus' filing. And the two-step mechanism would inject complexity into the process.

Admittedly, the proposed rule merely sets a default rule from which the court can opt out by local rule or order in a case. But such alterations will occur only if the circuit in question decides to adopt a local rule or the court in a given case decides to enter an order. One might speculate that such alterations may be more likely to occur if the national default rule errs on the

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[13] *See* Ninth Circuit Rule 29-2(e)(1) (10 days); Tenth Circuit Rule 29.1 (7 days); Eleventh Circuit Rules 35-6 & 40-6 (10 days); Federal Circuit Rules 35(g) & 40(g) (14 days).

side of affording a longer period than if the default rule errors on the side of affording a shorter period: Though the longer period carries some risk of disadvantaging a party (namely, a respondent who has been invited to respond to a rehearing petition), the much larger risk of an unduly long period would appear to fall on the court itself (to the extent that a longer period might delay the court's own processes). By contrast, it seems likely that in most instances it will be the would-be amicus rather than the court itself that feels disadvantaged by an unduly-short deadline.

As to the deadline for amicus filings in opposition to a rehearing petition, only four of the commentators proposed altering that deadline. They point out that an amicus needs time to review the party's filing in order to avoid repeating points made by the party and in order to explain the ways in which its own filing makes a distinctive contribution; that a short deadline for the amicus may decrease the quality of the amicus brief and/or invite motions for extensions of time; that a longer deadline, if it were afforded, would affect only the small number of appeals in which the court decides to request that the party answer the rehearing petition; and that the court could shorten the deadline when it so desired.

C. Merits briefing other than initial briefing of an appeal

Jeffrey White, writing on behalf of the Center for Constitutional Litigation, expresses concern that, as published for comment, the amended Rule 29 would address amicus filings during the initial consideration of a case on the merits and during consideration of whether to grant rehearing, but not thereafter. He explains that,

> [o]n rare occasions, CCL and/or the American Association for Justice present amicus briefs at a later consideration of the case on the merits where no brief was filed during the court's initial consideration of the merits—either after rehearing en banc has been granted or after a case has been remanded from the Supreme Court. On these rare occasions, our amicus briefs have focused on issues that were raised by the panel's or the Supreme Court's majority or dissenting opinions, or were necessary to present our client's interests in a case where those interests were not clear before the initial consideration of the merits by the court.

Mr. White asserts that current Rule 29 "does not limit when amicus briefs may be permitted." He suggests "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 Committee has not considered in any detail the possibility of adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. Mr. Englert's proposal – from which the pending amendments arose – focused particularly on filings in support of a petition for rehearing. The Committee has previously noted that some existing local circuit provisions address amicus filings after the grant of

rehearing en banc,[14] but no member has expressed support for adopting a national rule directed at those proceedings. As far as I can recall, the topic of amicus filings in connection with proceedings on remand from the Supreme Court has not previously been discussed by the Committee.

I suggest that the Committee not adopt Mr. White's suggestions for changes to the proposed Rule text. Although Mr. White is correct that current Rule 29 does not limit amicus filings after a grant of rehearing en banc or after a remand by the Supreme Court, neither would the proposed rule as published. Just as the current Rule has not been read to foreclose amicus filings at the rehearing-petition stage, the proposed Rule should not be read to foreclose amicus filings at the later stages identified by Mr. White. It seems very unlikely that any court would feel constrained by the canon *expressio unius est exclusio alterius* to conclude that it lacked authority to accept amicus filings after the grant of rehearing en banc or after a remand by the Supreme Court, merely because Rules 29(a) and (b) address prior stages of appellate litigation. However, if the Committee feels that there could be any room for doubt on this point, it would be a simple matter to add a sentence to the Committee Note disclaiming any intent to address the contexts identified by Mr. White. For example, the Note could state:

> Rule 29 is amended to address amicus filings ~~in connection with~~ during consideration of 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. Rule 29 does not address amicus filings after the grant of rehearing en banc or after a remand by the Supreme Court; amicus participation in those later stages of a proceeding is left to treatment by local circuit provisions.
>
> 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.

For three reasons, I suggest that the Committee should not attempt to draft Rule text, in connection with the current round of amendments, to address amicus filings after the grant of rehearing en banc or after a remand by the Supreme Court. First, it seems likely that any new provision addressing those contexts would need to be published for comment. Second, as Mr. White notes, amicus filings in those contexts occur only rarely, leading me to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible

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[14] *See* Third Circuit Local Appellate Rule 29.1(a); Ninth Circuit Rule 29-2; Eleventh Circuit Rule 35-9.

approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those contexts for treatment in local provisions and orders in particular cases.[15]

IV. Conclusion

The comments on the proposed amendments to Rule 29 highlight the following choices for the Committee:

- Default provision on length
    - Should the Committee select the published length limit (2,000 words) or a longer limit?
- Default provision on timing
    - Should the Committee select the published due dates (three days after the petition's filing for amici supporting the petition or supporting neither party; the date set for the response for amici opposing the petition)? Or should it select later due dates?
    - Should the Committee select a two-step process with one deadline for a notice of intent to file and a subsequent deadline for the actual brief?
- Other issues
    - Should the Committee delete the line limit from proposed Rule 29(b)(4)?

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[15] For local circuit provisions generally addressing procedure after a remand by the Supreme Court, see Fourth Circuit IOP 41.2 ("If a case is remanded to the Court of Appeals from the Supreme Court, the case shall be reopened under the original docket number and the Court of Appeals may require additional briefs and oral argument, summarily dispose of the case, or take any other action consistent with the Supreme Court's opinion."); Sixth Circuit Rule 45(d) ("The clerk refers remands from the Supreme Court of the United States to the panel that decided the case. Counsel need not file a motion concerning the remand – it is referred when the clerk receives a certified copy of the judgment. The clerk's office will advise counsel of further proceedings."); Seventh Circuit Rule 54 ("When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court's judgment pursuant to its Rule 45.3, file statements of their positions as to the action which ought to be taken by this court on remand."); Federal Circuit IOP 15.3 ("The en banc court or the panel may require the parties to file statements of their positions regarding the action to be taken by the court on remand. The en banc court or the panel may require additional briefs, schedule oral argument, summarily dispose of the case, remand to the trial court, or take any other action consistent with the opinion of the Supreme Court.").

- Should the Committee revise the Rule's text or Note to address amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court?

Encls.

TAB 5E(1)

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Amicus / Rehearing Proposals

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8ftu-2gxf
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0015
Position Paper of James C. Martin, on behalf of American Academy of Appellate Lawyers

Submitter Information

Name: James C. Martin
Organization: American Academy of Appellate Lawyers

General Comment

See Attached

Attachments

Academy Position Paper

AMERICAN ACADEMY OF APPELLATE LAWYERS

December 1, 2014

Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E., Suite 7-240
Washington, DC 20544

Re: Request to testify on proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Rose,

The American Academy of Appellate Lawyers requests the opportunity to testify at the public hearing on the proposal to amend Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, on January 9, 2015 in Phoenix, Arizona. The Academy is a professional association of nearly 300 members from across the country, whose membership is limited to lawyers, judges and educators dedicated to appellate practice and the administration of justice on appeal.

The Academy has submitted comments on the proposed amendments and a copy of its position paper is attached. The Academy's incoming president, Charles A. Bird, from San Diego, California, would be pleased to offer the Academy's views.

Very truly yours,

James C. Martin
President
American Academy of Appellate Lawyers

AMERICAN ACADEMY OF APPELLATE LAWYERS

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PRESIDENT

CHARLES A. BIRD
PRESIDENT-ELECT

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AMERICAN ACADEMY OF APPELLATE LAWYERS' COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The American Academy of Appellate Lawyers submits the following comment on the proposal by the Advisory Committee on Appellate Rules ("Advisory Committee") to amend Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35 and 40 of the Federal Rules of Appellate Procedure. When appropriate, the comment below addresses changes common to groups of rules, not each rule separately.

The Academy supports all of the proposed amendments except for the proposal to reduce the word limits on briefs and to apply a conversion rate of 250 words per page to documents being converted from a page limit to a word limit. The Academy believes that the Advisory Committee's rationale does not support the proposed reduction in the word limits and proposed conversion rate. It also believes that such a reduction will not improve appellate advocacy and may well increase the workload of the courts.

A. Statement of Interest

The Academy is an invitation-only professional association of nearly 300 members from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice.

B. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C).

The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of the documents covered by these rules. Under the proposed amendments, and assuming the other rule requirements are met (*i.e.* postage), the filing date would be 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.

The Academy believes that the proposed amendments are designed to clarify and improve inmate-filing rules, and would promote the fair administration of justice. The Academy supports these proposed changes.

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

The proposed amendment to appellate Rule 4(a)(4) addresses a circuit split over whether a motion under Civil Rules 50, 52, or 59 is "timely" when filed within a court-ordered "extension" of a non-extendable deadline under those rules. Adopting the majority view, the proposed amendment would make clear that post-judgment motions filed outside the deadline set by the Civil Rules are not "timely" under Rule 4(a)(4), even if the district court has erroneously granted an extension of the deadline, and therefore do not toll the time for filing a notice of appeal under Rule 4(a)(4).

The Academy supports this proposed amendment, because it is consistent with the understanding of Academy members that a district court lacks the authority to extend these specific deadlines and that a motion filed outside the time permitted under Rules 50, 52, or 59 does not toll the deadline for filing a notice of appeal.

D. Length Limits: Rules 5, 21, 27, 28.1, 32, 35 and 40

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the page limits currently applicable to documents filed under those rules. The type-volume limit would be based on a conversion ratio of 250 words per page. The change would apply to documents prepared on a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

The proposed amendments also would reduce from 14,000 words to 12,500 words the word limit for briefs on appeals under Rule 32 and for briefs on cross-appeals under Rule 28.1.

1. The Academy supports the principle of replacing other length limits with word-number limits.

The Academy supports the core concept of parts C and D that the permitted length of appellate filings produced on computers should be determined by word count. The Academy explains below why it opposes the proposed word numbers in parts C and D more strongly than it supports the underlying concept.

2. For all purposes in the proposed rules, the Academy opposes the 250-word-per-page conversion ratio.

The Academy respectfully opposes both the reduction in permitted word-count of briefs and the 250-word-per-page conversion ratio applied to other filings. The Academy believes the proposed conversion ratio, particularly in reducing the length of briefs, is not

supported by the published materials or the Advisory Committee's process, and is unwise.

3. The published background does not support the proposed conversion ratio.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000-word limit for principal briefs. The same amendments set the word limit for reply briefs derivatively and set the limit for appellees' combined briefs in cross-appeals by related reasoning. Rule 32 determines the length of briefs of amicus curiae derivatively under rule 29(d). The proposed amendments reduce the limit for principal briefs to 12,500 words, reduce the limit for reply briefs derivatively, and reduce the limit for appellees' combined briefs by related reasoning. According to the Advisory Committee, the 1998 change was based on an assumption that the appropriate conversion rate was 280 words per page applied to the 50-page limit for briefs then in effect. The Advisory Committee states that the proposed reduction is based on a study of D.C. Circuit briefs filed under the pre-1998 rules, which showed that the average in those briefs was closer to 250 words per page.

Our research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken. The genesis of that comment appears to be oral discussion reported in the minutes of the Spring 2014 meeting of the Advisory Committee on

Appellate Rules. The May 8, 2014 Report of Advisory Committee on Appellate Rules to the Committee on Rules of Practice and Procedure states that the word limit "appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines)." That quotation appears at page 18 of the materials for public comment. The proposed committee-notes to the proposed amendments to rules 28.1 and 32 now unequivocally state that the 1998 Advisory Committee used the 280-word assumption. But those notes also acknowledge: (i) that the current Advisory Committee does not know the basis for that assumption, and (ii) that the 1998 amendments intentionally superseded "at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs."

In contrast, Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, has posted a public comment stating that the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. To the extent we have been able to trace the history of the 1998 amendments, including through Fellows of the Academy who participated, we believe the assertion that the 1998 Advisory Committee incorrectly "assumed" a word ratio in appellate briefs is inaccurate. The record suggests that, regardless of the data on the table, the Advisory Committee selected the 14,000-word limit because it appeared wise and reasonable.

The Academy does not believe that a rule amendment should be adopted without a clear, articulated guiding rationale. That articulated rationale also should be supported with a detailed analysis of why the change is necessary to the administration of justice. The proposed reduction of word limits for briefs, and the parallel adoption of the 250-word conversion ratio for other appellate filings, do not adhere to these principles, and the Academy opposes them for that reason.

4. The Advisory Committee record does not support the proposed conversion ratio.

The Academy also is concerned that the Advisory Committee's record does not support the suggestion that the 250-word conversion ratio is intended or necessary to correct historical error. The minutes of the Advisory Committee's April 2014 meeting do not reflect a shared concern among its voting members about correcting error. Rather, the reported comments of the voting members focus on a desire of appellate judges for shorter briefs, the unwillingness of some circuits to allow longer briefs, and "whether the bar would be shocked by a proposal to reduce length limits to 12,500 words. . .." The minutes also reflect that the committee's professional support staff had received no complaints about the actual length of appellate filings.

The minutes of the Advisory Committee's discussion do not suggest that the committee received any analysis of how the length limits for briefing work in the courts of appeals. The publicly available

history of the proposed amendment supports an inference that changing the word limits—and adopting the 250-word ratio for new limits—arose late in the process without debate or analysis. *See, e.g.*, Minutes of the Advisory Committee on Appellate Rules, Sept. 27, 2012; Memo, Catherine T. Struve, Reporter, to Advisory Committee on Appellate Rules (Mar. 25, 2013) (using 280-word conversion ratio).

The Advisory Committee voted 6–4 to move the proposal forward. This vote appears to rest on six members' individual preferences, perhaps supplemented by unreported anecdotal information. In any event, the record does not support making the proposed material change in appellate due process for litigants and appellate lawyers. The amendments are not supported by a factual record and reasoned analysis appropriate for the federal judiciary.

5. *The proposal to reduce briefing length-limits is not beneficial.*

The proposed amendment to rules 28.1 and 32 would adversely affect developing issues in complex appeals. In the Academy's experience, the current word limits enable counsel in complex cases to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal. Reducing the word limit would impair fair recitation of the facts after all but short trials. Even when the statement of facts can be compact, reducing the word limit would impair appropriate development of difficult and

controversial legal issues. The inevitable results include more motions to file briefs exceeding the limits and inappropriately constricted presentation of complex appeals when counsel fears requesting additional words or a circuit has a practice of denying exceptions.

The proposal also would impair parties' access to court. While lawyers primarily control how briefs are drafted, a client has the right to control which (nonfrivolous) issues are argued. Criminal defense counsel lack discretion to omit a weak but non-frivolous issue.

In the Academy's anecdotal experience, fewer civil cases go through trial and appeal after the beginning of the Great Recession. But the tried cases tend to be the most complex and to involve the highest stakes. If the average civil-case brief is longer today than in 1998, the reason could be that appeals in civil cases are more complex. Many judges who participate in our seminars report that this is so, and that the increasing volume of white-collar crime prosecutions pushes a similar trend in criminal appeals.

In simpler cases, generally the briefs are shorter and the 14,000-word limit is not implicated. Consequently, the proposed amendments will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.

To the extent that verbose or unnecessarily long briefs are being filed—which is not the Advisory Committee's stated justification for the proposed amendments—that problem is far better addressed through meaningful training by and guidance from judges and lawyers experienced in effective appellate practice The Advisory Committee can find some of the Academy's views on such initiatives in its Statement on the Functions and Future of Appellate Lawyers, prepared for the 2005 National Conference on Appellate Justice and reprinted at 8 J. App. Prac. & Process 1 (2006).

6. The 250-word conversion ratio should not be applied to other rules.

The proposed amendments to Rules 5, 21, 27, 35, and 40 would substitute a type-volume limit for the current page limits. Anecdotally, Fellows of the Academy consider the conversion ratio to be a reduction because they can produce longer, readable, effective work product under the current page limits. The deleterious effect of the 250-word conversion rate would likely be even more pronounced on documents currently subject to shorter page limits – writs, rehearing petitions, petitions for leave to appeal – which often warrant greater development than the current page limits allow. The Academy requests that the length limits under all of those rules be converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.

As to proposed Rule 29(b), 2,000 words for a brief of an amicus curiae on rehearing is too short. At this stage, the great majority of AC briefs are filed in support of en banc review. That is, they tend to be filed in some of a court's most difficult cases. The proposed word length is barely sufficient for a party other than the government to explain its case-specific interest. The length for these briefs should be the same as the allowed length for the party's petition.

7. Conclusion

The record indicates that proposal 12-AP-E was an excellent idea that made a wrong turn. The good parts of it should be preserved, and the unjustifiably low conversion ratio should be revised. No amendment is needed to rules 28.1 and 32. The other rules should be amended, but the word limits should be based on a conversion ratio of 280 or more. Finally, briefs of amicus curiae on rehearing, which have no current limit, should have a 4,200-word limit.

E. Amicus filings in connection with rehearing: Rule 29

The proposed amendment would renumber the existing rule 29 as 29(a) and would add a new Rule 29(b). The new 29(b) would set a default for the treatment of amicus filings in connection with petitions for rehearing. While the proposed rule would continue to allow the United States, its officer or agency, or a state to file, without seeking leave, an amicus brief in support of rehearing, any other amicus brief regarding rehearing could be filed only by leave of court. In addition to

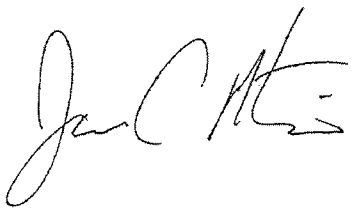
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

With the exception of a word limit based on a conversion rate of 250 words per page, discussed above, the Academy supports this proposed amendment.

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

The Advisory Committee proposes to amend Rule 26(c) to eliminate the three-day grace period when a brief is served electronically. Under the proposed amendment, 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. This proposed change would be accomplished by amending the rule to state that a paper served electronically is deemed to have been delivered on the date of service stated in the proof of service.

Although the Academy notes that electronic filing allows parties to file briefs late in the evening on the due date, the date of service is not counted in determining the deadline for filing and courts generally grant reasonable extensions of time for filing briefs. The Academy supports this proposed change to Rule 26(c).



James C. Martin
President, American Academy of Appellate Lawyers
November 24, 2014

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8g4l-2rxl
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0016
Comment from Molly Dwyer, United States Court of Appeals for the Ninth Circuit

Submitter Information

Name: Molly Dwyer
Organization: United States Court of Appeals for the Ninth Circuit

General Comment

Comments from the United States Court of Appeals for the Ninth Circuit

Attachments

FRAP_comments_2016

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
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95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Clerk of Court

(415) 355-8295
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December 18, 2014

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Judge Sutton:

I write in response to the call for comments regarding Proposed Amendments to Federal Rules of Appellate Procedure 5(c), 21(d), 27(d)(2) and 29(b)(5).

The Ninth Circuit Court of Appeals' Executive Committee reviewed the proposed changes to the Federal Rules of Appellate Procedure and asked me to convey its views on the amendments to Rules 5(c), 21(d), 27(d)(2) and 29(b)(5). The Court's Advisory Committee on Rules of Practice also reviewed the modifications and supports the Executive Committee's position.

Length limits for petitions for permission to appeal, motions and petitions for writs of mandamus/prohibition (Proposed Fed. R. App. P. 5(c), 21(d), & 27(d)(2))

There isn't any evidence that lengthy petitions for permission to appeal have presented a problem for the Court. Instead, the imposition of more exacting limits for writ petitions and motions will create problems where none exist. These pleadings frequently seek time-sensitive relief and the importance of a prompt response would seem to outweigh the delay and effort generated by the need to confirm compliance with the applicable length limits. Both the Executive Committee of this Court and its Advisory Rules Committee find that existing page count limits provide sufficient guidance to the bar and do not support the addition of word/line count limits for these filings.

Post-disposition amici curiae briefs (Proposed Fed .R. App. R. 29(b)(5))

The draft federal rule states an amicus brief that supports a petition for rehearing is due within three days after the filing of the petition; a brief that opposes the petition is due on the response's due date. It is the view of the Executive Committee that the short intervals may create problems where none exist. Specifically, this 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. That lengthier period has not impaired the Court's post-disposition deliberations; the Court and its Advisory Rules Committee therefore encourage the national advisory committee to provide a similar, more generous, period within which to submit the friend of the court briefs.

Thank you for allowing us the opportunity to comment.

Respectfully,

Molly C. Dwyer

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gw0-6ilx
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0019
Comment from Association of the Bar of the City of New York

Submitter Information

Name: Association of the Bar of the City of New York
Organization: Association of the Bar of the City of New York

General Comment

Please see the attached Report of the Committee on Federal Courts of the Association of the Bar of the City of New York

Attachments

City Bar comment - Appellate Rules

NEW YORK CITY BAR

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January 28, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E., Suite 7-240
Washington, DC 20544

RE: Proposed Amendments to the
Federal Rules of Appellate Procedure

At the request of Ira Feinberg, Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, I am submitting for consideration by the Advisory Committee on Appellate Rules a copy of the Association's report on certain of the proposed amendments to the Federal Rules of Appellate Procedure. A copy of this report has been submitted electronically using the "Submit a Comment" link made available on the United States Courts website.

Sincerely,

Peter C. Hein, Member
Committee on Federal Courts

cc: Ira Feinberg, Chair, Committee on Federal Courts
Alan Rothstein, General Counsel, Association of the Bar of the City of New York

REPORT OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK ON
PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE

The Association of the Bar of the City of New York, through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure proposed by the Advisory Committee on Appellate Rules. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for reviewing and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. LENGTH LIMITS

A. Rule 32: Word limits on Principal Briefs and Reply Briefs

The Federal Courts Committee respectfully opposes the reduction in the word count limits for principal briefs from 14,000 to 12,500 words, and the corresponding reduction in the word count limit for reply briefs.[1]

The Federal Courts Committee believes strongly that the current 14,000 word limit is often necessary in complex cases to permit each party to present its statement of the case, summary of argument and argument on the legal issues. While meeting the 14,000 word limit in complex

[1] We likewise oppose reducing the current word limit for cross appeals (Rule 28.1).

cases typically requires significant editing, counsel do generally seek to edit their briefs to meet the 14,000 word limit rather than submitting an application for permission to file a brief in excess of the limit. A reduction in the word count limit would often compel counsel in complex cases either to unduly truncate their presentation of the factual record relevant to the issues on appeal and their legal arguments or, alternatively, to seek permission to file a brief in excess of the proposed new (lower) word limits. Either course is likely to increase the burden on the Courts of Appeals, and creates the risk of unfairness to litigants in some cases where they simply may not have sufficient space to clearly articulate the relevant facts and legal arguments.

The Federal Courts Committee believes that such a significant change in established practice should not be made without a compelling justification. Yet the Report of the Advisory Committee on the Appellate Rules does not identify any basis in experience since the current word counts were adopted in 1998 that demonstrates a need to modify the existing word limits. Moreover, members of our committee are not aware, from their own experience, of any practical problems flowing from the existing word limits, and do not believe that the current word limits encourage unnecessarily lengthy briefs in cases where that length is not warranted.

The sole rationale provided by the Advisory Committee for the proposed change in the word limits is the assertion that the 14,000-word limit "appears to have been based" on the "assumption" that one page of a brief was (prior to the 1998 amendments) equivalent to 280 words. The Advisory Committee takes the position that this "assumption" was incorrect, and that – based on a 1993 study prepared by an advisory committee in the D.C. Circuit – "250 words per page is closer to the mark." Report of Advisory Committee on Appellate Rules, dated May 8, 2014 (revised June 6, 2014), at 18 of 372.[2] We respectfully submit that this rationale does not provide a sufficient basis for upsetting the word limits that have been in place for principal briefs and reply briefs for over 15 years. In addition to the points made above, several additional considerations reinforce our concern

[2] Page references are to the Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure, August 2014.

about the Advisory Committee's reliance on one over-20-year-old study, which was conducted over five years before the 1998 amendments that established the current word limits:

(1) The Advisory Committee Notes to the 1998 amendments reflect a comprehensive analysis of form, typeface and type-volume limitation issues. The discussion of type-volume limitations reflects a recognition that the use of a proportional typeface can increase the amount of material per page as compared to the use of a monospaced typeface, as well as other technical considerations that may influence the length of a brief. Thus, the word limits adopted in the 1998 amendments appear to be the product of careful focus and consideration, and there is insufficient basis for the Advisory Committee's view that the word limits adopted were the product of inadvertence.

(2) The July 1993 study that is referenced in the Report of the Advisory Committee (see *id.* at 20-24 of 372, and 54 of 372) is hardly a comprehensive study of issues relating to brief length. It relies upon a very limited selection of briefs from only three sources: ten principal briefs and ten reply briefs from a Department of Justice Civil Division archive of appellate briefs, plus five appellate briefs filed by the FCC and three appellate briefs filed by the law firm of Wilmer Cutler and Pickering. According to the 1993 study, these briefs were not randomly selected; rather, briefs that the authors subjectively viewed as containing an excessive number of single-space footnotes and block quotes were avoided. Overall, the average word count is said to have approximated 250 words per page. But the 28 briefs considered ranged in word count up to 288 words per page, and five of the 28 briefs had 270 or more words per page. And the fact that differences in the formatting of particular briefs could account for different per page word counts – as is evident from the fact that one of the 28 briefs considered had over 288 words per page – also underscores the inappropriateness of relying upon this over-20-year-old study to change the word limits in place since 1998.[3]

[3] As noted, the study considered only 28 non-randomly selected briefs from three sources. The format used in those briefs could have impacted the per page word count. Among other things, the 1993 study suggests the briefs studied included the captions and signature blocks. See page 21 of

In any event, the July 1993 study, as well as the local circuit rule based on an estimate of 250 words per page also referred to in the Report of the Advisory Committee on Appellate Rules (see p. 54 of 372), were presumably part of the body of material available to those working on the 1998 amendments. Yet the 1998 amendments adopted the current word limits and chose not to incorporate a word limit based on 250 words per page. One may infer that the 14,000 word limit adopted for principal briefs was not the result of "inadvertent" error, but rather was deemed appropriate when one took into consideration potential differences in word count for briefs based on different formats and typefaces utilized at the time of the 1998 amendments as well as other considerations.

Members of our committee have anecdotally checked the word count per page in recent appellate briefs (which now reflect the 14 point or larger typeface required by Rule 32(a)(5), also a product of the 1998 amendments) as well as district court papers that comply with district court margin requirements and use 12 point typeface (larger than the 11 point typeface permitted prior to the 1998 amendments). Typical appellate briefs using 14 point typeface average 240 words per page (use of 11 point typeface, as permitted before the 1998 amendments, would yield significantly more words per page). Typical district court papers using 12 point typeface (larger than the 11 point typeface permitted by FRAP 32 before 1998), and margins consistent with pre-1998 FRAP Rule 32, can significantly exceed 280 words per page. We point to this admittedly anecdotal information not in an effort to establish the "correct" word count per page that might have been expected in a pre-1998 brief, but rather simply to make the point that the limited number of briefs considered in one over-20-year-old study may not have been representative, and that it does not make sense, in 2014, to be modifying a long-established and accepted word count limit based on a count of words in 28 briefs from 3 sources in an over 20 year-old study.

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372. If one makes adjustments for the space used for the case caption (which could take up 1/3, or more, of the first page of a brief) and the signature block – neither of which need to be considered in a word count – the briefs studied would have averaged a greater number of words per page of actual text. In addition, the lines of text used per page and the typeface used could both have impacted the word count.

B. Word Limits for Other Papers

We agree with the proposal to provide for a volume limitation based on a word count (or lines of text printed in a monospace typeface), for papers produced using computers, for petitions for permission to appeal (Rule 5), writs of mandamus (Rule 21), motions (Rule 27), petitions for hearing or rehearing en banc (Rule 35), and petitions for panel rehearing (Rule 40). However, we believe the page-to-word conversion should be based on the convention of 280 words per page, utilized in connection with the 1998 amendments, for principal briefs and reply briefs. Since the current rules that utilize page limits have been in place even as filings have gravitated to the use of proportional type, utilizing a conversion of pages to words lower than the 280 words per page assumed at the time of the 1998 amendments would effect a significant reduction in length versus current practice, as well as a reduction in length compared to the practice that existed in 1998 when word limits were first adopted for principal briefs.

Petitions for permission to appeal, writs of mandamus, motions and petitions for rehearing can entail important issues and it benefits both the parties and the Courts of Appeals to allow counsel adequate latitude to present their positions.

Moreover, there is no indication in the Report of the Advisory Committee on Appellate Rules that the current page limits – even with the use of proportional type – result in excessively long papers not warranted by the complexity of the issues being addressed.

II. BRIEFS OF AN AMICUS CURIAE DURING CONSIDERATION OF WHETHER TO GRANT RE-HEARING

The proposed amendments to FRAP 29 would establish specific rules governing the time in which an amicus curiae must file its brief, accompanied by a motion for filing when necessary, in support of a petition for rehearing. For some unexplained reason, the proposed rule requires such an amicus brief to be filed no later than three days after the petition is filed (for amicus curiae supporting the petition or supporting neither party), rather than the seven days permitted by Rule 29 for amicus briefs filed during briefing of the appeal; the proposed amendments also require an amicus curiae opposing a petition to file on the same date set for responses by the parties, instead of seven days later. The current Rule, by permitting an amicus curiae to file no later than seven days after the principal brief of the party being supported, allows an amicus curiae to take into account the arguments of the party it supports when finalizing its own brief. No reason is given in the Report of the Advisory Committee on Appellate Rules for shortening the time for filing amicus briefs in the case of petitions for panel rehearing or rehearing en banc, and it is not clear why allowing the seven-day period of time currently permitted presents a practical problem in the case of petitions for panel rehearing or rehearing en banc. In the experience of the members of the Federal Courts Committee, there is rarely an extraordinary need for urgency with respect to the filing of briefs on rehearing, nor do the Courts of Appeals typically address petitions for rehearing with the urgency that the proposed rule seems to assume. And in cases where there is a need for urgency in the disposition of a petition for rehearing, the Court of Appeals can issue an order modifying the usual schedule for the filing of amicus briefs.

Finally, we believe the applicable word limit for petitions for rehearing should be based on the 280 words per page convention, for the reasons expressed above.[4]

Dated: January 28, 2015
New York, New York

Respectfully submitted,

Committee on Federal Courts
Association of the Bar of the City of New York

Ira M. Feinberg, *Chair*
Benjamin A. Fleming, *Secretary*
Cindy P. Abramson, Esq.
Alex Bein
Neil S. Binder, Esq.
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Michelle L. Levin, Esq.
Elaine K. Lou, Esq.
John M. Lundin, Esq.
Margaret Malloy, Esq.
Glen G. McGorty, Esq.

[4] The Advisory Committee also proposes to amend FRAP 26(c) to remove service by electronic means from the modes of service that allow three added days to act after being served. This proposal parallels a similar proposal to modify the Federal Rules of Civil Procedure. The Federal Courts Committee supports this proposal, for the reasons outlined in a separate report of the Association of the Bar of the City of New York on the proposed amendments to the Federal Rules of Civil Procedure.

Natalie Marcus, Esq.
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The Honorable Vera M. Scanlon
MaryAnn Sung, Esq.
Jeffrey A. Udell, Esq.
Jeannette A. Vargas, Esq.
George S. Wang, Esq.
William R. Weinstein, Esq.
Robert Weintraub, Esq.
Sidney N. Weiss, Esq.
Adrienne Eason Wheatley, Esq.
Sam A. Yospe, Esq.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gwi-nnyd
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0020
Comment from Dorothy Easley, Easley Appellate Practice

Submitter Information

Name: Dorothy Easley
Organization: Easley Appellate Practice

General Comment

Please see attached article in The Florida Bar Appellate Practice Section that details the concerns, but an abstract of that articles is:
The concern among many appellate practitioners is this reduction in word count and its impact on the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived. The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are deemed most certainly waived. Further reducing word count could have a significant adverse impact on appellate briefing and preservation.
Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients. But consider this-- twenty-five percent of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. These statistics and judicial observations that appellate briefs are increasingly THE most important tool in understanding the issues on appeal indicate that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.
Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. Increased work load to further research and understand the appellate issues, to make well-informed decisions, in both civil and criminal appeals that are fact-intensive (e.g. employment law cases, Section 1983 cases, criminal law cases concerning intent etc.). 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. In other words, word count reductions may actually increase the appellate courts labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex. Insufficient room to explain those complexities coupled with appellate issue preservation restrictions and reductions in oral argument do not aid the appellate process that labors to make decisions that are correct, not decisions that are the most expedient.

Attachments

APP-winter2014 EASLEY ARTICLE

Proposed Amendments (Some Controversial) to the Federal Rules of Appellate Procedure

By Dorothy F. Easley[1]

D. EASLEY

With the exception of the United States Supreme Court, the Rules Enabling Act, 28 U.S.C. §§ 2071–2077[2] establishes the process by which the federal rules are made for all federal courts, including all circuit courts of appeals. One of the greatest features of the process is that federal judicial rulemaking is transparent and intentionally designed for public participation. These comments to proposed federal rule amendments are often from bar associations, judges, practitioners, and law professors, but can also come from the general public.[3] The judicial rulemaking process allows for participation by the public, even at open Standing Committee and advisory committees meetings,[4] subject to some exceptions where public meetings may impede the process, with the publication of all proposed rule amendments and a generous amount of time to submit written comments.[5] There is even the opportunity to submit testimony at public hearings.[6] These comments to proposed federal rule amendments are taken very seriously.[7] "Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[8]

Against that backdrop, below are some proposed amendments to the Federal Rules of Appellate Procedure to which comments have been invited. One proposed amendment concerns Rule 4(c), Fed. R. App. P., on inmate filings, with the Committee Notes explaining that the proposed revision to Rule 4(c)(1) is to offer an alternative way for inmates to establish timely filing, to "streamline and clarify" the inmate-filing rule's operation, and "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."[9] Amendment to Rule 25(a)(2)(C), concerning filing methods and timeliness, is also proposed to address those inmate-filing revisions in Rule 4.[10] With these amendments, the filing date would be the date on which "the inmate deposited the document in the institution's mail system rather than the date the court received the document."[11]

Amendment to Rule 4 is also being proposed to address what is meant by "timely" tolling motions, to resolve a split among the circuit courts of appeals regarding whether a motion filed outside the Fed. R. Civ. P. 50, 52, or 59 deadlines, which are non-extendable, still qualifies under Rule 4, Fed. R. App. P., as "timely" where the district court ordered in error an extension of the deadline to file such a motion.[12]

There is also a proposed amendment to Rule 29, Fed. R. App. P., concerning amicus filings in connection with rehearing.[13] The Rule 29 amendments would not require a circuit to accept amicus briefs, but would renumber Rule 29 as Rule 29(a) and add a new Rule 29(b) to establish guidelines and default rules for the treatment of amicus filings concerning rehearing petitions.[14] An amendment is also proposed for Rule 26(c), Fed. R. App. P., and the "three-day rule" in the context of electronic service (catching up with the e-technology, in other words). The above proposed amendments are clarifying and helpful.

Now, to the more controversial. There are also some proposed amendments to the Federal Rules of Appellate Procedure that convert page limits to word count limits, to be consistent with other appellate rules on word count limits, and to further reduce word count limits, for documents created on a computer, in Rules 5 (Appeals by Permission), 21

continued on page 9

Proposed Amendments
from page 2

(Writs of Mandamus and Prohibition and Other Extraordinary Writs), 27 (Motions), 28.1 (Cross-Appeals), 32 (Briefs), 35 (En Banc Determinations), and 40 (Petitions for Panel Rehearing), and Form 6, Fed. R. App. P.

Rule 28.1(e)(2)(A)(i), Fed. R. App. P., for example, concerns word limits and a proposed reduction from the current 14,000 words to 12,500 words for opening and response briefs. Rule 28.1(e)(2)(B)(i), Fed. R. App. P., concerns cross-appeals and a proposed reduction from the current 16,500 words to 14,700 words for opening and response briefs, with reductions in reply briefs as well. Rule 32 (a)(7)(B)(i), Fed. R. App. P., concerns briefs generally, and there is a proposed reduction in word limit from the current 14,000 words to 12,500 words. The limit on reply briefs would drop from 7,000 to 6,250 words. There is also a proposed change to Petitions en Banc under Rule 35, Fed. R. App. P., currently limited to 15 pages, to impose a limit of 3,750 words. Those same changes are being proposed for Petitions for Rehearing under Rule 40, Fed. R. App. P., to impose a 3,750 word limit.

As to the above proposed word limit reduction amendments, comments have already been submitted, with some favoring and others disfavoring the reductions.[15] All agree that appellate courts, more than ever, must insist on concise appellate briefs and word/page limits. The concern among some appellate practitioners is this reduction in word count within the already-strict confines of the rule that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived.[16] The circuit courts of appeals generally hold that unspecific arguments and footnote arguments in the opening or response brief will not sufficiently preserve an issue or argument in the appeal, and are certainly waived if presented for the first time in the reply brief.[17]

Added to the above concern is the general view that federal appellate courts—like state appellate courts—disfavor motions to exceed page limits and what is often referred to as the "brief bloat" trend. Consider the January 9, 2012 "Standing Order Regarding Motions to Exceed Page Limitations of the Federal Rules of Appellate Procedure" that the full United States Court of Appeals for the Third Circuit issued, which explicitly warns that motions to exceed page limits or word counts are "strongly disfavored" absent demonstration of "extraordinary circumstances".[18] "Of the 12 Circuits surveyed, 9 Circuits reported that they 'rarely' or 'almost never' grant motions to exceed the page or word limitations."[19]

The Hon. Judge Joel Dubina, former Chief Judge and a current Senior Judge of the United States Court of Appeals for the Eleventh Circuit, has observed that, under the current word limits, in the Eleventh Circuit, only "a small percentage of lawyers file motions to exceed the page limitations, which are almost always denied" and that "Eleventh Circuit Rule 28-1 explicitly states 'that [the Eleventh Circuit] looks with disfavor upon motions to exceed the page limitation and will only grant such a motion for extraordinary and compelling reasons.'"[20]

But significant about the Third Circuit's Standing Order is that it notes statistics that, even under the current word count limits "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".[21] Experienced appellate practitioners recognize that lengthy, shotgun-issue briefs are ineffective and do not serve their clients, but **twenty-five percent** of practitioners in the Third Circuit are already seeking to exceed page and word count limit under the current limits, presumably in part to ensure adequate appellate briefing. Judge Dubina adds that "[a]lthough not one excess word should be used, the writer should not make the brief so short as to be incomplete and inadequate. Lawyers need to explain their reasons sufficiently so that the court can follow what they are trying to say. A brief that omits steps and reasoning essential to understanding will fail to serve its purpose."[22] These statistics and judicial observations suggest that the existing word count limits are already balanced and that further reductions in word count may not aid the appellate process.

Meaning, with reductions in court funding, including reductions in support staff, and judges expected to carry the heaviest of case loads, reductions in word count could backfire and increase work load. That is, while an experienced appellate practitioner has a strong sense of the issues that are worthy of advancing on appeal and labors many hours editing the brief down to hone those issues and discard the rest, it is also true that appellate courts sometimes adjudicate based on an issue that the practitioner had considered to be minor, but included in an abundance of caution to protect the client's appellate rights. The above statistics and advice from appellate judges suggest, therefore, that the proposed reductions in word count, coupled with strict appellate issue preservation requirements and motions to exceed word count granted in only the rarest of cases, may present a more onerous burden in appeals, with the most adverse effects on criminal appeals, where preservation can affect later collateral proceedings.

To be sure, page and word limits aid appellate advocacy. Having to "[w]rit[e] succinctly forces the lawyer to think with precision by focusing on what he or she is trying to say."[23] But reductions in word count in appellate briefs and petitions may not aid appellate advocacy in the context of protecting all of the client's appellate rights during the appeal. Again returning to Judge Dubina's wisdom: "the brief is the single most important aspect of appellate advocacy. Indeed, I suspect that in the future, as the

court's caseload continues to climb, more and more cases will be decided without oral argument. Consequently, the brief will be even more significant."[24] Word count reductions may actually increase the appellate court's labor in understanding the issues on appeal if they are insufficiently developed in the briefs because of word count limits. The law is being decided at ever increasing rates and, as society and business grow more complex, the law grows more complex.

Anyone wishing to provide comments on the proposed amendments to the appellate rules, whether favorable, adverse, or otherwise, must submit them electronically by following the instructions at: http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx. Or those wishing to comment may do so by visiting "regulations.gov, Your Voice in Federal Decision-Making", and proceeding to this direct link: http://www.regulations.gov/#!docketDetail;D=USC-RULES-AP-2014-0002. All comments must be submitted no later than **Tuesday, February 17, 2015**. All comments will be made a part of the official record and available to the public.

Endnotes

1 Dorothy F. Easley earned her J.D., with honors, in 1994 from the University of Miami School of Law and her M.S., with highest honors, in 1986 from SUNY/CESF. She is board certified in appellate practice, managing partner of Easley Appellate Practice, PLLC, and is admitted to practice in all Circuit Courts of Appeals and the Supreme Court. Ms. Easley is a past chair of the Appellate Practice Section, 2009-2010.

2 Congress enacted Title 28 U.S.C. § 2071 to establish the federal courts' rule making powers generally, with specificity in Title 28 U.S.C. § 2072. Title 28 U.S.C. § 2073 establishes the method by which rules are enacted, with § 2073(b) authorizing the "Judicial Conference [of the United States to] appoint[ ] a standing committee on rules of practice, procedure, and evidence." The Judicial Conference is tasked in Title 28 U.S.C. § 331 with a continuing responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay".

3 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

4 28 U.S.C. § 2073(b), (c); Guide to Judiciary Policy, Vol. 1, § 440, § 440.20.40 Publication and Public Hearings (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx) (last visited Nov. 8, 2014).

5 *Id.*

6 *Id.*

7 More detailed information regarding the Federal Rulemaking process can be found on the U.S. Courts website: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx (last visited Nov. 8, 2014).

8 U.S. Courts, *How the Rulemaking Process Works* (website address: http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx) (last visited Nov. 8, 2014).

9 Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*: *Rule 4, Fed. R. App. P.,* 1, 26-27 and Rule 4 comm. notes. (Aug. 2014).

10 *Id*. at Rule 25, at 29 and Rule 25 comm. notes.

11 *Id*. at 16 (citing *Houston v. Lack*, 487 U.S. 266 (1988); *see also* Rule 4 at 26-27. Amendments for related Forms 1 and 5 and a new, related Form 7 are also proposed.

12 *Id*. at 16 (discussing *Bowles v. Russell*, 551 U.S. 205 (2007), which held that statutory appeal deadlines were jurisdictional while non-statutory appeal deadlines (those set by rule) are nonjurisdictional and the circuit split that the proposed amendment resolves); *see also* Rule 4 at 37-38.

13 *Id*. at proposed Rule 29 at 62-63.

14 *Id*.

15 U.S. Courts, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure* (website address: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=USC-RULES-AP-2014-0002;dct=PS) (last visited Nov. 9, 2014).

16 *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) (When a party presents in its appellate brief "no developed argumentation on a point ... we treat the argument as waived under our well established rule."); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (same); *U.S. v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (same); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert denied*, 513 U.S. 946 (1994) ("'a passing reference to an issue ... will not suffice to bring that issue before this court.' ") (quoting *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992)); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Adler v. Wal–Mart Stores*, 144 F.3d 664, 679 (10th Cir. 1998) (arguments inadequately briefed in the opening brief are waived); *Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978 (Fed. Cir. 2006) (argument not raised in opening brief on appeal is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (similar); *see also Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *see also Shah v. Wilco Systems, Inc.*, 76 F. App'x 383, 385 (2d Cir. 2003) (where only a single footnote contained in a brief made state law contentions, that was not sufficient to preserve the issue for appeal); *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 231 n. 13 (3d Cir. 2013) (same); *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646 (4th Cir. 2014) (issue raised only in footnote of appellate brief, addressed with only declarative sentences, waived for appellate review.); *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (argument raised in "single footnote and. . .not otherwise developed" considered forfeited); *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d. 850, 856 (6th Cir. 2005) (same); *Hutchins v. District of Columbia*, 188 F.3d 531, 539–540 n. 3 (D.C. Cir. 1999) (court "need not consider cursory arguments made only in a footnote").

17 *See, e.g., Tallahassee*, 815 F.2d at 1446 n. 16.

18 Jan. 9, 2012 United States Court of Appeals for the Third Circuit Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure (hereinafter, "Third Circuit Standing Order") (website address: http://www.ca3.uscourts.gov/standing-orders-0) (last visited Nov. 9, 2014).

19 Hon. Theodore A. McKee, Chief Judge of the United States Court of Appeals for the Third Circuit, *Permission to Exceed the Page or Word Limitations for Briefs Is Now the Exception, Not the Rule*, Vol. VI(1) BAR ASS'N THIRD CIR. 1 (Mar. 2012).

20 Hon. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 6, n. 26 (1998) (hereinafter, "Dubina, *How to Litigate Successfully in the Eleventh Circuit*").

21 Jan. 9, 2012 Third Circuit Standing Order.

22 Dubina, *How to Litigate Successfully in the Eleventh Circuit* at 6.

23 *Id.* at 6.

24 *Id.* at 6.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8gz7-vvvc
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0022
Comment from P. David Lopez, EEOC, Office of General Counsel

Submitter Information

Name: P. David Lopez
Organization: EEOC, Office of General Counsel

General Comment

Please see the attached comment-letter of the General Counsel, Equal Employment Opportunity Commission.

Attachments

EEOC comments on proposed FRAP amendments 2015

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

February 2, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington DC 20544

Dear Judge Sutton:

The Office of General Counsel of the Equal Employment Opportunity Commission submits the following comments on the proposed amendments to the Federal Rules of Appellate Procedure, published on August 15, 2014.

The Appellate Services section of the Office of General Counsel handles appeals where EEOC is a party and also files briefs as amicus curiae in private appeals raising issues of importance to the interpretation of the federal statutes that EEOC enforces. In 2014, for example, Appellate Services filed 61 appellate briefs. The proposed changes would therefore directly affect EEOC's enforcement responsibilities.

1. EEOC urges the Committee to retain the current word limits for main briefs, cross-appeal briefs, reply briefs, and amicus briefs. Experienced counsel know that documents filed with the courts should be as succinct as possible. The current limits work well for all but the most complex appeals.

The proposed new lower word limits, in Proposed Rule 28.1, Proposed Rule 32(a)(7), Related Committee Notes, and, by implication, Proposed Rule 29(a)(5), would be especially problematic for counsel handling legally and/or factually complicated appeals — as EEOC appeals often are. If the limits were adopted, counsel in such cases would routinely need to seek leave to file over-length briefs, creating extra work for the courts as well as counsel. If leave were denied, counsel might well be unable to address the issues and arguments in their cases cogently and thoroughly. This would benefit neither the parties nor the courts.

2. EEOC agrees with the proposal to replace page limits with word limits in other documents prepared by computer. The new word limits for such documents — rehearing petitions, motions, interlocutory appeals, mandamus petitions, and related amicus briefs — should be comparable to the existing word limits for briefs — that is, 280 words per page. The

proposed conversion rate of 250 words per page, found in Proposed Rules 5, 21, 27, 35, 40, and related Committee Notes, 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.

3. EEOC agrees with the proposal in Proposed Rule 29(b)(2) and (5) to specify a due date for amicus briefs in rehearing proceedings and to permit the Government to file without seeking leave of court. However, because of the potential importance of such proceedings to the development of the law, the EEOC recommends that amici be permitted to file briefs one week after the party's rehearing petition. Particularly where the Office of General Counsel would have to obtain Commission approval before filing an amicus brief, the three-day-limit in Proposed Rule 29(b)(5) is insufficient.

In addition, the word limits for amicus briefs and party petitions should be the same. That is the rule in most circuits now, and such a rule makes sense. Because they must also include a statement of interest, amici, like the parties, typically need at least fifteen pages to set out the conflicting authority and develop arguments explaining why a challenged decision is flawed. Yet, the proposed new word limit in Proposed Rule 29(b)(4) — only 2000 words — effectively institutionalizes a rule, now only in the D.C. Circuit, limiting amici to half (or less) the length of a party's petition. The proposal does not explain or even acknowledge this new limitation.

Thank you for the opportunity to provide comments on the proposed amendments to the Federal Rules of Appellate Procedure.

Sincerely,

P. David Lopez
General Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h1y-rge9
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0024
Comment from Charles Roth, NA

Submitter Information

Name: Charles Roth
Organization: NA

General Comment

We would suggest a different approach to the proposed word limits, which we think would achieve the Committee's objectives without triggering the adverse consequences noted by others. We also suggest an increase in the word length for rehearing-stage amicus briefs, in line with the current Tenth Circuit local rule. See attached file(s)

Attachments

Roth FRAP change comments

NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

February 6, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Appellate Procedure 29 and 32

Dear Judge Sutton,

I write in response to the Committee's proposed changes to Rules 29 and 32 of the Federal Rules of Appellate Procedure.

I am the Director of Litigation at the National Immigrant Justice Center (NIJC). We are active litigators in all of the geographic federal circuits on immigration matters. We frequently co-counsel with pro bono law firms, and attempt to provide consistently high-quality briefing to the Courts of Appeals. NIJC tends to become involved in cases which are particularly likely to establish significant precedent. NIJC cases have resulted in more than 80 published Court of Appeals opinions in the past ten years, and in multiple grants of certiorari.

NIJC files amicus curiae briefs with some frequency, both at the merits stage and in support of rehearing efforts. NIJC's amicus briefs have been cited and presumably found helpful by appellate bodies, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013); *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012); *Diouf v. Napolitano*, 634 F. 3d 1081, 1087 (9th Cir. 2011), and NIJC has on occasion participated as amicus in argument. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc). NIJC amicus briefs in support of rehearing have resulted in modification of panel decisions, *see*, *e.g.*, *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (amending 641 F.3d 1103); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012) (replacing 658 F.3d 1222); *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013) (replacing 662 F.3d 1128, 651 F.3d 969); *Zahren v. Holder*, 637 F.3d 698 (7th Cir. 2011) (supplementing 487 F.3d 1039); in one case, an amicus brief we filed helped convince a unanimous panel to grant rehearing to reverse itself. *Walji v. Gonzales*, 500 F.3d 432 (5th Cir. 2007) (vacating 489 F.3d 738).

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Rule 32 Word Count:

I share the committee's sense that some appellate briefs are too long or of poor quality, and that most briefs should be less than 12,500 words in length. In preparing this comment, I reviewed approximately two dozen NIJC briefs filed in recent years, and all or nearly all were less than 12,500 words in length.

That said, some appeals have involved such a plethora of complex issues that we have approached the current word limit. For instance, in *Samirah v. Ashcroft*, 335 F.3d 545 (7th Cir 2003) and *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010), our briefs needed to address (a) habeas authority, (b) authority under § 1331, mandamus, and the APA, (c) the potential jurisdictional bars at 8 U.S.C. § 1252(a)(2)(B); (d) novel questions of statutory interpretation; (e) novel questions of regulatory interpretation; (f) the political question doctrine; (g) the doctrine of consular nonreviewability; (h) the application of the law of the case doctrine and res judicata; (i) procedural due process, including the existence *vel non* of a liberty interest, (j) remedy issues including 8 U.S.C. § 1252(g), and (k) disputed procedural and factual issues relating to our client's prior legal status. Indeed, even then the case was decided on a basis which we briefed only in passing, which avoided many of the legal issues briefed by the parties. A lower word count limit would likely have caused us to seek the Court's leave to exceed those limits.

Likewise, in *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), we were required to brief novel jurisdictional issues under 8 U.S.C. § 1252(a)(2)(C); novel statutory issues relating to eligibility for asylum and withholding of removal triggered by a particularly serious crime finding; factual and legal issues relating to the Convention Against Torture (CAT); and a complex habeas corpus issue applying *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) and *Demore v. Kim*, 538 U.S. 510, 523 (2003), to a situation of extended detention. Our client's victory in the Court of Appeals on the CAT issues vindicated our decision to argue those issues. Our client's release mooted the habeas arguments, which have subsequently prevailed in the Third and Ninth Circuits. The Supreme Court's grant of certiorari as to the other legal issues, 128 S.Ct. 29 (2007) (voluntarily dismissed at 128 S.Ct. 828 (2007)), shows the significance of the issues on which we did not prevail in the Court of Appeals. At the Court of Appeals, we were (barely) able to fit within a 14,000 word limit; but it would have done injustice to our client, and a disservice to the Court of Appeals, to cabin such a complex matter into a smaller space.

The majority of NIJC cases involve significant and novel matters, and well over 50% result in published opinions. Even so, most issues can be adequently briefed in 12,500 words or less. But as Judge Easterbrook noted, 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.

The comments submitted thus far to the Committee demonstrate that many judges feel that many briefs are too long and waste their time; but that many experienced appellate advocates feel that the proposed rule change would waste time in different ways.

I join my voice to that of other litigators who believe that the rule proposed by the committee would create substantial ancillary work for the courts and for attorneys (in NIJC's case, pro bono attorneys). It appears to me that Judge Easterbrook is likely correct in suspecting that a reduction in the size of briefs would likely – in those cases – trigger additional work for us as attorneys and for the Court by triggering additional requests for leave to file over-length briefs. It strikes me that 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.

I note further that there may be costs to courts where such overlength motions are denied. For instance, a party denied leave to file an overlength brief may thereafter file a brief which does not adequately address some issues. Courts generally decline to address issues not adequately addressed in an opening brief; but such a court might feel unhappy doing so where the party tried to address the issue in the proposed overlength brief (attached as an exhibit to a motion for leave to file an over-length brief) but did not do so in the shorter brief. Yet the court could face a conundrum in such a situation. If a court has denied leave to file an overlength brief, the opposing party would naturally produce a brief responsive to the brief actually accepted for filing by the court. Should a court thereafter find that it would be prudent to address that inadequately briefed issue (perhaps to prudentially avoid other more complex issues) it would find that the opposing party did not have a fair opportunity to respond to the briefing; and would then find itself forced to choose between a suboptimal approach to resolving the appeal, and ordering supplemental briefing. Needless to say, the effect of a word count reduction in that scenario would be substantial inefficiency.

I would also submit that the number of overlenghth brief motions might become greater because of a perception that the word count reduction may affect judicial attitudes toward motions for leave to file overlength briefs. The current perception that courts strongly disapprove of overlength briefs is a strong check upon their filing. If motions to file overlength briefs appear more reasonable, then courts will view them less disapprovingly, and will grant them more often. This will likely have a cyclical effect; if such motions are granted with some regularity, that will reduce the perceived downside risk in filing such motions, and encourage more numerous motions; which will further increase the judicial workload.

I would suggest a middle ground option which might suffice to address the Committee's concerns while avoiding the downsides of the proposed rule. The Committee might adopt 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. Such an attestation could be included within the scope of the Rule 32(a)(7)(C) attestation already filed with briefs.

Such an approach would have the effect of discouraging the filing of briefs exceeding 12,500 words, without triggering any increase in motions for leave to file overlength briefs. This could accomplish a slight reduction in brief size without triggering the need to expend judicial time to police the new limits and to adjudicate resulting ancillary motions. (A similar approach could be applied to reply brief deadlines.)

Rule 29 Rehearing-Stage Amicus Changes:

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.

As noted above, NIJC is relatively active in supporting and seeking rehearing and rehearing en banc, filing approximately a dozen such motions annually. Many circuits lack a local rule or precedential decision governing this situation, which triggers substantial uncertainty amongst clerks offices and counsel.

NIJC views the proposed timing of amicus briefs as sensible. The current Seventh Circuit rule, *see Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers) – which requires same-day filing of amicus briefs – strikes us as artificial and on verging on inviting impropriety. I acknowledge that it might be efficient for courts considering rehearing petitions to receive all supportive filings at the same time, but that efficiency is outweighed by other considerations. The *Fry* rule effectively (as it acknowledges) requires a putative amicus to work directly with the party to obtain extensions, if required, and even to coordinate on brief content. An *amicus curiae* is not supposed to repeat arguments made by a party; but the only way to know if a party which has not yet filed a brief will make a given argument is to ask that party what they intend to argue. Certainly, it is common that parties share briefs with *amicus curiae*, and vice versa; but it is not always appropriate. Forcing putative amici to coordinate with a party is at best unwise. NIJC suspects that amicus briefs can

be very helpful to a court when a party misperceives the issues in the case, or chooses to frame them in a way which might be helpful to the party but may also obscure possible (often preferable) resolutions of those issues. Yet under the *Fry* rule, an amicus is beholden to the party in various respects, which tends to facilitate amicus briefs which do not directly address party arguments. A same-day filing rule hinders an amicus from undertaking the sometimes delicate, nuanced analysis which would often be most helpful to a court. We commend the Committee for proposing a different rule.

NIJC finds it easy to function under the current, generous Ninth Circuit rule, but the Ninth Circuit presumably employs that rule because (given the massive size of its docket) its judges do not consider a rehearing matter before its amicus brief deadline. Likewise, we appreciate the Tenth Circuit local rule (permitting 7 days to file), but given that Court's relatively light docket, a potential amicus may worry that Tenth Circuit judges will form judgments about a rehearing petition sooner than the 7 day mark. As amici supporting rehearing, we often feel an impetus to file quickly, but without any firm deadlines. Courts which review rehearing petitions expeditiously presumably find it inefficient to wait for several weeks to adjudicate rehearing petitions; and cannot know whether an amicus brief is even being considered. It seems evident that a court will find an amicus brief less helpful if the court has already considered, and formed judgments about, a rehearing petition. The proposed three-day rule seems to us to strike the right balance.

However, NIJC is concerned about the proposed 2000 word limit on amicus briefs. When the Tenth Circuit adopted Local Rule 29.1, it initially proposed a 7.5 page limit to briefs, similar to the limit proposed by the Committee. NIJC submitted comments to the Tenth Circuit, urging that Court to set a higher word limit; and the Tenth Circuit subsequently adopted a 3000 word limit, approximately 11 pages. (By email communication, the clerk of that court indicated to me that the Court had altered its rule in response to our comments.)

I would submit to the Committee, as I urged the Tenth Circuit some years ago, that by definition, the party seeking rehearing has already failed to persuade the Court of the merits of its claim. This might be because the claim is weak, but it might also be because the claim was poorly presented. I practice immigration law. Regrettably, the immigration bar has become known for the proliferation of poor or substandard representation (this might be due to the relative lack of resources on the part of immigrants facing removal). Thus, courts are commonly making judgments about immigration matters on the basis of briefing which fails to contain significant points in support of arguments. Courts naturally attempt to make the best decision possible on the record before them (and generally decline to address issues not raised in the briefs). Because precedential decisions can only be overturned by the en banc court - a process

which requires significant resources and is not appropriate except for relatively major issues - it would be advantageous for panels addressing rehearing petitions to have relatively fuller briefing before them, so that any modifications may be made using fewer appellate resources. The alternative, particularly where one court would end up issuing a decision which would disagree with other Courts of Appeals (a circumstance which would invite repeated en banc requests), would often require greater resources to remedy.

I urge the Committee that 2000 words is rarely enough space to make arguments which would be helpful to a court considering rehearing. NIJC engages in amicus briefing under the principle that courts do not value an amicus brief as a "vote" for an outcome, or as evidence of the importance of an issue; presumably the fact of publication evidences the importance of a court decision. We do hope that we may earn the trust and respect of federal courts through consistently strong representation. But we assume that courts value our amicus briefs for their legal content. A rehearing stage amicus brief which is only 2000 words in length will rarely have time to do more than gesture at issues raised in a court decision, issues which the Court has presumably already considered at some length. Adoption of the Tenth Circuit's word limit would be more likely to permit helpful amicus filings at the rehearing stage, precisely because that limit would allow an amicus to explain context, where helpful; develop arguments; and explore implications of the court's earlier opinion.

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 principle) benefit of amicus briefing at the rehearing stage. A grant of full en banc rehearing is always rare, even in the Ninth Circuit; decision modification is much less so. One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision. The proposed rule seems to ignore this significant utility of the rehearing amicus.

For instance, the initial panel decision in *Carrillo de Palacios v. Holder*, 651 F.3d 969 (9th Cir. 2011), denied a petition for review on two alternate grounds. One of those grounds was not only a novel holding without any precedent in any court, but ran contrary to (uncited) subregulatory agency authority. The government subsequently chose not to defend that part of the panel opinion. The Court of Appeals eventually denied en banc rehearing, but issued a new decision affirming that outcome based only on the other, less controversial, ground. *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013).

Similarly, a panel may write a decision which unintentionally sweeps more broadly than intended by the Panel. In *Anaya-Aguilar v. Holder*, 683 F. 3d 369 (7th Cir. 2012), the Seventh Circuit adopted a rule precluding jurisdiction over certain decisions of the Board of Immigration Appeals, but employed language which appeared to bar not only

claimed abuse of discretion, but legal and constitutional claims. On rehearing, the Court of Appeals issued a brief order clarifying the scope of its earlier decision, ensuring that its decision was consistent with precedent and avoiding the need for plenary en banc review. *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012). The petitioner in that case had little incentive to ask the court to modify or clarify its precedent; to the contrary, the court's clarification likely reduced the chances of a grant of certiorari. An amicus like NIJC, which frequently practices in that circuit, had the means and incentive to raise the issue.

In the rehearing context, there is often alignment between the interests of an amicus and the interests of judicial efficiency. Both benefit from clear and correct rules, while a party may benefit from the case law remaining in confusion, or from it appearing erroneous enough to attract the attention of the Supreme Court.

We submit that these cases illustrate one of the primary utilities of the rehearing process: i.e., to permit a panel to clarify or correct its decision – including to reserve issues (the complexity of which may not have been initially evident) for future resolution – without requiring the resources of the full en banc court. I listed a number of other similar outcomes in my introduction to these comments.

In sum, in my experience, amicus briefs at the rehearing stage are often the most helpful to a court when prior representation has been the most unhelpful. Limiting rehearing stage amicus briefs to 2000 words (approximately 8 pages, much of which is consumed by required sections such as the statement of the amicus) would constitute a regrettable limitation on the ability of groups like NIJC to provide courts with that assistance. It would be an unfortunate and unnecessary limitation, which would impede the utility of an otherwise useful and efficient amendment to the rules.

I thank the Committee for the opportunity to submit these comments.

Respectfully Submitted,

s/ Charles Roth
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PUBLIC SUBMISSION

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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
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Document: USC-RULES-AP-2014-0002-0035
Comment from Jeffrey R. White, Center for Constitutional Litigation

Submitter Information

Name: Jeffrey R. White
Organization: Center for Constitutional Litigation

General Comment

Please see the attached comments submitted by the Center for Constitutional Litigation.
See attached file(s)

Attachments

CCL Comments 021115

CENTER FOR
CONSTITUTIONAL LITIGATION
A PROFESSIONAL CORPORATION

Via Electronic Submission

February 11, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

The Center for Constitutional Litigation, P.C. ("CCL") submits these comments on proposed amendments to the Federal Rules of Appellate Procedure currently being considered by the Committee. We sincerely appreciate the Committee's willingness to consider CCL's views.

CCL has served as an appellate firm for the plaintiffs' bar since 2001. Trial lawyers turn to CCL to represent their clients in civil appeals involving complex legal issues. CCL has represented parties in high-profile cases in the Supreme Court of the United States and in all the federal circuit courts of appeals, excepting the Federal Circuit. In addition, CCL represents the American Association for Justice as amicus curiae in courts around the country, including the federal courts of appeals. The ability to write effective appellate briefs is vital to our success and to the vindication of the rights of our clients.

CCL therefore offers the following comments regarding the proposed changes.

Rule 4: Tolling Motions

CCL does not oppose the proposed amendment to Rule 4(a)(4)(a) that would adopt the majority view that post-judgment motions made outside of the time limits of the Civil Rules are not "timely," and thus cannot toll the time for filing a civil appeal.

Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6: Type-Volume Limitations

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.

CCL agrees with the Committee's observation that the Rules' reliance on page limits has "been largely overtaken by changes in technology." In 1998, the Committee recognized that widespread use of personal computers had opened the door to manipulation of fonts, kerning, margins, and other "tricks" that threatened to make the existing 50-page limit "virtually meaningless." Advisory Committee Note to 1998 amendments. Rule 32 was therefore sensibly

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amended to incorporate type-volume limits as a more effective means of controlling the length of briefs. In 2005, Rule 28.1 adopted limits on cross-appeal briefs that were based on the Rule 32 type-volume limitation. The same recognition of the impact of technology supports the conversion of page limits in other rules to equivalent word limits, and CCL supports that conversion.

The proposal to shorten briefs and other documents is another matter entirely. The proffered justification for the proposed change is that the 14,000 word limit adopted in 1998 was based on the Advisory Committee's erroneous determination that 50-page briefs contained approximately 280 words per page. The proponents of lower limits contend that the true conversion rate should have been 250 words per page.

Judge Frank Easterbrook was present at the creation of the 1998 rule and disputes this version of events. His comment indicates that the 50-page to 14,000-word conversion was based on his own word count of printed briefs. Similarly, the comment by the General Counsel of the Equal Employment Opportunity Commission states that some of the EEOC's briefs under the 50-page limit contained over 14,000 words. The American Academy of Appellate Lawyers has commented that the record of the proceedings leading up to the 1998 amendments does not provide "any basis to support the comment that the 1998 Advisory Committee was confused or mistaken."

The Advisory Committee in 1998 arrived at 14,000 words as the enforceable equivalent of a 50-page filing that would work no change in the amount of content of principal briefs. Even when the Advisory Committee was given the opportunity to "correct" any error in the conversion ratio in 2005, the Committee instead applied the same conversion ratio in Rule 28.1 as it used in Rule 32. After almost a decade of practice under the type-volume limits of Rule 28.1 and more than fifteen years of practice under Rule 32's type-volume limits, the suggestion that those limits must now be reduced threatens to disrupt appellate practice nationwide. The technology rationale for converting to type-volume limits provides no justification for enlarging or reducing those limits; it is a rationale for preserving existing practice and settled expectations.

Nor has any persuasive rationale for shorting type-volume limits been advanced. The judges of the Tenth Circuit and Judge Silberman of the D.C. Circuit have commented that many briefs filed in their courts are too long. But wordy and unfocused briefs come in all sizes, including 12,500 words. Lower limits on the quantity of written advocacy will not likely improve its quality.

To the contrary, CCL believes that blanket reduction in the size of briefs and other filings will reduce the quality of appellate advocacy and undermine proper decision making by the federal appellate courts. Those civil actions that proceed to trial and then to appeal are often the most complex and intractable disputes. Justice is not served when counsel cannot lay out the facts of a complex case in sufficient detail, identify all the issues of consequence, and set forth the governing statutory and precedential law. The opportunity to fully present the facts, issues and law in appellate briefing is especially important because any federal appeal may be decided without oral argument, even if oral argument is requested by the parties. Fed. R. App. P. 34(a)(2)(C); *see also* United States Court of Appeals for the Fourth Circuit Local Rule 34(a)

("*Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.*").

The law that must be discussed in appellate briefing has not become simpler in recent decades. The inexorable growth of statutes and regulations – "hyperlexis" – is well known. *See* Mila Sohoni, *The Idea of "Too Much Law,"* 80 Fordham L. Rev. 1585, 1591 (2012); Dru Stevenson, *Costs of Codification*, 2014 U. Ill. L. Rev. 1129 (2014). Supreme Court opinions, the authoritative declarations of federal law, have become substantially longer. Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 634 (2008). There is no reason to believe federal appellate opinions have not followed suit. The growth of computerized legal research has enabled counsel to better identify and organize the weight of legal authority governing the issues in his or her case. A blanket reduction in word limits moves the advocate away from nuanced discussion toward a string of citations.

It is no answer that counsel can move for an enlargement of the word limits. Even if such requests were routinely granted, the shortened limits would have succeeded only in increasing the work of courts and counsel. In our experience, amici curiae rarely seek and courts rarely grant enlargement of the word limit for amicus briefs. 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, thus increasing the number of briefs (and words and pages) filed, not reducing them.

Because CCL regularly prepares and files amicus curiae briefs on behalf of the American Association for Justice and other clients, CCL notes that the proposed reduction in type-volume limitations will affect amicus briefs disproportionately. Under Rule 29, the word limit for amicus briefs is half of that for a party's principal brief, and so would be reduced more than 10 percent to 6,250 words. However, Rule 29 also requires a "statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." An amicus must also state "whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) 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, identif[y] each such person." Both these statements count against the word limit.

Because there appears to be no good reason to impose a blanket reduction in the size of all filings, CCL submits that the proposed amendments to Rule 32 and 28.1 be withdrawn, and the page limits for Rules 5, 21, 27, 35, and 40 be converted using the existing ratio of 280 words per page.

Rule 29: Amicus Filings in Connection With Rehearing

Similarly, 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."

Proposed Rule 29(b) would make special provision for amicus filings during a court's consideration of petitions for rehearing or rehearing en banc. No rule currently governs such filings, and CCL agrees with the Advisory Committee that the bar would welcome clear guidance on this point.

CCL agrees with the comment submitted by the General Counsel for the EEOC that the proposed deadline for filing an amicus brief should be extended from 3 days to one week after the party has filed the petition for rehearing. Amici should be afforded reasonable time to consider the petition and to fulfill their internal requirements for approval of amicus participation.

CCL disagrees with the proposal to limit amicus briefs to 2,000 words. Rehearings 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. Addressing those matters in addition to setting forth the identity and interest of the amicus often may require longer briefs.

It is significant that the federal circuits that have local rules on this point set substantially higher word limits. *See* Ninth Circuit Rule 29-2(c) (An amicus brief submitted while petition for rehearing is pending is limited to 4,200 words.).

CCL further suggests 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, the proposed Rule 29(a) limits its application to amicus filings during a court's initial consideration of a case on the merits. CCL questions the rationale for limiting amicus briefs to a court's initial consideration of a case on the merits, which is not explained in the Committee Notes.

On rare occasions, CCL and/or the American Association for Justice present amicus briefs at a later consideration of the case on the merits where no brief was filed during the court's initial consideration of the merits—either after rehearing en banc has been granted or after a case has been remanded from the Supreme Court. On these rare occasions, our amicus briefs have focused on issues that were raised by the panel's or the Supreme Court's majority or dissenting opinions, or were necessary to present our client's interests in a case where those interests were not clear before the initial consideration of the merits by the court. We believe it is unwise to limit Rule 29(a) to the "initial" consideration of the case on the merits.

CCL thanks the Committee for this opportunity to comment on these proposed rule changes.

Regards,

Jeffrey R. White
Senior Litigation Counsel

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h5v-szuf
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Comment from Federal Courts Committee NYCLA, Federal Courts Committee of the New York County Lawyers Associaton

Submitter Information

Name: Federal Courts Committee NYCLA
Organization: Federal Courts Committee of the New York County Lawyers Associaton

General Comment

Please see the attached Report by the Federal Courts Committee of the New York County Lawyers Association.

Attachments

Report on Federal Rules of Appellate Procedure FINAL 2-12-15

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Vincent T. Chang
Co-Chair
Hon. Joseph Kevin McKay
Co-Chair
Federal Courts Committee

February 12, 2015

FEDERAL COURTS COMMITTEE OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Courts Committee (the "Committee")[1] of the New York County Lawyers Association ("NYCLA") has approved the following comments concerning the proposed amendments to the Federal Rules of Appellate Procedure (the "Proposed Amendments") proposed by the Judicial Conference Advisory Committee on Appellate, Bankruptcy, Civil and Criminal Rules (the "Advisory Committee") and published for public comment on August 15, 2014.[2] If enacted, the amendments will become effective December 1, 2016.

NYCLA is an organization of nearly 9,000 lawyers. Its Federal Courts Committee comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA and its Federal Courts Committee issue reports and position papers on matters of interest to our membership, including proposed changes in law and procedure that we believe impact the public interest.

As further detailed below, the Committee generally supports the Proposed Amendments, but opposes certain of the proposed amendments and suggestions with respect to other items. In particular, the Committee opposes certain changes to the requirements for inmate filings. In the sections below, we first comment on a proposed amendment to the so-called "three days are added" rule, which we also address in our separate comments on the Federal Rules of Civil Procedure, and then offer comments on the proposed amendments to other rules in the Federal Rules of Appellate Procedure, including rules on inmate filings and changes in word count limits and amicus briefs.

PROPOSED AMENDMENTS AND COMMITTEE COMMENTS

A. "Three Days Are Added" Rule

Proposed Amendment:

The Federal Rules of Appellate Procedure provide that where a party's time to act is measured from the service of a paper, three days are added to that time if the paper is served other than by hand delivery. *See* Fed. R. App. P. 26(c). The Proposed Amendments would

[1] The views expressed are those of the Federal Courts Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

[2] The Advisory Committee simultaneously published proposed amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Criminal Procedure; however, the comments contained herein are limited to the proposed amendments to the Federal Rules of Appellate Procedure. The Committee has issued separate comments on the proposed amendments to the Federal Rules of Civil Procedure.

eliminate electronic service from the types of service that add three days to the other party's time to act. In other words, for purposes of the "three days are added" rules, electronic service would be the functional equivalent of service by hand and would no longer trigger the rule.

The Proposed Amendment to the Federal Rules of Appellate Procedure is as follows[3]:

Rule 26. Computing and Extending Time

****

(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.

The Proposed Amendments – and parallel Proposed Amendments to Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Criminal Procedure[4] – are based on the same underlying rationale. Fed. R. App. P. 25 was amended in 2001 to provide for service by electronic means. At the same time, Fed. R. App. P. 26 was amended to include such electronic service among the types of service that give the recipient three additional days to act. At that time, there were two reasons for such inclusion: (a) concerns about delays in electronic transmission due (for example) to incompatible systems or the like; and (b) a desire to induce parties to consent to electronic service, which initially was authorized only with the consent of the person being served.

The Proposed Amendments recognize that both of these reasons no longer exist. Electronic communication is now the norm, and is considered reliable.[5] In most federal courts, electronic filing – the standard means of electronic service – is mandated in virtually all cases; any attorney wishing to practice before the court must "consent" to it. There is therefore little remaining reason to treat electronic service with the wariness that led to its initial inclusion among the types of service that extend a period to act by three days. As the Advisory Committee Notes to the Proposed Amendments point out, electronic service has become the norm.

[3] Additions are signified with red underlining; deletions are signified with ~~red strikethrough~~.

[4] Although the Proposed Amendments to the Criminal and Bankruptcy Rules are beyond the scope of these comments, we note that the Proposed Amendments would alter the "three days are added" rules in essentially the same manner in all federal courts.

[5] The rules separately address the possibility of any actual failure of electronic communication. Fed. R. App. P. 25(c)(2) authorizes electronic service only through the court's transmission of electronic filings – which, under Fed. R. App. P. 25(a)(2)(D), can be made only in accordance with the court's local rules. These local rules, in turn, generally include provisions respecting technical failures. *See, e.g.*, Second Circuit Rule 25.1(d)(3).

In addition, eliminating the extra three days for the mode of service that is now the most common greatly simplifies the computation of time. As the Advisory Committee Notes point out:

> 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 complications by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the Proposed Amendment would change the rule to provide for additional time *only* where a party's time to act is triggered by service on that party ("after being served"), not where a party's time to act is triggered by that party's own service of a document ("after service"). This is obviously a simple matter of logic; there is no reason to give a party an extra three days by virtue of that party's own choice to serve a document in a manner other than personal delivery or electronic service.

The Committee's Comments:

The Committee generally endorses the adoption of the Proposed Amendments to Fed. R. App. P. 26 for all of the reasons set forth above. We do, however, make one observation.[6]

Although the rules do not specify as much, as a practical matter an attorney can generally serve opposing counsel by hand only during the business hours of that counsel's office. The reason for this is because, unless the paper is handed directly to opposing counsel, the rules require that it be delivered "to a responsible person at the office of counsel" (Fed. R. App. P. 25(c)(1)(A)), which requires, at a minimum, opposing counsel's office be open and accessible.

Electronic service, in contrast, can be accomplished at any hour – regardless of whether the recipient's office is open. This is one reasons why some attorneys prefer to serve papers electronically. But it also means that electronic service may not be quite the same as hand delivery for purposes of reasonable notice. A paper can be served electronically on a given day any time until 11:59 p.m., whereas in practice most attorneys could not receive service by hand at such an hour. At first blush, it seems unfair to treat 11:59 p.m. electronic service the same as service by hand during business hours for the purpose of triggering a time to act that is measured in calendar days. That unfairness is magnified where the papers are voluminous: electronic

[6] A minority of the Committee's members dissented to the Committee endorsing the adoption of the Proposed Amendments to Fed. R. App. P. 26, principally for the reasons stated in the majority's "one observation." However, the dissenters disagree with the majority's statements in the "one observation," characterizing the reasons for opposing these amendments as a "small anomaly" and characterizing these amendments as "an efficient adjustment of the rules to comport with the realities of modern practice." The dissenters believe that the proposed changes will lead to "gamesmanship" with frequent service of papers electronically after the close of business, especially on Fridays, to reduce the adversary's effective response time by three days. Additionally, service electronically is not equivalent to hand delivery, because of the time imposed on the recipient for printing and compiling papers, which may include voluminous exhibits. For these reasons, the dissenters do not believe these changes to be "an efficient adjustment of the rules" and would not approve them.

service imposes on the recipient the burden of printing and organizing papers that, if served by any other means, would arrive bound and tabbed.

On balance, however, the Committee does not believe that this is a reason to reject these Proposed Amendments. In most instances, counsel work out briefing schedules among themselves, and can address such issues as the timing of electronic service in their agreements. Almost invariably, a party that needs an additional day because of late-night service should be able to obtain it either by agreement or from the court. We therefore do not see this small anomaly as a barrier to what we otherwise agree is an efficient adjustment of the rules to comport with the realities of modern practice.[7]

B. Tolling Motions

Proposed Amendment:

Fed. R. App. P. 4(a)(4) currently 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" (emphasis added). As the Advisory Committee explains, this rule has generated a split in the circuits concerning what happens if a district court has extended the deadline for such a post-judgment motion and no party has objected to that extension. The majority (including the Second Circuit) holds that compliance with such an extended deadline does *not* toll the time to file an appeal, but a minority (including the Sixth Circuit) holds that it does.

The Proposed Amendment would resolve this split by adopting the majority view: Fed. R. App. P. 4(a)(4) would now specify that in order to toll the time to file an appeal, a post-judgment motion would have to be made "within the time allowed by" the Federal Rules of Civil Procedure.

The Committee's Comments:

The Committee supports this amendment, which will create uniformity and clarity (and which, we note, will not change the practice in the Second Circuit).

[7] We note, moreover, that in the Second Circuit (a) the due dates for principal briefs are generally set by order based on the parties' requests (the deadlines for which are triggered by events other than service); and (b) the due date for any reply brief is triggered by the *filing* of the appellee's brief, not by its service. *See* Second Circuit Rule 31.2. As a result, in the Second Circuit the Proposed Amendment would impact the timing of papers only for motions (which are governed by Fed. R. App. P. 27). We also note 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.

C. Inmate Filings

Proposed Amendment:

Proposed amendments to the Fed. R. App. P. 4 and 25 and a new proposed Form 7, with accompanying revisions to Forms 1 and 5, would modify the requirements for litigants who are prison inmates to establish timely filing of notices of appeal and other papers in certain circumstances. Rule 4 relates to filing notices of appeal, which are initially filed in the district court from which the appeal is taken. Rule 25 relates to the filing of any paper in the court of appeals.

Under the current and amended version of those rules, inmates may file papers by mailing them to the courthouse, and their papers may be considered timely if deposited in the prison mailing system by the deadline for filing. The proposed amendments, which are substantively the same for Rule 4 and Rule 25, would alter the existing rules in three principal respects.

First, the current rules provide that "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The proposed amendments would eliminate this language, allowing inmates to take advantage of the timely-filing rule regardless of whether they use the institution's legal mail system (if it has one) or its general mail system.

Second, the proposed amendments address when an inmate can submit a declaration or affidavit to establish that the filing was deposited in the mail system as of the filing deadline. The amendments would clarify that, subject to the court's discretion, the inmate must include such a declaration or affidavit with the document being mailed. The current rule does not expressly require inclusion of such a declaration with the paper being filed, and courts have reached different conclusions as to whether an inmate can submit a declaration or affidavit of timely mailing after-the-fact.

Third, the proposed amendments modify the language required for such declarations or affidavits of timely filing. Among the amendments is a proposed Form 7, which is a sample inmate declaration of timely filing by mail.

The proposed revisions to Rule 25(a)(2)(C) and the accompanying proposed Advisory Committee Note are set forth below. (The revisions to Rule 4(c), which governs inmates filing a Notice of Appeal, are substantively the same.)

Proposed Revisions to Rule 25(a)(2)(C):

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate filing.** 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 second sentence of the former Rule—which had required the use of a "system designed for legal mail" when one existed—is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

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 subsequent to the deposit of 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.

As indicated above, the Advisory Committee proposes that a sample declaration be added to the Appellate Rules as a new Form 7. Form 7 is a sample court-captioned declaration. The body of the sample declaration reads as follows:

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

To alert inmates to the requirements that would be imposed under the amendments to Appellate Rule 4, the Advisory Committee proposes the addition of new language to the sample notices of appeal (Forms 1 and 5). The warning would appear in bracketed language at the bottom of those Forms, as follows (the proposed changes to Form 1 and Form 5 are identical):

> *[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the 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.]*

The Committee's Comments:

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.

The proposed amendments to the inmate filing provisions of Rules 4 and 25 would impose an additional procedural hurdle on a select class of pro se litigants, namely inmates of prisons or other institutions.[8] Non-inmate *pro se* parties can deposit filings directly into the U.S. mail or with a private courier (the rules allow filing by mail for all parties, so long as the clerk receives the papers by the last day for filing). Different considerations apply to prison inmates, who have no direct access to the U.S. mail system, and no control over delays within a prison mail system. The current provisions in Rule 4(c) and Rule 25(a)(2)(C) reflect these considerations.

The Committee does not support the addition of a new procedural filing requirement designed solely to streamline and clarify the existing rule that could cause unwitting defaults by *pro se* prisoner litigants. In the Committee's experience, *pro se* litigants can have difficulty complying with the numerous requirements for appellate filings, which can differ significantly

[8] Prison inmates represented by counsel will generally file all papers electronically through counsel and are likely not affected by the proposed amendments.

from district court filing requirements. The Committee acknowledges that any unfairness to prisoner litigants is mitigated to some extent (1) because the proposed amendments permit the clerk's offices to accept the filing if accompanied by other evidence of timeliness, such as a postmark or date stamp; and (2) because the proposed amendment gives the courts of appeals discretion to consider later-filed declarations of timely deposit. On balance, however, the Committee favors a rule that permits but does not require *pro se* prison inmates to include these sorts of declarations at the time of filing, or to later prove timeliness of filing if and when challenged.

The Committee endorses the amendments to include a sample declaration of timely filing (Form 7), and to include references to that sample in the current form notices of appeal. The Committee does not favor the language of the proposed new Form 7. The form declaration requires the inmate to swear under penalty of perjury that she "deposited" the paper for filing in the institution's mail system as of a particular date. An 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. Interestingly, the Advisory Committee acknowledges and corrects a similar problem under the existing rule, and proposes requiring that the inmate declare that first class postage 'is being prepaid," not (as directed by the existing Rule) that it "has been prepaid." *See* Advisory Committee Note to FRAP 4, 25 Amdts. ("This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system."). In addition, the past-tense language 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.

D. Length Limits

Proposed Amendment:

The proposed amendments to Fed. R. App. P. 32 and 28.1 would reduce the word count limits for appellate briefs, reducing the word limit for main briefs from 14,000 words to 12,500 words; for reply briefs from 7,000 words to 6,250 words. In cases involving cross-appeals, the proposed amendments would reduce the word count for the appellant's principal brief from 14,000 words to 12,500; the appellee/cross-appellant's brief from 16,500 words to 14,700 words; and the appellant's reply brief and the appellee/cross-appellant's reply brief from 14,000 to 12,500 words. The proposed amendments do not affect the existing limits as stated in lines of text, which remain an alternative basis for complying with the rules' length limits. The Advisory Committee explains that the reduction in word count limits is intended to correct an anomalous conversion rate that was used in 1998, when then-applicable page limits were converted into word and line limits:

> 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. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments

inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

(Advisory Committee Note to Rule 32 Proposed Amdt.)

Further amendments to Rule 32 would clarify the specific sections of briefs that are excluded from the word count, set forth in a new Rule 32(f).

Finally, Rule 32 is amended to include a global certification requirement for virtually all papers filed before the court of appeals, not just briefs, that the paper complies with applicable type-volume requirements.

The revisions to Rule 32 are copied below.

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 complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~12,500 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 complies with 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).~~

* * * * *

(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
- any item specifically excluded by rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2)—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.

Proposed amendments to Fed. R. App. P. 5, 21, 27, 32, 35, and 40 relate to filings other than parties' merits briefs. Each Rule would be amended to include length limits for computer-generated papers in terms of number of words or, alternatively, number of lines printed in monospaced font. The amended versions of these rules preserve page limits only for handwritten or typewritten papers. The proposed limits effectively convert the existing page limits under these rules into word and line limits, applying a conversion rate of one page equaling 250 words or 26 lines of text.[9]

The Advisory Committee proposes accompanying changes to Form 6, the sample certification that a party has complied with length limits for briefs. The revised Form 6 could be used for certifying compliance as to any "document" filed with the court of appeals, rather than merely briefs. The revised Form 6 reflects that, under the proposed amendments, a party can certify compliance with all computer-generated papers, not merely briefs, in terms of the document's word count or line count.

The Committee's Comments:

The Committee endorses these proposed amendments.

The Report of the Advisory Committee on Appellate Rules explains that the 1998 adoption of word limits inadvertently increased the permissible length of briefs before the courts of appeals. At that time, the Appellate Rules were amended to replace the 50-page limit for briefs with a 14,000 word limit, apparently employing a conversion rate of 280 words per page – a number of unknown origin. A study of briefs under the pre-1998 rules indicates that an average 250 words per page would have been a more accurate benchmark. The proposed amendments use this more accurate conversion rate, applying it to the 1998 page limits for briefs

[9] Thus, requests for permission to appeal (Rule 5), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text. Petitions for mandamus and other extraordinary writs (Rule 21), currently limited to 30 pages, would be limited to 7,500 words or 780 lines of text. Motions and responses to motions (Rule 27), currently limited to 20 pages, would be limited to 5,000 words or 520 lines of text; reply briefs on motions, currently limited to 10 pages, would be limited to 2,500 words or 260 lines of text. Petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), currently limited to 15 pages, would be limited to 3,750 words or 390 lines of text.

and the current limits (expressed in pages) for other filings. The Committee agrees with the Advisory Committee's rationale of adopting word limits that better achieve the intended result of maintaining the length limits in place in 1998. Notwithstanding these amendments, any circuit could adopt local rules to maintain the existing limits or otherwise permit longer limits.

The Committee also endorses the proposed amendments relating to papers other than briefs on the merits, as they provide greater uniformity in length limits across different types of appellate papers, and greater clarity in calculating a paper's length. Under the proposed amendments, the length limits for computer generated papers in support of petitions for Appeal by permission (Rule 5), mandamus and other extraordinary writs (Rule 21), motions (Rule 27), petitions for rehearing (Rule 40) and petitions for rehearing en banc (Rule 35), all currently expressed in pages, would be governed by word or line counts. The proposed amendments to Rule 32 provide more clarity as to what items are excluded from the word or line count. The more comprehensive list makes clear that the word or line count should not include any cover page, signature block, or proof of service – components that are not expressly mentioned in Rule 32's current list of exclusions.

For the sake of fairness, the Committee notes that these 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.

E. Amicus Briefs on Petitions for Rehearing

Proposed Amendment:

No federal rule governs the timing and length of amicus briefs filed in connection with petitions for rehearing, and the Advisory Committee reports that most circuits have no local rule addressing such filings.[10] The Proposed Amendments seek to fill this void by re-numbering Fed. R. App. P. 29 (which is titled "Brief of an Amicus Curiae" and addresses amicus briefs generally) as Fed. R. App. P. 29(a), titling that subsection "During Initial Consideration of a Case on the Merits," adjusting the numbering of its sub-parts accordingly, and adding a new Fed. R. App. P. 29(b) entitled "During Consideration of Whether to Grant Rehearing." The provisions of the new subsection would apply only where no "local rule or order in a case provides otherwise." Thus, the rule would not require any circuit court to accept amicus briefs on such petitions or mandate any particular rules concerning the length or timing of such briefs; it would only establish default rules for timing and volume where such briefs are permitted.

The Proposed Rule sets a volume limit of 2,000 words, or 208 lines of text printed in a monospaced face – slightly more than half of the volume limit proposed for petitions for rehearing in the Proposed Amendments to Fed. R. Civ. P. 40. An amicus brief in support of a petition for rehearing (together with a motion for leave to file it if the amicus is not the United States, its officer or agency, or a state) would have to be filed no later than three days after the petition it supports. A brief in opposition to such a petition (together, again, with a motion for

[10] The Second Circuit has no such rule.

leave if required) would have to be filed no later than the date set by the court for any response to the petition.

The Committee's Comments:

The Committee generally supports this clarification, particularly in light of the room it leaves for courts to develop their own rules. Presumably any circuit that disagrees with the default approach will promulgate a local rule to address the issue; thus, in either case, there will be a rule that provides counsel with some guidance in this area. We agree with the general proposition that having no rule at all leads to confusion – and in all likelihood burdens clerks' offices with calls that would be unnecessary if there were a rule.

We do note, however, that the Advisory Committee has not explained why the deadline for an amicus brief opposing rehearing should presumptively be the same as the deadline for the opposing party's brief. A motion for leave to file an amicus brief must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). As a practical matter, this generally requires the amicus 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. It is difficult (if not impossible) for an amicus to do this until *after* the filing of the brief of the party whose ultimate position it is supporting.

We would therefore suggest that the default deadline for an amicus brief in opposition to a petition for rehearing be three days after the filing of the main brief in opposition. Although we recognize that this would require the court to wait three days to see if any amicus is filed, as a practical matter we do not believe that this will significantly lengthen the time it takes to resolve any motion for rehearing. We also note that opposition papers are permitted on such applications only where the court requests them. We respectfully submit that any application for rehearing that warrants such a request should also warrant the addition of three days to the briefing schedule to accommodate the interests of any amicus curiae.

We recognize that a three-day deadline is very short because (following the 2009 amendments) intermediate Saturdays, Sundays and holidays are no longer excluded from the counting. In some instances this could mean that a weekend represents all of the time an amicus has between the filing of the party's brief and the deadline for its own. We do not, however, suggest an expansion of that time because we recognize that as a practical matter an amicus will have to begin preparing its papers at the same time it would if it were a party; the additional time would primarily give the amicus an opportunity to see the final version of the party's brief and adjust its own accordingly. This opportunity should be available to an amicus on either side, but the default length of time need not (in our view) be any longer than what the Advisory Committee proposes.

Report prepared by:

Vincent T. Chang, Committee Co-Chair

Hon. Joseph Kevin McKay, Committee Co-Chair

Adrienne B. Koch, Committee Member

Kimo Peluso, Committee Member

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h8j-agbc
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0039
Comment from Peter Goldberger, National Association of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger
Organization: National Association of Criminal Defense Lawyers

General Comment

The attached comments are submitted on behalf of the National Association of Criminal Defense Lawyers.

Attachments

NACDL comment App Rules 021615

NACDL
1660 L St., NW, 12th Fl.
Washington, DC 20036

February 16, 2015

To the Members of the Advisory Committee:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 4(c), 26(c), and 29, as well as the type-volume provisions of Rules 21, 27, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure.

Our organization has approximately 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public criminal defense attorneys and interested academics. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. As you know, we have a long and consistent record of submitting comments. On the basis of that history, we appreciate the close and respectful attention that our comments have always received.

APPELLATE RULES 4(c) and 25(a)(2)(C) – TIMELINESS OF INMATE-FILED NOTICES OF APPEAL

NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail. We have one suggestion, consistent with the spirit and purpose of the Rule, as explained in the proposed Advisory Committee Note. 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, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage, as otherwise required by subparagraphs 4(c)(1)(A)(i) & (ii) and 25(a)(2)(C)(i). The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

As for the related proposed amendment to Form 1 and creation of a new Form 7, we also have a suggestion. 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."

APPELLATE RULE 26(c) – COMPUTING AND EXTENDING TIME: ADDITIONAL 3 DAYS AFTER ELECTRONIC SERVICE

NACDL opposes the proposed package of amendments – including the proposed amendment to Appellate Rule 26(c) – to remove from the list of circumstances in which three days are added to otherwise stated time limits those (many) occasions when a document is due under a Rule or court order to be filed a certain number of days "after service" of another paper, and service has been made by electronic filing. Regardless of the arid logic behind the proposal, the fact is that the amendment would reduce by three days the time available to counsel to respond to an adversary's motion or brief. This small increase in the speediness of proceedings would provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners. This is particularly so as to criminal defense lawyers, whose clients may be incarcerated but who may have to be consulted before responses can be prepared. Many defense lawyers practice solo or in very small firms. Many are in court for much or all of normal working hours on most days. Many have little if any clerical or paralegal support, particularly in the digital age with its decreased demand for secretaries. For this reason, many criminal defense lawyers 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. The burdens thus placed on defense counsel (and thus indirectly on defendants) by the proposal – as well as the increased burden on appellate courts, which will be confronted with many more motions for short extensions of time, or for leave to file documents out of time – far outweigh any perceived benefit in simplicity or abstract elegance in the rules.

Relatedly, if the 3-day addition is to be retained, as we recommend, this Rule has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by 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.

APPELLATE RULES 21, 27, 28.1, 32, 35, and 40 – ACROSS-THE-BOARD 11% REDUCTION IN TYPE-VOLUME LIMITS

NACDL opposes the proposed reduction of type-volume limits and pages lengths throughout the appellate rules. The proposed reduction is based on a recalculation of the presumed type-volume per page from 280 words to 250, relative to the number of pages that was allowed for certain documents prior to 1998. We are aware that many other comments have been submitted criticizing this change for a variety of different reasons, with many of which we concur. In our view, however, the question of what was in the Committee's mind in 1998, one way or the other, when the page limit for briefs was changed to a type-volume rule, should not be given significant weight. The real question is whether there is any good reason to believe that the quality of appellate justice today would be enhanced by forcing an across-the-board 11% reduction in the maximum allowable length of briefs, motions, and other submissions from what is now permitted. We cannot imagine that it would.

We speak from the perspective of criminal defense lawyers who handle appeals for accused or convicted persons. The indictments our clients face often contain numerous counts brought under a variety of federal criminal statutes. These statutes continue to proliferate in number and in complexity. Federal criminal trials can last for weeks, generating potentially more, not fewer errors plausibly providing grounds for appeal. Moreover, error will not result in reversal if it is harmless, but we cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial. This requires more, not less space in even the best-written briefs. Federal sentencing law has also become increasingly complex since 1998, both under the Guidelines and under developing constitutional rules, as well as post-*Booker,* judge-made jurisprudence. The same is true of the law governing federal habeas corpus. Moreover, the number of potentially-applicable judicial precedents grows endlessly, multiplying each year the number of cases that might reasonably be cited, either as supportive precedent or as necessary to be distinguished. All the federal court decisions from our Nation's first hundred years (including many opinions from the bench) were published in 30 volumes of the Federal Cases. The first series of the Federal Reporter, which began approximately when the federal appellate courts were established in 1891, covered the next 44 years in 300 volumes. The Second Series ("F.2d") covered 70 years in 999 volumes. The Third Series ("F.3d") is now in its 774th volume (containing many more pages per volume, as well) after less than another 22 years. About 615 of those volumes

have appeared since 1998. Indeed, the number of precedential opinions *required* by rules of professional responsibility to be cited is ever-growing.

In this context of a burgeoning body of statutes and case law, defense lawyers are sworn to protect our clients' constitutionally-guaranteed right to effective assistance on appeal. We are committed to fulfilling this duty, but we cannot do so with one hand tied behind our back by pressure to drop potentially viable issues or to develop issues less fully. When we file amicus briefs (as NACDL often does) and are limited to one half the allowable party maximum, the significance of the proposed reduction becomes even more acute, as our opportunity to provide helpful information to the court would be severely hampered. For these particular reasons, as well as those proffered by other commenters, NACDL strongly opposes the suggested changes.

Based on the 280-words formula (and without regard to its typographical accuracy), the allowable maximum type-volume under Rule 21 for a mandamus petition should be 8400 words. For a motion under Rule 27, it should be 5600 words. For briefs under Rules 28.1 and 32(a)(7) the volume should remain at 14,000. For a rehearing petition under Rules 35 and/or 40, the maximum should be 4200.

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.

APPELLATE RULE 29(b) – TIME FOR FILING AN AMICUS BRIEF IN CONNECTION WITH A PETITION FOR REHARING

NACDL applauds the Committee for addressing this long-overlooked issue. We have two points of difference with the proposal, however. First, for the reasons discussed in the preceding section of these comments, the allowable type-volume for an amicus submission in connection with a petition for rehearing should be 2250 words under proposed Rule 29(b)(4), not 2000. Also, we strongly urge the Committee to consider allowing a more realistic five days, not just three, under proposed Rule 29(b)(5), to file a memorandum of amicus curiae in support of a petition for rehearing. This is still less than the seven days allowed for an amicus brief on the merits. But based on our experience in filing such memoranda, 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, all while producing the most useful and informative submission for the Court's consideration.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

William J. Genego
Santa Monica, CA

Co-Chairs, Committee on
Rules of Procedure

Please respond to:
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Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0042
Comment from Anne Small, Securities and Exchange Commission

Submitter Information

Name: Anne Small
Organization: Securities and Exchange Commission

General Comment

The Office of General Counsel of the Securities and Exchange Commission appreciates this opportunity to express its views on the word limits for appellate briefs in Proposed Rules 28.1, 29 and 32. As explained below, we believe that the proposed word limits should not be adopted.

Our office, acting on behalf of the SEC, files numerous briefs in the federal courts of appeals addressing the federal securities laws and other issues. These briefs are filed in appeals in civil enforcement actions brought in district court, appeals from administrative actions, and challenges to agency rules and regulations. Our office also files amicus curiae briefs, generally in private securities law actions.

We are concerned that the word limitations in the proposed amendments to the Federal Rules of Appellate Procedure 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 in order to present the factual and legal arguments to the court in full.

Further, many appellate matters in which the SEC participates 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 in deciding the case.

Please feel free to contact me if there is any additional information that we can provide.

Sincerely,
Anne K. Small

General Counsel
Securities and Exchange Commission
202-551-5001
SmallA@sec.gov

See attached file.

Attachments

Securities and Exchange Commission comments on proposed FRAP amendments

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F STREET, N.E.
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

ANNE K. SMALL
202-551-5001
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February 13, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Word Limitations in Proposed Rules 28.1, 29 and 32.

Dear Judge Sutton:

The Office of General Counsel of the Securities and Exchange Commission appreciates this opportunity to express its views on the word limits for appellate briefs in Proposed Rules 28.1, 29 and 32. As explained below, we believe that the proposed word limits should not be adopted.

Our office, acting on behalf of the SEC, files numerous briefs in the federal courts of appeals addressing the federal securities laws and other issues. These briefs are filed in appeals in civil enforcement actions brought in district court, appeals from administrative actions, and challenges to agency rules and regulations. Our office also files *amicus curiae* briefs, generally in private securities law actions.

We are concerned that the word limitations in the proposed amendments to the Federal Rules of Appellate Procedure 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 in order to present the factual and legal arguments to the court in full.

Further, many appellate matters in which the SEC participates 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 in deciding the case.

Please feel free to contact me if there is any additional information that we can provide.

Sincerely,

Anne K. Small
General Counsel
Securities and Exchange Commission

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Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0046
Comment from Richard Samp, NA

Submitter Information

Name: Richard Samp
Organization: NA

General Comment

My comments are attached.

Attachments

Judicial Conference- Proposed Word-Limit Changes

WASHINGTON LEGAL FOUNDATION
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February 17, 2015

Via Electronic Submission

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

Thank you for this opportunity to comment on the proposed amendments to the Federal Rules of Appellate Procedure. My litigation practice includes the drafting of a considerable number of amicus curiae briefs in the federal appellate courts. These comments focus on proposed changes to Rules 29 and 32, with a particular focus on the effects of proposed changes on amicus curiae filings.

The Advisory Committee has recommended that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words. Although unmentioned by the Advisory Committee, 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. For the reasons stated below, I oppose both word-limit reductions.

Party Briefs. A number of federal judges have submitted comments in support of the proposed change to Rule 32(a)(7)(B). A common theme of those comments is that many briefs are "much too long" and would be more effective if they were more concise. I fully agree with that sentiment, and for that reason, briefs I have submitted on behalf of parties rarely approach the 14,000-word limit. But there will often be occasions on which the complex subject matter of a case requires a 14,000-word brief, and in those instances a word-limit reduction will have one or both of the following results: (1) counsel will be prevented from fully developing important legal arguments; and/or (2) courts will be burdened by a significant increase in the number of motions requesting permission to file briefs in excess of the word limit.

Moreover, I rarely find that an attorney whose lengthy briefs are unpersuasive suddenly becomes more persuasive when he or she submits a shorter brief. Rather, my experience is that all the briefs submitted by some lawyers are poorly drafted and unpersuasive without regard to

length, while the appellate specialists whose work I most admire file lengthy briefs (when necessary) that are just as persuasive as their shorter briefs.

Some supporters of the proposed amendment have bemoaned a perceived increase in the number of pages in a typical brief; they note that briefs now often exceed 60 pages. But while page length has increased since 1998, the principal cause is unrelated to verbosity. Rather, page length has increased due largely to the 1998 amendment to Rule 32, which mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font. The increase in type size rendered briefs far more easily readable, but it also added six or seven pages to the typical brief.

Amicus Curiae Briefs. Rule 29(d) provides that "an amicus curiae brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Accordingly, a word-limit reduction for the brief of a party will have the effect of reducing the maximum words in an amicus brief from 7,000 words to 6,250 words. The Advisory Committee has supplied no explanation for that proposed reduction, which I oppose. While Rule 29(d) permits amicus filers to file a motion for leave to file a brief in excess of the normal word limit, I am unaware of any instance in which a federal appeals court granted such a motion.

I note initially 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 than does the current 14,000-word limit—is inapplicable to amicus briefs. Before 1998, the page limit on amicus briefs was 30 pages. So if one uses the Advisory Committee's estimate that the average pre-1998 page included 250 words, the Committee's rationale would support a 7,500-word limit (250 words/page x 30 pages) for amicus briefs, not the reduction to 6,250 words that the Committee is proposing.

More importantly, the most plausible argument raised by supporters of a word-limit reduction for a party's brief is inapplicable to amicus briefs. Many federal judges feel obliged to read a party's brief in its entirety, no matter how unpersuasive or poorly written. Some complain, however, that their time is wasted when they are forced to read overly long, unpersuasive briefs; and they thus support a measure that would tend to reduce the average length of party briefs. But I am unaware of federal judges who feel obliged to read all amicus briefs submitted in a case. Indeed, my understanding is that most judges do not read an amicus brief (or read nothing more than the summary of argument) unless the amicus filer has a track record of filing uniformly well-drafted briefs or a law clerk has recommended that the brief be read.

As a result, drafters of amicus briefs already have a large incentive to file concise briefs that include no more words than they deem absolutely necessary. If they hope to have their briefs read by the judge, they need to submit briefs that are no longer than is necessary to make the legal arguments they seek to convey. A 7,000-word amicus brief that is unpersuasive

because it is overly long will not result in a waste of judicial resources because it will not be read.

Accordingly, if the Committee on Rules goes ahead with the proposed amendment to Rule 32, I recommend that Rule 29 be amended to state explicitly that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words.

Amicus Curiae Briefs in Support of Rehearing Petitions. I largely support the proposed Rule 29(b), which would govern amicus filings "during consideration of whether to grant rehearing." I support creation of a nationwide rule governing such filings. Nationwide uniformity in filing rules would be a significant improvement over the current system, under which every circuit has its own set of rules, some of which are not written. Proposed Rule 29(b)(5) states that amicus briefs must be submitted no later than three days after the petition for rehearing is filed. I concur; that period is sufficient to allow the amicus filer to review the petition before filing but at the same time does not unduly interfere with the petition-review process. However, for the same reasons that I endorse continuation of the 7,000-word limit on amicus briefs in support of a party's principal brief, I suggest that proposed Rule 29(b)(4) be amended to increase the word limit on rehearing amicus briefs from 2,000 words to 2,500 words. A 2,500-word limit better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages.

Rule 26(c)'s "Three-Day Rule." The Advisory Committee proposes that the "three-day rule"—under which the time period for responding to a court filing is extended for three days when service of the paper is accomplished by certain methods—be amended so that it is no longer applicable to electronic service. I largely support the change; the three-day rule was designed with service by U.S. Mail in mind and makes little sense in the context of electronic service. However, my experience is that most lawyers, when they file and serve briefs, do so late in the day. Very often, the lawyer receiving electronic service will have gone home for the evening when the service email arrives. Accordingly, I recommend that the proposed amendment to Rule 26(c) be revised to make clear 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.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

PUBLIC SUBMISSION

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Document: USC-RULES-AP-2014-0002-0050
Comment from Miriam Nemetz, Mayer Brown LLP

Submitter Information

Name: Miriam Nemetz
Organization: Mayer Brown LLP

General Comment

Please see the attached comment submitted by the Supreme Court and Appellate Practice of Mayer Brown LLP.

Attachments

Mayer Brown LLP Letter Commenting on Proposed Changes To The Rules of Appellate Procedure

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February 17, 2015

VIA ONLINE SUBMISSION

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington DC 20544

Re: Comments on Proposed Revisions to the Rules of Appellate Procedure

Dear Mr. Rose:

This letter is submitted on behalf of the members of the Supreme Court and Appellate Practice of Mayer Brown LLP. Mayer Brown has the Nation's oldest and largest appellate practice. The members of our group include four former Deputy Solicitors General and three former Assistants to the Solicitor General, as well as numerous former Supreme Court and federal appellate clerks. Collectively, we have written thousands of federal appellate briefs. We also are the authors of the BNA treatise FEDERAL APPELLATE PRACTICE, and four Mayer Brown appellate partners are among the five co-authors of SUPREME COURT PRACTICE. We offer these comments based on our shared experiences representing our clients in appeals in all the federal courts of appeals.

To summarize our comments, we oppose both the proposal to reduce the word limits for briefs and the proposed deadline for amicus briefs in support of rehearing petitions.

1. Proposed Reduction To Word Limits For Briefs.

We respectfully urge the Committee to retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs. In our view, the 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.

According to its Note on the proposed rule change, "the Committee believes that the 1998 amendments," which replaced the 50-page limit for principal briefs with the current 14,000-word limit, "inadvertently increased the length limits for briefs." The Note further suggests that this inadvertent increase resulted from mistaken assumptions about the number of words contained in a typical 50-page brief. We understand there to be some debate about the

basis for the Committee's selection of 14,000 words as an appropriate word limit. Whatever the Committee's rationale for that number, however, it is unlikely that in adopting a 14,000-word limit the Committee actually increased the permissible length of briefs. Most briefs filed prior to the 1998 amendments used 12-point type. A 50-page brief in that type size could easily contain 14,000 words, even before considering the word-expansive effects of typeface, line spacing, and other formatting choices. Indeed, in adopting the new word limit the Committee observed that the "widespread use of personal computers" had "made the 50-page limit virtually meaningless." *See* Fed. R. App. P. 32(a)(7), Advisory Committee Note to 1998 Amendment. Thus, 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.

Equally important, of course, is whether the 14,000-word limit that has now governed for more than 16 years is reasonable or should be changed. We agree with the observation of several commenters that appellate briefs in simple cases can and should contain fewer than 14,000 words. A *maximum* word limit, however, should be sufficient to accommodate appeals involving a detailed factual record and multiple issues of moderate complexity. In our experience, it is often challenging in such cases to provide a sufficient factual recitation, argue the issues raised with appropriate references to the pertinent evidence and legal authorities, and include all required parts of the brief (such as the summary of argument) within the currently allotted 14,000 words. Given the various components that an appellant's opening brief (though not necessarily the appellee's answering brief) must contain, a 1,500-word reduction—more than 10%—would substantially cut into the space available for the Statement of Facts and the Argument. Consequently, it is inevitable that brief writers—especially those who do not specialize in appellate advocacy—would sacrifice readability and clarity in an effort to excise the necessary number of words. (Consider the ambiguities created by the ever-increasing tendency to drop the conjunction "that" following verbs.[1]) Reducing the maximum word limit would discourage punctilious citation to the record and inclusion of parentheticals describing cited cases and other sources—adding a burden for the judges and clerks that surely exceeds that of reading (or glossing over) such citations and parentheticals. At the same time, it would encourage overuse of acronyms, "cheating" on citation format, and other attempts at shortening without actually cutting substance.[2] Worst of all, in some cases parties would be forced to choose between making scattered cuts that render the brief less effective overall and omitting meritorious issues altogether.

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[1] For examples, see GARNER'S MODERN AMERICAN USAGE 808 (3d ed. 2009); MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE 298 (2d ed. 2013).

[2] Ironically, one of the commenters who favors reducing the word limit is also one of the strongest critics of overuse of acronyms. *See Nat'l Ass'n of Reg. Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012) (Silberman, J.).

We respectfully disagree with the suggestion that appellants—upon whom the practical effects of this proposed change would fall disproportionately—can address the proposed word-limit reduction by excising issues on which they are less likely to prevail. Certainly, it is wise to leave weak or superfluous arguments on the cutting-room floor. But selecting between meritorious alternatives is risky, because it is difficult to predict which issues an appellate panel will find persuasive. 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.

To illustrate, members of our group routinely handle appeals from large jury verdicts (often including punitive damages). The potential issues on appeal in these cases include challenges to the sufficiency of the evidence supporting the finding of liability for the underlying causes of action, a challenge to the sufficiency of the evidence supporting the finding of liability for punitive damages, challenges to evidentiary and instructional rulings, and arguments that the compensatory and punitive damages are excessive. When we are drafting the opening brief, there is no way for us to know which of these arguments might carry the day with a panel of three judges (especially because the identity of the panel members is unknown at the time of briefing except in the D.C. Circuit). Indeed, in some cases in which we have briefed each of these categories of issues, we prevailed on the sufficiency of the evidence for the underlying tort, winning the case outright; in others, we prevailed on the sufficiency of the evidence for punitive liability, thereby eliminating the punitive damages; in still others, we prevailed on evidentiary or instructional issues resulting in a new trial on part or all of the case and, in a subset of those, also prevailed on the sufficiency of evidence supporting the finding of punitive liability; and in still others, we lost on all of these antecedent issues, but prevailed on our argument that the damages were excessive. To require litigants to engage in ruthless culling so that they can satisfy a strict word limit therefore could exact a very high price by requiring elimination of a potentially winning argument.

A reduction of the word limit in complex cases would likely disadvantage not only parties but also the courts and the administration of justice. When deciding particular cases, the courts of appeals announce or explain general rules of law that will apply in future cases. It is therefore important that appellate courts have a full understanding of the practical and legal context in which a particular dispute arises. If forced to comply with reduced word limits, practitioners will be inclined to eliminate discussions of important contextual issues—for example, related statutory or regulatory provisions—that may not be directly at issue in the case at bar, but which should nevertheless be considered when resolving the parties' dispute. If the courts are deprived of such discussions, as they likely will be if the word limit is reduced, there is a significant risk that appellate decisions will have unanticipated (and undesirable) consequences.

Finally, the potential availability of a word-limit extension is no substitute for a reasonable default word limit. For at least the last 30 years, the presumption has been that requests for extensions are reserved for unusual cases. It is hard to imagine that presumption changing. Thus, although reducing the limit to 12,500 words is sure to increase the number and

frequency of extension requests—a new burden for Clerk's offices, judges, and their clerks—it is far from certain that such requests would be granted more generously than they currently are. And in cases of great complexity that are today seen as warranting extensions beyond current word limits, the extensions are likely to be materially stingier, even though the cases will be no less complex. Moreover, the predictable increase in extension requests would add uncertainty and inefficiency to the appellate process. Courts do not typically rule on such requests immediately, and appellants facing tight deadlines would likely be forced to begin preparing briefs before knowing how many words will be allowed. And in courts like the Ninth Circuit that allow parties to tender a proposed brief with the motion for an extension of the due date of the brief, the appeal could be delayed if the motion is denied and the party is forced to shorten the brief. Either way, the burden on counsel and the cost to the client would increase.

For these reasons, we think that a reduction of the word limits would create more problems than it would solve. We thus respectfully request that the Committee retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs.

2. Proposed Deadline For Amicus Briefs In Support Of Petitions For Rehearing.

We also urge the Committee to modify its proposed revision to Rule 29, which would establish a specific deadline for an amicus brief in support of a petition for rehearing. With some notable exceptions, it is generally recognized among federal appellate judges that amicus briefs can be enormously helpful by, among other things, providing "expertise not possessed by any party," explaining "the impact a potential holding might have" beyond the parties to the case, or addressing "points deemed too far-reaching" by the parties. *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers) (internal quotation marks omitted). That is all the more true when it comes to the weighty determination whether to grant rehearing en banc.

Under the proposed rule, an amicus brief in support of a petition for rehearing would be due three days after the filing of the petition. If that deadline were adopted, 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. Such a short deadline would make it extremely difficult for most organizations to file amicus briefs at this important stage. We therefore suggest 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. Such a procedure would enable the court to move expeditiously in the majority of cases in which no amicus brief is being filed, while making it feasible for the amicus to prepare an adequate brief in those few cases of particular public importance where such briefs are most likely to be of value. If that proposal is not acceptable, then we suggest that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed.

Sincerely,

Timothy S. Bishop	Richard B. Katskee	Kevin S. Ranlett
Craig W. Canetti	Michael E. Lackey, Jr.	Charles A. Rothfeld
Hannah Y.S. Chanoine	Philip Allen Lacovara	Jeffrey W. Sarles
Scott A. Chesin	Demetrios G. Metropoulos	James C. Schroeder
Donald M. Falk	John E. Muench	Stephen M. Shapiro
Andrew L. Frey	Miriam R. Nemetz	Adam C. Sloane
Kenneth S. Geller	Brian Netter	John Sullivan
Lauren R. Goldman	Michele L. Odorizzi	Carl J. Summers
Dan Himmelfarb	Archis A. Parasharami	Evan M. Tager
Erika Z. Jones	Eileen Penner	Andrew E. Tauber
Stephen J. Kane	Andrew J. Pincus	Joshua Yount

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Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0053
Comment from Saul Bercovitch, NA

Submitter Information

Name: Saul Bercovitch
Organization: NA

General Comment

Please see the attached comments from the State Bar of Californias Committee on Federal Courts.

Attachments

proposed FRAP amendments-02-2015-CFC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Federal Courts respectfully opposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure. In our view, the proposed reductions are more likely to harm appellate court efficiency and decision-making than they are to help.

We acknowledge that many appellate briefs are longer than they need to be. The problem is that determining an appropriate brief length depends on the case—it requires comparing the brief's length to the complexity of the legal and factual issues involved. While short briefs usually suffice for cases governed by clear legal authority and limited factual records, longer briefs may be necessary when cases turn on novel legal issues or divergent precedents, or when it is necessary to explain a complex factual record.

Judges do not benefit when lawyers present an overgeneralized and incomplete portrayal of legal precedent or of the factual record. Some briefs are short because they substitute generalities for specifically cited record facts, or because they fail to acknowledge that a case may be subject to two lines of authority which must be reconciled. Indeed, responsive briefs are sometimes longer precisely because an opponent's overly summary opening brief contains legal and factual errors, requiring correction, or omits necessary law and facts, requiring augmentation. In such cases, a longer brief may serve judicial accuracy and efficiency alike. Given appellate caseloads and the structure of our adversary system, counsel must bring the facts and governing law to the court's attention with appropriate citations, rather than relying on the court to review the entire factual record or conduct new legal research.

The proposed change to Rule 32 would decrease word limits by roughly 10.7%, reducing main briefs from 14,000 to 12,500 words, and reducing reply briefs from 7,000 to 6,250 words. Most

appellate briefs (including most briefs that are longer than they should be) are already under the 12,500 and 6,250 word limits, and would not be affected by the change. Instead, the reductions are likely to disproportionately affect cases that actually require long briefs—incentivizing counsel to cut back on factual nuance and citations, or to refrain from alerting courts to the complexity of governing precedent. That would result in less accurate judicial decision-making, while doing little to lessen judges' overall burden from overlong briefs.

These problems will not be fixed by relying on motions to file oversized briefs. First, requiring litigants to file, and courts to decide, such motions will create burdens out of proportion to any efficiency savings achieved by the word count reductions. As stated above, most briefs (whether appropriately sized or overlong) will be unaffected by the change; the briefs affected will be, disproportionately, those requiring extended treatment. Second, because appropriate brief size depends on each case's legal issues and factual record, a motions judge who has not immersed himself or herself in the case is unlikely to know whether or not extra words are necessary. Either judges will have to engage in substantial legal research and record review at the motions stage, or they will risk inappropriately refusing extensions to briefs that really deserve them. For similar reasons, we object to the proposed word limit changes to Rule 32, and also to the proposed changes to Rule 28.1 reducing word limits for briefs in cross-appeals.

We also believe that the word limit for petitions for rehearing or rehearing en banc, under Rules 35 and 40, should be set at 4,200 words, not 3,750. Requests for appellate rehearing are supposed to be limited to cases where the legal issues are exceptional, 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. Requiring lawyers to explain such factors in 3,750 words will save judges virtually nothing in time or effort; yet the reduction in an already short pleading is likely to severely curtail lawyers' ability to explain why a panel opinion has led to the unusual step of seeking rehearing. Similar reasoning leads us to recommend setting Rule 29(b)(4)'s word limit for amicus briefs relating to petitions for rehearing at 2,240 words rather than 2,000, setting Rule 21's word count limits for papers relating to extraordinary writs at 8,400 words, rather than 7,500, and setting Rule 5(c)'s limit for petitions requesting discretionary appeal at 5,600 words, rather than 5,000 – all of which are based on the current conversion rate of 280 words per page.

We take no position on the other aspects of the proposed changes to the Federal Rules of Appellate Procedure, 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.

We appreciate your consideration of our comments.

Disclaimer

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membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

Esther L. Klisura
Chair, 2014-2015
The State Bar of California
Committee on Federal Courts

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h9c-8s0y
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0058
Comment from Saul Bercovitch, The State Bar of Californias Committee on Appellate Courts

Submitter Information

Name: Saul Bercovitch
Organization: The State Bar of Californias Committee on Appellate Courts

General Comment

Please see the attached comments from the State Bar of Californias Committee on Appellate Courts.

Attachments

proposed FRAP amendments-02-2015-CAC

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

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February 17, 2015

The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment 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." The 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)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address 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. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(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 25(a)(2)(c)(ii), as further amended, would provide:

(ii) 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 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes 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. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports 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.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length 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. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that 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. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

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Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 15-AP-B: Technical amendment to update Rule 26(a)(4)(C)'s reference to Rule 13

In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a), and a new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added.[1] At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)"[2] should have been updated to refer to "filing by mail under Rule 13(a)(2)."[3] I regret to say that I overlooked the cross-reference at the time. I now propose amending Rule 26(a)(4)(C) to update the cross-

[1] The 2013 Committee Note to Rule 13 explains:

> Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

[2] Prior to the 2013 amendment, Rule 13(b) read: "**(b) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations."

[3] Rule 13(a)(2) now reads: "**(2) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations."

reference. Here is the proposal, which, as a technical amendment, can proceed without publication:[4]

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.

* * * * *

[4] An additional proposed amendment to Rule 26(a)(4)(C) is discussed elsewhere in this agenda book. That additional amendment would update Rule 26(a)(4)(C)'s cross-references to Rule 25(a) in the event that Rule 25(a) is restructured in connection with the amendments related to electronic filing. But assuming that the Committee decides to proceed with that proposal, the additional amendment to Rule 26(a)(4)(C) would be at least one year behind the technical amendment proposed here (due to the need for publication for comment).

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.

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Possible amendments relating to electronic filing (Item Nos. 11-AP-D and 15-AP-A)

The Committee has long had on its docket a number of proposals that relate to electronic filing and service. Recently, the Standing Committee's CM/ECF Subcommittee – with Judge Chagares as its Chair and Professor Capra as its Reporter – considered possible amendments to all five sets of national Rules that would take account of the shift to electronic transmission and storage of documents and information. One of the first products of those discussions – an amendment to Appellate Rule 26(c) that would abrogate the "three-day rule" as it applies to electronic service – is presented elsewhere in this agenda book for the Committee's final approval. This memo focuses on other possible amendments relating to electronic filing and service.

Part I discusses a possible amendment to Appellate Rule 1(b) that would define "information in written form" to include electronic materials. Part II.A discusses possible amendments to Appellate Rule 25 that – subject to certain exceptions – would make electronic filing mandatory and authorize electronic service irrespective of party consent. Part II.B discusses the special filing and service issues that arise in cases involving pro se litigants. Part II.C discusses the possibility of providing that a notice of electronic filing serves as proof of service on any party served through the court's transmission facilities. Part II.D sketches a possible set of amendments addressing these aspects of Rule 25.[1]

I. Defining "information in written form"

The CM/ECF Subcommittee discussed the possibility of adopting a pair of "electronic = paper" definitions in all the sets of Rules. Professor Capra prepared for the Subcommittee a template rule that would provide two definitions, as follows:

[1] Part II also sets out proposals for conforming amendments to Rules 26(a)(4)(C) and 39(d)(1).

> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The Civil, Criminal, and Bankruptcy Rules Committee reporters have informed me that their Committees are not intending to proceed at this time with the adoption of the template rule. The question becomes whether the Appellate Rules Committee should nonetheless proceed on its own.

As the Committee discussed at its fall 2014 meeting, it seems inadvisable at this time to adopt part (b) of the template, which would address action by electronic means. Although all the courts of appeals have now made the transition to CM/ECF, for some of those courts the transition is still in the recent past. Practices can be expected to evolve as the circuits gain experience with electronic filing and service. Although there exist several categories of action as to which part (b) of the template would be harmless and potentially useful,[2] there are other categories of action that, in some or all circuits, cannot currently be taken electronically.[3] Although the list of actions that one or more circuits do not permit to be taken electronically will likely become shorter over time, it nonetheless seems likely that some exceptions will persist for the foreseeable future.

Accordingly, the question narrows to whether the Committee should propose adoption of part (a) of the template. One initial question concerns the way in which part (a) would be interpreted once it is viewed on its own, without part (b). When the two subparts were presented together, it seemed clear that only (b) referred to action by electronic means. But if part (a) is viewed on its own, that may not be so clear. That is to say, if the Rules define "information in written form" to include "electronically stored information," then a reference to filing a paper might be read to encompass filing an *electronic version of the paper*. For example, under that reading, when Rule 5(a)(1) directs that a "petition for permission to appeal ... must be filed with the circuit clerk," the Rule's directive arguably could be met if the party files an electronic version of the petition for permission to appeal. A reader who interpreted the Rules in this way might be misled into thinking that the availability of electronic filing is broader than it currently is (or will be in future). Currently Rule 25(a)(2)(D) permits electronic filing only when

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[2] These categories include the entry of judgments; service by the clerk on a CM/ECF user; most non-case-initiating filings by a CM/ECF user; and service effected between parties who are both CM/ECF users.

[3] These categories including filing case-initiating documents; filing documents prior to docketing in the court of appeals; filing under seal; filing appendices; filing generally (if one is not allowed to use CM/ECF); service on or by a non-ECF filer; and service of a case-initiating document, a sealed document, or another document that was filed in paper form.

authorized by local rule; and, as discussed later in this memo, it seems likely that some exceptions to the availability of electronic filing will persist into the foreseeable future.

The other relevant consideration is that the Rules already contain a somewhat similar definition. The last sentence of Appellate Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules."[4] That definition notably does not raise the problem sketched in the preceding paragraph, because it applies only to papers filed electronically in compliance with a local rule, and thus it would not override local circuit provisions requiring paper filings. A similar sentence would be carried forward in the proposed amendments to Rule 25 that are sketched in Part II.D of this memo. Proposed Rule 25(a)(2) would explain when electronic filings are and are not required or permitted, and then would state that "[a] paper filed electronically constitutes a written paper for purposes of these rules."

Proposed Rule 25(a)(2)'s definition, like the definition in current Rule 25(a)(2)(D), would confer many of the same benefits as part (a) of the template rule, but without the potential downside identified above. The question thus would seem to be whether that definition in Rule 25(a)(2) suffices. It should be noted that the Evidence Rules already contain a version of part (a) of the template rule: Evidence Rule 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." There are no reports of problems with Evidence Rule 101(b)(6). However, one difference between the Evidence Rules and the Appellate Rules is that the Evidence Rules tend to focus more on *documents*, and the Appellate Rules tend to focus more on *actions that could be taken with respect to documents*. That is to say, documents are discussed in the Evidence Rules largely as types of evidence,[5] whereas documents are discussed in the Appellate Rules largely as items to be filed or served. So a definition like that in Evidence Rule 101(b)(6) seems more likely to be useful, and much less likely to be problematic, in the Evidence Rules than in the Appellate Rules.[6]

If the Committee is interested in adopting part (a) of the template rule, another question is whether the definition of "information in written form" would adversely affect provisions that specifically require a "writing." Appellate Rules that refer to writings and, thus, would be affected by part (a) of the template include:

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[4] For similar provisions, see Bankruptcy Rule 5005(a)(2); Civil Rule 5(d)(3).

[5] A quick search of the Evidence Rules found only one instance in which a Rule referred in the present or future tense to the act of filing by a party. On WestlawNext, a search of the USCA database for [PR,CI,TI("federal rules #of evidence") and TE(files filed file filing)] pulled up, inter alia, Evidence Rule 412(c)(1)(A), which directs a party who "intends to offer evidence under Rule 412(b)" to "file a motion."

[6] Of course, as to any evidentiary question addressed by the Evidence Rules, those Rules, including Evidence Rule 101(b)(6), already apply to proceedings in the courts of appeals. *See* Evidence Rule 1101(a).

- Rule 9(a)(1): "The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case."

- Rule 10(b)(1)(A)(i): When the appellant orders a transcript from the reporter, "the order must be in writing."

- Rule 11(f): "The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party."

- Rule 17(b)(2): "The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed."

- Rule 24(a)(2): "If the district court denies the motion [for leave to appeal in forma pauperis], it must state its reasons in writing."

- Rule 24(a)(3): A party who was allowed to proceed i.f.p. in the district court or who was found indigent in a criminal case may proceed i.f.p. on appeal "unless ... the district court ... certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding ...."

- Rule 25(c)(1): "Service may be ... by electronic means, if the party being served consents in writing." *[N.B.: For a proposal to delete this language, see Part II.D below.]*

- Rule 27(a)(1): "A motion must be in writing unless the court permits otherwise."

- Rule 32.1(a): "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'nonprecedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007."

- Rule 32.1(b): "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited."

- Rule 41(d)(2)(B): A stay of the mandate pending the filing of a petition for certiorari "must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay."

- Rule 44(a): "If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals."

- Rule 44(b): "If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals."

- Rule 46(a)(3): "On written or oral motion of a member of the court's bar, the court will act on [an] application" for admission to the court's bar.

Overall, the Appellate Rules' references to *writings* seem unlikely to be adversely affected by adoption of part (a) of the template rule. One question concerns Rules 11(f) and 17(b)(2), both of which refer to written stipulations. If stipulations must be signed by both (or all) parties in order to be binding, a rule that defines a "written stipulation" to include an electronic version of the stipulation might raise the further question of what will suffice for signatures when the document is in electronic form. The proposed e-filing amendment to Rule 25 that is sketched in Part II of this memo would provide that "[t]he act of electronic filing constitutes the signature of the person who makes the filing," but it would not address the question of signatures by persons other than the filer. The question of electronic filings containing signatures by persons other than the electronic filer is addressed by local rule in some but not all circuits; drafting a national rule that would address the topic might prove challenging.[7] On the other hand, the last sentence of present Rule 25(a)(2)(D) raises a similar issue, given that it authorizes the use of stipulations (and other documents) "filed by electronic means in compliance with a local rule." I am not aware of any reports of problems with the application of that sentence in Rule 25(a)(2)(D). Accordingly, the question of signatures on stipulations should not, it seems to me, provide a reason for rejecting part (a) of the template rule.

If the Committee is interested in proceeding with a proposal to adopt part (a) of the template rule, the logical place to add it would be in Rule 1(b), which currently contains one definition. Here is a sketch of the possible addition:

Rule 1. Scope of Rules; Definitions; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

[7] The Bankruptcy Rules Committee, at its spring 2014 meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) Definitions. In these rules,

(1) "state" includes the District of Columbia and any United States commonwealth or territory; and

(2) [unless otherwise provided] a reference to information in written form includes electronically stored information.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

Rule 1(b) is amended to provide that a reference to information in written form [presumptively] includes electronically stored information. *Cf.* Federal Rule of Evidence 101(b)(6) (providing a substantially similar definition).

II. Rule 25: electronic filing and service and proof of electronic service

Appellate Rule 25(a)(2)(D) currently authorizes the adoption of local rules mandating electronic filing, subject to reasonable exceptions. The Appellate Rules do not currently authorize local rules to require the use of electronic service; instead, Appellate Rule 25(c)(1)(D) purports to allow such service only with the recipient's consent. In Part II.A, I discuss whether the time has come for the national Rules to mandate e-filing and permit e-service (subject to certain exceptions). Part II.B focuses on how the amended rule should treat pro se litigants. Part II.C discusses whether to amend Rule 25(d) to address proof of service when service is effected electronically through the court's transmission facilities. Part II.D sets out a combined sketch of changes discussed in the preceding parts.

Any project to revise the e-filing and e-service rules requires close coordination among the advisory committees. At its meeting this week, the Civil Rules Committee will consider proposals to make e-filing- and e-service-related changes in Civil Rule 5. I enclose a copy of the relevant proposals as set out in the Civil Rules Committee's spring 2015 agenda book. I also enclose copies of supplemental materials prepared by Professors Cooper, Beale, and King addressing the topic of filings by pro se litigants.

A. Mandating e-filing and permitting e-service

A national rule mandating e-filing would need to have exceptions for local rules that require or permit paper filing, and should also – as a safety valve – include an exception for "good cause." Similar exceptions would be necessary in a national rule permitting e-service. Currently, all thirteen circuits set a presumptive requirement that all attorney filers file electronically but permit exemptions on a showing of sufficient justification. Some circuits bar pro se litigants from using CM/ECF.[8] At least three circuits authorize (but do not require) pro se litigants to use CM/ECF. Still other circuits authorize pro se litigants to seek court permission to use CM/ECF; in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants. Even when a filer is generally required to use CM/ECF, local provisions sometimes require particular types of filings to be made in paper form and sometimes permit other types of filings to be made in paper form. Currently, all thirteen circuits have local provisions stating that registration for CM/ECF constitutes consent to electronic service, which typically would mean service by means of the notice of docket activity (NDA) generated by CM/ECF.

How would adoption of such a proposal – as part of the Appellate Rules – change practice in the courts of appeals? In a case where all parties are represented by counsel, it seems unlikely to change much. All the circuits currently require attorneys to use CM/ECF, and thus they also require attorneys to "consent" to electronic service by means of the notice of docket activity. The "good cause" exemption would roughly capture the contours of the exemptions provided in current local circuit rules. Authorizing local rules to permit or require additional exemptions would allow the circuits to continue (if they choose) to treat pro se litigants (or a subset of pro se litigants) differently for purposes of electronic filing and service, and would also allow the circuits to continue requiring or permitting non-CM/ECF filing and service in specific instances. In fact, such amendments might capture most or all of the benefits that would flow from adoption of part (b) of the template discussed in Part I, while avoiding a number of drafting difficulties and possible unintended consequences.

Provisions requiring e-filing and permitting e-service, subject to local-rule and good-cause exceptions, were sketched in the initial set of materials in the Civil Rules Committee's agenda book. Subsequently, however, concerns expressed by the Criminal Rules Committee led to the development of an alternative approach designed to address more specifically the treatment of pro se litigants.

B. Pro se litigants

Special concerns arise with respect to electronic filing by, or electronic service on, pro se litigants. In this part, I discuss two different sets of concerns. One set of concerns has been voiced by the Criminal Rules Committee, which would prefer that any

[8] Detail on the local circuit provisions is set out in my October 3, 2014 memorandum on this topic, which was included in the Committee's fall 2014 agenda book.

national rule requiring electronic filing explicitly exempt pro se criminal defendants.[9] A different concern has been voiced by Robert M. Miller, Ph.D., a pro se litigant who reports that the Federal Circuit's refusal to permit him to file electronically imposed financial costs (of printing, copying, and mailing) and increased the risk of untimely filing (due to "unfor[e]seeable problems at the copy store or delivery service").[10]

Professors Beale and King explain that

> [t]he Criminal Rules Committee's concerns can be grouped into three somewhat overlapping categories: (1) doubts about whether the CM/ECF system itself is ready for the challenges that pro se filing access will raise (including but not limited to pro se filers accused of crime or in custody); (2) constitutional concerns about creating barriers to paper filing for pro se filers accused of crime or in custody; and (3) the concern that most districts will have to change their local rules to accommodate any new rule mandating e-filing for all pro se filers absent a showing of good cause or a local rule exemption.

I find these concerns persuasive, though the need for explicit mention of pro se litigants may not be as great in Appellate Rule 25 as it may be in the rules that govern filings in the district court. An exemption based on a circuit's local rules might well suffice to address issues at the appellate level, given the likelihood that all of the thirteen circuits would either maintain or adopt local rules that exempt pro se litigants from electronic filing and service. All thirteen circuits currently have local provisions that, in effect, exempt pro se litigants from any requirement of using CM/ECF. Some of those circuit provisions, carried forward without change, would also exempt pro se litigants from an e-filing requirement that included a local-rule exemption; this would be true, for example, of local circuit rules that bar pro se litigants from using CM/ECF[11] and local circuit rules that permit pro se litigants to use CM/ECF or not as they choose.[12] Other

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[9] I enclose a March 26, 2015 memo from Professors Beale and King summarizing the Committee's concerns.

[10] I enclose Dr. Miller's submission.

[11] *See* Sixth Circuit Rule 25(b)(2)(A) ("The following must be filed in paper format: .... A document filed by a party not represented by counsel."); Seventh Circuit Rule 25(b) (Seventh Circuit Rule 25(a), which requires electronic filing and service, "does not apply to documents submitted by unrepresented litigants who are not themselves lawyers. Nor may documents be served electronically on unrepresented parties who are not lawyers. Filing by, and service on, these unrepresented litigants must be accomplished by paper copies ....").

[12] *See, e.g.*, Third Circuit Local Appellate Rule 25.1(c) ("Litigants proceeding pro se may, but are not required, to file documents electronically."); Third Circuit Local Appellate Rule 31.1(b)(5) ("Litigants proceeding pro se need not file an electronic brief."); Third Circuit Local Appellate Rule 113.2(b) ("A party to a pending civil case who is not represented by an attorney may, but is not required to, register as a Filing User in the electronic filing system solely for purposes of that case."); Eighth Circuit Rule 25A(a) ("Use of the CM/ECF system ... is voluntary for all pro se litigants proceeding

circuits might need to amend their local rules in order to maintain the status quo (*i.e.*, to maintain the categorical exemption of pro se litigants from e-filing and e-service requirements); this would be true if the current provision exempting pro se litigants is in something other than a local rule, such as a circuit guide or administrative order concerning electronic filing.[13] It might also be true if the current local circuit provision focuses on when pro se litigants *are permitted* to use CM/ECF rather than on *exempting* them from CM/ECF;[14] though such provisions should be read to provide an exemption whenever authorization to use CM/ECF has not been granted to a particular pro se litigant, it would seem preferable for the local rule to create an explicit exemption.

To ensure that CM/ECF participation by pro se litigants continues to be voluntary under an amended Rule 25, there would seem to be two ways to proceed. One would be

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without counsel."); Ninth Circuit Rule 25-5(a)("Use of the Appellate ECF system is voluntary for all parties proceeding without counsel.").

[13] *See, e.g.*, First Circuit CM/ECF Rules Preamble (administrative order) ("[U]se of the electronic filing system is mandatory for all attorneys filing in this court, unless they are granted an exemption, and is voluntary for all non-incarcerated pro se litigants"); First Circuit CM/ECF Rule 2 (administrative order) ("A non-incarcerated party to a pending case who is not represented by an attorney may, but is not required to, register as an ECF Filer for purposes of that case."); Tenth Circuit CM/ECF Manual Section II.A.2 ("Pro se litigants may continue to file documents conventionally (i.e., in hard copy form). A pro se litigant may, however, request permission to file documents electronically in an individual appeal or proceeding."); *id.* Section II.B.2 ("Pro se litigants are not required to file documents electronically and generally do not file via ECF."); Eleventh Circuit Guide to Electronic Filing Sections 4.5(1) and 4.6 (unrepresented non-attorney parties must file in paper form and the Clerk will scan the filings and place them in the ECF system); Federal Circuit Rule ECF-2(B) (administrative order) ("A party to a pending case who is not represented by an attorney will not be permitted to register as an ECF filer."); Federal Circuit Rule ECF-8(A) (administrative order) (clerk will scan paper filings and place them in CM/ECF).

See also D.C. Circuit Rule ECF-2(B) (administrative order) ("At the discretion of the court, a party to a pending civil case who is not represented by an attorney may be permitted to register as an ECF filer solely for purposes of that case."); D.C. Circuit Rule ECF-8(A) (administrative order) ("A party proceeding pro se must file documents in paper form with the clerk and must be served with documents in paper form, unless the pro se party has been permitted to register as an ECF filer for that case.").

[14] *See* Second Circuit Rule 25.1(b)(3) ("A pro se party who wishes to file electronically must seek permission from the court by filing the court's CM/ECF Pro Se Filing User Request Form available on the court's website."); Fourth Circuit Rule 25(a)(2) ("If permitted by the Court, a party to a pending civil case who is not represented by an attorney may register as a filing user of the Court's CM/ECF system solely for purposes of that case"); Fifth Circuit Rule 25.2.1 ("Counsel must register as Filing Users under Rule 25.2.3 ... , unless excused for good cause. Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize."). *See also* D.C. Circuit Rule ECF-2(B) (administrative order); D.C. Circuit Rule ECF-8(A) (administrative order).

to consider writing an exemption for pro se litigants into the text of the rule. This would be particularly desirable if the Civil Rules Committee votes to take that approach as well. At the Civil Rules Committee's meeting later this week, the Committee will have before it two alternative versions of the proposed revisions to Civil Rule 5(d)(3). The second version, set out in a supplement to the Civil Rules Committee's agenda materials, would categorically exempt pro se litigants from the e-filing provision. That approach would ensure that pro se litigants qualify categorically for exemption in every circuit, without the need for amendments in any local circuit rules.

On the other hand, if in future the CM/ECF technology becomes so readily accessible that it is undesirable to have a blanket exemption for all pro se litigants, the Rule text would require revision. Moreover, if the Civil Rules Committee were to decide not to adopt a categorical exemption for pro se litigants, that would remove some of the uniformity-based incentive for including a categorical exemption in Appellate Rule 25. Another way to address the concern about pro se filers would be to inquire of each circuit whether it would be inclined to adopt (or maintain) a local rule exempting all pro se filers if Rule 25 were to be amended to adopt a national e-filing requirement. If, as I suspect, all circuits would adopt or carry forward such a local rule, then the omission of an explicit categorical exemption in Rule 25 would seem innocuous. (This option seems much more practicable for the Appellate Rules than for the Civil and Criminal Rules, because monitoring local rules in thirteen circuits is much more practicable than monitoring local rules in 94 federal districts.)

In addition to determining whether Rule 25 should presumptively *require* e-filing by pro se litigants, the Committee has now been asked to determine whether Rule 25 should *explicitly authorize* e-filing by pro se litigants. Dr. Miller, as noted above, argues "that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar." As Dr. Miller observes, the Ninth Circuit currently takes this approach; so do the Third and Eighth Circuits.[15] But, as he also notes, the Federal Circuit bars pro se litigants from using CM/ECF;[16] so do the Sixth, Seventh, and Eleventh Circuits.[17] Still other circuits authorize pro se litigants to seek court permission to use CM/ECF;[18] in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants.[19]

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[15] *See supra* note 22.

[16] *See supra* note 23.

[17] *See supra* notes 21 and 23.

[18] *See* D.C. Circuit Rule ECF-2(B); D.C. Circuit Rule ECF-8(A); Second Circuit Rule 25.1(b)(3); Fourth Circuit Rule 25(a)(2); Tenth Circuit CM/ECF Manual Sections II.A.2 and II.B.2.

[19] *See* First Circuit CM/ECF Rules Preamble (electronic filing is "voluntary for all non-incarcerated pro se litigants"); First Circuit CM/ECF Rule 2 (same); Fifth Circuit Rules 25.2.1 and 25.2.3 ("[n]on-incarcerated pro se litigants" in civil cases may seek permission to register for CM/ECF).

In addressing Dr. Miller's suggestion, the question for the Committee is whether current circumstances justify a national rule presumptively requiring all circuits to permit pro se litigants to use CM/ECF. The variation in local circuit approaches suggests that practices are continuing to evolve. The Committee would need to investigate the reasons why the majority of circuits do not presumptively permit use of CM/ECF by pro se litigants. The Committee should also consider whether filings by incarcerated pro se litigants pose special issues. The time may not be ripe for a national rule that would override a particular circuit's decision not to make CM/ECF available to all pro se litigants. Accordingly, the sketch in Part II.D adopts the approach shown in Professor Cooper's supplemental document – namely, it states that a pro se litigant may e-file "only if permitted by local rule or by court order."

C. Proof of service

It also seems worthwhile to consider amending Appellate Rule 25(d), which requires that a paper presented for filing contain either "an acknowledgment of service" or "proof of service." The question is whether Rule 25(d) could be revised so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity (NDA) generated by CM/ECF. Although twelve of the thirteen circuits have local provisions that make clear that the NDA does not replace the certificate of service, Michael Gans has explained that these provisions likely arose from an assumption that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. The Second Circuit now has a local provision indicating that filling out the "service" section in CM/ECF constitutes compliance with Appellate Rule 25(d)'s requirement for a certificate of service.

Mr. Gans reported that majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF – though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF.[20] On the other hand, a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, as Mr. Gans points out, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred.

D. A sketch of possible amendments to Appellate Rule 25

The sketch below illustrates the possible amendments to Rule 25 concerning electronic filing and service and proof of electronic service. To present electronic filing as the presumptive choice, it seems useful to restructure Rule 25(a)(2) into two new

[20] I enclose Mr. Gans's October 14, 2014 letter.

subdivisions – a new Rule 25(a)(2) addressing filing methods, and a new Rule 25(a)(3) addressing timeliness issues for some filing methods. This change requires re-numbering of the rest of Rule 25(a), which I realize is not optimal. Westlaw searches indicate that there have not been many citations to the precise subdivision numbers 25(a)(3), 25(a)(4), and 25(a)(5).[21] However, present Rules 25(a)(2)(A), (a)(2)(B) and (a)(2)(C) have been cited with greater frequency,[22] and thus re-numbering them could impose a cost on researchers.

The sketch below diverges from the proposed amendments to Civil Rule 5 with respect to the treatment of electronic service. Proposed Civil Rule 5(b)(2)(E), as set out in the Civil Rules Committee's agenda materials, would presumptively authorize service "by electronic means" without limitation to service through the court's transmission facilities. In the current electronic-service rules, the lack of a definition of "electronic means" works, because the rule purports to require consent, and the consent would establish the nature of the electronic means (for example, a litigant "consents" to service by means of the court's transmission facilities when he or she registers for CM/ECF). Once the requirement of consent is removed, it seems advisable to specify the type of electronic means. In the Civil Rules, different considerations may apply because it may be desirable, for example, to exchange discovery materials by email rather than through the court's transmission facilities. In the Appellate Rules, service and filing are more closely congruent (*i.e.*, it is likely that anything being served is also being filed), so it would seem to make sense, in Appellate Rule 25, to link the presumptive-electronic-service provision to the presumptive-electronic-filing provision. The sketch below does this by authorizing service through the court's transmission facilities on anyone required by Rule 25(a)(2)(A) to file electronically, and by retaining the consent provision (in a new subdivision) as to any recipient who is not required to file electronically and as to any electronic service other than through the court's transmission facilities. This has the further benefit of addressing the issue of electronic service on or by pro se litigants. A pro se recipient could be served electronically only if the pro se litigant consents in writing. A court of appeals that permits such a litigant to file electronically can of course require such consent as a condition of the permission to file electronically. A pro se litigant who is not participating in CM/ECF can serve another party electronically – for example, by email – if the other party consents in writing.

A few conforming amendments would be necessary or appropriate if Rule 25 were to be amended as noted below. It would be necessary to amend Rule 26(a)(4)(C)'s cross-references to Rules 25(a)(2)(B) and 25(a)(2)(C). It would be desirable to amend Rule 39(d)(1), which includes a requirement of proof of service that seems redundant in

[21] A search in the CTA database for "25(a)(3)" turned up no relevant results; a search in the same database for "25(a)(4)" turned up one relevant result; and a search in the same database for "25(a)(5)" turned up seven relevant results.

[22] A search in the CTA database for "'25(a)(2)(A)' /50 clerk" returned 33 results. A search for "'25(a)(2)(B)' /50 (brief appendix)" returned seven results. A search for "'25(a)(2)(C)' /50 (inmate prison jail institution)" returned 27 results.

light of Rule 25(d).[23] Review of Rule 26(a)(4)(C)'s cross-references discloses a separate issue for which I must take the blame: Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been, but was not, updated in 2013 to refer to "filing by mail under Rule 13(a)(2)."[24] That amendment is sketched here but is on the Committee's agenda as a separate item;[25] it should be adopted on an expedited track whether or not the Committee proceeds with the full package set out here.

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method; Signing. ~~and Timeliness. (A) In general.~~

(A) All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.

(C) The act of electronic filing constitutes the signature of the person who makes the filing. A [paper] filed electronically constitutes a

[23] Other provisions that require proof of service can be found in Appellate Rules 5(a)(1), 21(a)(1), and 21(c). Those provisions, however, are not redundant, because they specify the parties on whom service must be made. See Rule 5(a)(1) ("all other parties to the district-court action"); Rule 21(a)(1) ("all parties to the proceeding in the trial court"); Rule 21(c) ("the respondents"). Compare Rule 25(b) (requiring service of all papers on "the other parties to the appeal or review").

[24] In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a), and a new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added.

[25] *See* the memorandum elsewhere in this agenda book concerning Item No. 15-AP-B.

written [paper] for purposes of these rules.[26] ~~Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.~~

(3) Filing: Timeliness of Certain Methods. Where paper filing is required or allowed:

(A) By mail. Filing by mail [must be addressed to the clerk and][27] is not timely unless the clerk receives the papers within the time fixed for filing.

(B) A brief or appendix. A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) Inmate filing.[28] A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system

[26] Professor Capra has observed that now that the term "paper filing" is to be introduced into the Rule, it may be preferable to avoid placing the noun "paper" in close proximity to the adverb "electronically." One possible way to address this concern would be to change "paper" to "document" in this sentence. However, Professor Cooper notes that the use of "paper" in proposed Civil Rule 5 dovetails with Civil Rule 11, which refers to a pleading, written motion, "and other paper" but not to a "document."

[27] The bracketed language is carried forward from current Rule 25(a)(2)(A) ("Filing may be accomplished by mail addressed to the clerk ...."). I am not sure whether the bracketed language is necessary; after all, common sense would indicate that the way to ensure that the filing reaches the clerk is to address it to the clerk. On the other hand, perhaps the concern is that neophytes might otherwise address their filings to a judge of the court.

[28] The pending proposal to amend Rule 25(a)(2)(C) is discussed elsewhere in the agenda book. Adoption of that proposal would not affect the proposal discussed in this memo.

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.

~~**(D) Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

~~**(3)**~~ **(4) Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

~~**(4)**~~ **(5) Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

~~**(5)**~~ **(6) Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed

by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) on a [person] [party][29] who is subject to Rule 25(a)(2)(A)'s electronic-filing requirement, by electronic means through the court's transmission facilities; or~~, if the party being served consents in writing~~

(E) if electronic service is not authorized under Rule 25(c)(1)(D), by electronic means if the [person] [party] being served consents in writing.

~~(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).~~

[29] Current Rule 25(c)(1)(D) uses "party." The proposed revised Rule 25(a)(2) uses "person." I prefer "person" because there might be situations where service is made by or on someone not a party. However, on the theory of "if it ain't broke, don't fix it," I do not propose altering the references to "parties" in Rule 25(b).

~~(3)~~ (2) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

~~(4)~~ (3) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) ~~A paper presented for filing must contain either of the following~~ Proof of service consists of:

(A) an acknowledgment of service by the person served; ~~or~~

(B) ~~proof of service consisting of~~ a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service~~.~~; or

(C) as to any [person] [party] served through the court's transmission facilities, a notice of electronic filing.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule ~~25(a)(2)(B)~~ 25(a)(3)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service – other than under Rule 25(d)(1)(C) – must ~~may~~ appear on or be affixed to ~~the~~ any papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Subdivision (a)(2) is split into two new subdivisions (a)(2) and (a)(3). New subdivision (a)(2) sets a default rule that electronic filing is mandatory for represented litigants (subject to exceptions). Subdivision (a)(3) discusses timeliness of filings made non-electronically. Existing subdivisions (a)(3) through (a)(5) are re-numbered (a)(4) through (a)(6).

Subdivision (a)(2). Electronic filing has matured. Currently, all thirteen circuits set a presumptive requirement that all attorney filers file electronically but permit exemptions on a showing of sufficient justification. Rule 25(a) is now amended to make electronic filing presumptively mandatory, except for filings made by a person proceeding without an attorney. However, the courts of appeals must permit paper filings for good cause, and are free to have local rules that permit or require paper filings for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules. At present, some circuits bar pro se litigants from using CM/ECF. At least three circuits authorize (but do not require) pro se litigants to use CM/ECF. Still other circuits authorize pro se litigants to seek court permission to use CM/ECF; in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign. The amended rule applies directly to the filer's signature. It does not address others' signatures. Some filings include papers signed by someone other than the filer. Examples include affidavits and stipulations. Provision for these

signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The amended rule does not address verification by electronic means. Verification is mentioned only once in the Appellate Rules, in Rule 39(d)(1)'s requirement of "an itemized and verified bill of costs." The special policies that justify a verification requirement suggest that it is better to defer a national rule concerning electronic verification pending further experience. Local rules may address verification by electronic means.]

Subdivision (a)(3). The timeliness rules from former subdivision (a)(2) – for filings by mail, briefs and appendices, and inmate filings – are now collected in new subdivision (a)(3). No mention is made of the other method of paper filing – in person at the Circuit Clerk's office – because timeliness for in-person paper filings is straightforward. *See* Appellate Rule 26(a)(4)(D).

Subdivisions (c)(1)(D) and (E). Provision for electronic service was first made when electronic communication was not as widespread or as reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished. The amendment makes electronic service through the court's transmission facility the standard whenever the recipient is a person required, under Rule 25(a)(2)(A), to file electronically. But the Rule also recognizes that electronic service is not always appropriate. When service is made on a litigant who is not required by Rule 25(a)(2)(A) to file electronically – or when service is not made through the court's transmission facilities – electronic service requires the recipient's written consent.

Subdivision (d). The amendment provides that a notice of electronic filing generated by the court's CM/ECF system constitutes proof of service on any party served through the court's transmission facilities. Proof of service is now defined as (1) an acknowledgment of service by the party served; (2) a statement certifying the required details of service, or (3) for parties served through the court's electronic transmission facilities, a notice of electronic filing. Where either of the first two kinds of proof of service is employed, proof of service must be included with the filing; no such requirement applies where the third kind of proof of service is employed, because it is the electronic filing itself that generates the notice of electronic filing.

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)~~ 25(a)(3)(B), and 25(a)(3)(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). References to Rules 25(a)(2)(B) and 25(a)(2)(C) are revised to refer to Rules 25(a)(3)(B) and 25(a)(3)(C) in light of a simultaneous amendment to Rule 25(a). 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 amendments to subdivision (a)(4)(C) are technical and no substantive change is intended.

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk~~, with proof of service,~~ an itemized and verified bill of costs.

* * * * *

Committee Note

Subdivision (d)(1). Subdivision (d)(1)'s reference to proof of service is deleted as redundant in light of Rule 25(b) (requiring service of all papers that are filed) and 25(d) (defining and requiring proof of service). The amendment is technical and no substantive change is intended.

III. Conclusion

The time seems ripe for the Appellate Rules Committee to consider developing proposed amendments that would further adjust the Appellate Rules to current CM/ECF practice. The proposed amendments to Rule 25 discussed in Part II of the memo will, most likely, require further refinement. As noted in Part II.C, the approach to e-filing by and e-service on pro se litigants requires particular attention. The decisions to be taken by the Civil Rules Committee at its upcoming meeting will be particularly informative.

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TAB 7A(1)

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Electronic Filing and Service

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information.

Earlier work has considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter -- the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples,

as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing.

The draft rules set out below do address the signature of an authorized e-filer. The alternative drafts of Rule 5(d)(3) deserve careful consideration.

The proposals set out below are advanced for consideration of a recommendation that they be published for comment in August, 2015. They cover e-filing, e-service, and recognizing a notice of electronic filing as proof of service.

e-Filing and Service; NEF as Proof of Service

Introductory Notes

The draft Committee Notes are new. They are designed in part to identify issues that may prompt further discussion and changes in the draft rule texts.

e-Filing

To be complete, alternative versions of this proposal have been carried forward. But as noted with Alternative 2, at least most participants favor Alternative 2. Discussion may well begin with Alternative 2 unless Alternative 1 wins new fans.

Alternative 1

Alternative 2 has become the preferred version of at least most of the reporters and the Civil Rules Committee members who have participated in the subcommittee work.

(3) *Electronic Filing*~~*,*~~ *and Signing*~~*, or Verification*~~*.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made~~, signed, or verified~~[1] by electronic means

[1] Deletion of verification by electronic means seems a conservative choice, but may be wrong. Is there any experience with local rules that might help? Verification is required for the complaint in a derivative action, Rule 23.1, a petition to perpetuate testimony, Rule 27(a), and is allowed as an alternative to an affidavit to support a motion for a temporary restraining order, Rule 65(b)(1)(A). Verification or an affidavit may be required in receivership proceedings, Rule 66. Supplemental Rule B(1)(A) requires a verified complaint to support attachment in an in personam action in admiralty. Rule C(2) requires verification of the complaint in an in rem action. Those are the only rules

that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons. [Many courts now have local rules that provide for paper filing by pro se litigants, and may carry those rules forward.][2]

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.[3]

The amended rule applies directly to the filer's signature. It does not address others' signatures. Many filings include papers

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provisions that come to mind at the moment. Statutes also may require verification. There may be circumstances in which a federal court will adopt a state-law verification requirement, although that seems uncertain.

If verification is accomplished by the filer, the signature would have to be accompanied by some sort of statement that the paper is verified. Perhaps it is better, after all, to retain "verified" in rule text?

[2] Examples could be given of good cause, or other exceptions, but this may be a case where a terse Note is better.

[3] Civil Rule 11(a) provides that every pleading, written motion, and other paper must be signed. Rule 5(d)(3) already provides that a paper filed electronically in accordance with a local rule is a written paper for purposes of the Civil Rules. It seems useful to carry this provision forward in this place, not Rule 11, omitting only the reference to local rules.

signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. {Local rules may address verification by electronic means.**}]**

Civil Rule 5(d)(3)

(d) Filing. * * *

Alternative 2

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made and~~,~~ signed~~, or verified~~ by electronic means that are consistent with any technical standards ~~or standards of form~~[4] established by the Judicial Conference of the United States. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~ But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. [Many courts now have local rules that provide for paper filing by pro se litigants, and may carry those rules forward. And a local rule may allow or require paper filing for other reasons.]

The means of electronic signing are left open; local rules can specify appropriate means. If the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

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[4] This phrase likely should be omitted. It was included to recognize that Judicial Conference standards might go beyond the electronic technology to address such issues as whether a machine signature should be preceded by /s/ or some such (L.S.? locus sigilli?).

The amended rule applies directly to the filer's signature.[5] It does not address others' signatures. Many filings include papers signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, as many courts do now, unless the Judicial Conference adopts a preemptive national standard.[6]

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience{; local rules may provide useful experience}.**]**[7]

e-Service

Civil Rule 5(b)(2)(E)

(b) Service: How Made. * * *

(2) Service in General. A paper is served <u>on the person to be served</u>[8] under this rule by:

(A) handing it to the person * * *

(E) sending it by electronic means ~~if the person consented in writing~~, <u>unless the person shows good cause to be exempted from such service or is exempted by local rule</u>. ~~--in which event~~ <u>Electronic</u> service is complete upon transmission, but is not effective if the

---

[5] Should this proposition be asserted more directly in rule text? E.g., "must be made and signed <u>by the filer</u>"?

[6] Alternative 1 above avoids the questions raised by attempting to address non-filer signatures in a Committee Note to a rule that does not directly address the question.

[7] See footnote 1.

[8] This provision is included to address the question that arises when readers confront "the person" in (E). The stylists chose to use "the person" throughout (A), (B), (C), (D), (E), and (F). We cannot simply add "the person <u>to be served</u>" in (E) and leave the others untouched.

Adding "to be served" to all the other subparagraphs is awkward because "the person's" appears in (B)(i), (B)(ii), and (C).

But it works to add "on the person to be served" in the introduction. Do we want to second-guess the style choice?

serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished. The amendment makes electronic service the standard. But it also recognizes that electronic service is not always effective. Some litigants lack access to suitable electronic devices. Exceptions are available on showing good cause in a particular case. And local rules may establish other exceptions that reflect local experience.

Notice of Filing as Proof of Service

Civil Rule 5(d)(1)

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served ~~-- together with a certificate of service --~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities [unless the serving party learns that it did not reach the party to be served]. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Rule 5(d)(1) addresses the certificate of service only. It does not address electronic service or a failure of electronic

service.[9]

Discussion

Judge Harris has drafted a revision of this proposal that would provide uniform certificates of service across appellate, bankruptcy, and civil rules, and across the districts and circuits. He recognizes that since e-service has come to predominate in civil practice there may be less need for such provisions in the civil rules than in other sets of rules, but thinks the move toward uniformity would still be a good thing. His draft omits the underlined new material in the proposal set out above and substitutes this:

> When one or more parties are served in a manner other than through the court's transmission facilities, a certificate of service must be filed that specifies the following as to [those parties][all parties served in a manner other than through the court's transmission facilities]:
>
> (A) the date and manner of service;
>
> (B) the names of the persons served; and
>
> (C) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

Although there may be some fine-tuned drafting work to be done if such details are to be added to the rule, the central question is the perennial one: just how much detail should be provided in the national rules? The provision requiring a certificate of service was added to Rule 5 in 1991. The Committee Note explained that local rules generally had imposed the requirement, and observed that having "such information on file may be useful for many purposes." It observed that generally the certificate would

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[9] This brief sentence seems better than any attempt to explore what the person who attempted electronic service should do on learning that service failed. Information about the failure may be provided when the person to be served asks whether it will be receiving such a paper. More often, it will be provided when the attempted service is bounced back through the system. A study in the Southern District of Indiana found that most often the "bounceback" reflected failure of service on a secondary target, an assistant to the attorney or a paralegal, at the same time as the attorney was in fact served. There may be little point in requiring a renewed effort to serve a duplicate on the assistant, along with a certificate of service.

Alternatively, this paragraph could be dropped. Rule 5(b)(2)(E) addresses failure of electronic service. Why bother to state the obvious -- that proposed Rule 5(d)(1) does not?

state the date and manner of service, but that a party employing a private delivery service might not be able to specify the date of delivery. "In the latter circumstance, a specification of the date of transmission of the paper to the delivery service may be sufficient * * *." Has the time come to provide specifics that were not attempted then? The risk is always that details will prove incomplete or incorrect, either when adopted or eventually. One example: if service is made by electronic means outside the court's transmission facilities, is it enough to provide the e-address used to send the message? Or is it then important to add a provision for the party who later learns that the message did not go through?

Judge Solomon and Clerk Briggs, delegates to the all-committees subcommittee, report that their experience shows that adequate certificates of service are filed now. And it seems likely that as e-service expands to include more pro se litigants there will be fewer occasions for separate certificates. It well may be that there is no need to add this level of detail to the rule text.

This issue arises in connection with a proposal to publish for comment. It is not as important to achieve uniformity among the advisory committees as it is to achieve uniformity on the 3-added-days question in a rule that has been published and is moving toward a recommendation on adoption. But if the contents of the certificate are to be specified in the rule, it would be good to act in a way that leaves the way open to move toward uniform recommendations to the Standing Committee.

CIVIL RULES APRIL 2015 AGENDA SUPPLEMENT

Rule 5(d)(3): e-Filing

This memorandum supplements the materials on e-filing that appear at pages 212-215 of the agenda book for the Committee meeting on April 9-10, 2015.

The alternative sketch of Civil Rule 5(d)(3) that appears here was worked out in collaboration with representatives of the Criminal Rules Committee — the Committee Chair, Judge Raggi, Judges Feinerman and Lawson, and Reporters Beale and King. Professor Capra carried forward as Reporter Emeritus for the recently disbanded all-Committees Subcommittee on matters electronic.

Judge Oliver and Clerk Briggs represented the Civil Rules Committee in the conference call. Judge Campbell joins them in recommending that the Committee recommend publication of the revised Rule 5(d)(3) and Committee Note set out below.

First, a bit of background to explain the purposes of this alternative. Present Rule 5(d)(3) authorizes local rules that allow electronic filing, and provides that "[a] local rule may require electronic filing only if reasonable exceptions are allowed." Many local rules address e-filing by pro se litigants. A recent count by the Administrative Office found that 36 districts permit nonprisoner pro se litigants to request permission to e-file, while 48 districts do not permit nonprisoner pro se litigants to e-file. 59 districts explicitly bar pro se prisoners from e-filing. The Northern District of Texas requires pro se litigants to conventionally file the complaint, but permits e-filing of later papers. Two districts allow pro se prisoners to e-file through a special program. (Less formal programs also are experimenting with e-filing by pro se prisoners.)

Past discussions of the proposal to make e-filing mandatory, with exceptions, devoted substantial attention to pro se litigants. The potential difficulties that will be encountered by pro se litigants, and that in turn will be visited on courts and other parties, were recognized. But two related considerations counseled against including an explicit exception for pro se litigants in rule text. The fundamental belief was that e-filing can be as useful for a pro se litigant as for other litigants, substantially reducing costs and expediting the filing process. A subsidiary belief was that an explicit rule provision might need to be revisited soon in response to rapid advances in the availability of electronic means for filing and in the sophistication needed to engage in e-filing. The drafts in the agenda book leave the burden of providing exceptions or exclusions on the local rules process: "But paper filing must be allowed for good cause, and may be *required* or allowed for other reasons by local rule."

The Criminal Rules Committee discussed these issues and studied the Civil Rules drafts at its March meeting. Acting on a

thorough report by a subcommittee, and on advice of their district clerk liaison, they were concerned that serious problems would frequently result from e-filing by criminal defendants and by incarcerated persons seeking relief under the Rules Governing § 2254 and § 2255 proceedings. The Appendix to this memorandum is a memorandum prepared by Professors Beale and King outlining those problems. They fear that these problems are so serious and will occur often enough that a national rule allowing exclusions or exemptions only according to local rules will impose a substantial burden on local rulemaking in all districts.

It well may be that problems with e-filing by pro se litigants will arise more frequently, and be more severe, in criminal prosecutions and in proceedings for post-judgment relief than in civil actions. These litigants often experience severe disadvantages, among them lack of ready (or even any) access to electronic systems while incarcerated. It may be particularly difficult to provide them the training needed to navigate the CM/ECF system. That prospect could be relied on to support adoption of different provisions in the Criminal Rules and the Civil Rules. Although uniformity among all sets of rules is desirable when addressing common topics, differences in context often justify differences in rule text.

The considerations that underlie the alternative Civil Rules proposals in the agenda book, however, are not compelling. The burden placed on local rules can be reversed, without great cost and indeed with potential benefit. Instead of requiring e-filing by pro se litigants absent excuse or exclusion by local rule, the national rule can exclude pro se litigants from e-filing unless authorized by local rule. That approach is reflected in the alternative draft set out here. It can be supported by noting that it will build directly on present local rules, which take different approaches. Courts that now allow e-filing by pro se litigants in some circumstances may come to broaden the practice if experience shows that will work. Those that now exclude it may come to allow it, moving in response to experience in other districts and to local circumstances. The national rule might come to be revised eventually as e-filing by pro se litigants becomes a general practice, but it may be urged that revision is not likely to be needed in the next few — or even several — years.

The revised approach can be adopted with either of the alternative approaches to e-signatures reflected in the agenda book. This version works with the "constitutes the signature" approach:

(3) *Electronic Filing and Signing.*

(A) All filings, except those made by a person

proceeding without an attorney,[1] must be made[2] by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.

(C) The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically is a written paper for purposes of these rules.

Over-and Underline Version

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~. ~~A court may, by local rule, allow papers to be filed~~*

(A) All filings, except those made by a person proceeding without an attorney, must be made~~, signed, or verified~~ by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

(B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.

---

[1] Different ways of referring to pro se litigants are possible. One obvious alternative, using fewer words, would be "except those made by a person proceeding pro se." Or "a person not represented by an attorney." A more positive approach might be "All filings made by an attorney must * * *." One reason for "a person proceeding without an attorney," as shown in text, is that it seems to speak to a situation addressed in one circuit rule: an attorney who appears pro se as a party. The attorney appearing on his own behalf may not be admitted to practice in the district court, or indeed may not be admitted to practice anywhere. At least some participants believe it is better to treat this attorney as any other pro se party.

[2] "and signed" could be included here if that approach seems the better approach to the e-signature question.

(C) The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and increasing familiarity of most people with electronic communication.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.[3]

The amended rule applies directly to the filer's signature. It does not address others' signatures. Many filings include papers

[3] Civil Rule 11(a) provides that every pleading, written motion, and other paper must be signed. Rule 5(d)(3) already provides that a paper filed electronically in accordance with a local rule is a written paper for purposes of the Civil Rules. It seems useful to carry this provision forward in this place, not Rule 11, omitting only the reference to local rules.

signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. {Local rules may address verification by electronic means.**}]**

Rule 6(d) (3 added days) Committee Note

A suggestion by the Department of Justice to add language to the Committee Note for Rule 6(d) is quoted at page 191 in the agenda book. The agenda materials note that other advisory committees have shown interest in adding something along these lines to their Committee Notes.

Uniformity on this point is desirable. Without suggesting that the Committee Note should be expanded, a shorter statement may suffice. Something like this:

> The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. [alternative 1: It is expected that courts will allow appropriate extensions when warranted.] [alternative 2: Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances.]

Language like this not only reduces the number of words but also — particularly in alternative 2 — is less directive.

TO: **Civil Rules Committee**
FROM: **Sara Beale and Nancy King, Reporters for the Criminal Rules Committee**
RE: **E-filing rules for pro se litigants**
DATE: **March 26, 2015**

At its spring meeting last week, the Criminal Rules Committee discussed the e-filing proposal that was on the agenda for the spring meeting of the Civil Rules Committee, and whether a parallel change to the Criminal Rules would be desirable.

The Committee asked the reporters to relate its concerns about the proposed change to Professor Cooper, and to request that the Civil Rules Committee consider revising the proposed amendment to eliminate any requirement that pro se filers must e-file (absent a local rule or showing of good cause). Alternatively, if the Civil Rules Committee recommends a mandatory e-filing rule that would encompass pro se litigants, the Criminal Rules Committee would like time to prepare a proposal for amendments to the Criminal Rules and to the 2254 and 2255 Rules that could be published at the same time.

Following an informal telephone conference, Professor Cooper suggested that a memorandum summarizing the concerns of the Criminal Rules Committee would assist the Civil Rules Committee in its consideration of the e-filing rule at its upcoming meeting. We have prepared this informal Reporters' Memo for that purpose, based on our memories of the discussion last week. Please note that although this memorandum has been reviewed by Judge Raggi and the chairs of the relevant subcommittee, it has not been approved by the Criminal Rules Committee.

The Relevance of the Civil Rule to the Criminal Rules Committee

Criminal Rule 49(d) provides that a paper must be "filed in a manner provided for in a civil action." Thus any change to Civil Rule 5(d) on e-filing would apply automatically in criminal cases when the civil rule amendment takes effect. In addition, any change to filing requirements in the Civil Rules will likely affect cases filed under Sections 2254 and 2255, for which the Criminal Rules Committee traditionally has taken responsibility. Rule 12 of the Rules Governing Section 2254 Cases provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12 of the Rules Governing Section 2255 Proceedings states: "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."

Why Has the Criminal Rules Committee Requested a Carve-Out for Pro Se filers?

The Criminal Rules Committee's concerns can be grouped into three somewhat overlapping categories: (1) doubts about whether the CM/ECF system itself is ready for the challenges that pro se filing access will raise (including but not limited to pro se filers accused of

crime or in custody); (2) constitutional concerns about creating barriers to paper filing for pro se filers accused of crime or in custody; and (3) the concern that most districts will have to change their local rules to accommodate any new rule mandating e-filing for all pro se filers absent a showing of good cause or a local rule exemption.

(1) *Challenges of extending CM/ECF filing to pro se litigants*

The Criminal Rules Committee was concerned that courts lack experience allowing pro se litigants access to CM/ECF, a system designed for use by attorneys, who are bound by rules of professional conduct and who have received a legal education. Members were concerned that use of CM/ECF by pro se litigants was still in its experimental stages, and doubted whether it had been tested sufficiently to have addressed the following:

- Lack of training or resources for training for pro se filers, and the inability or unwillingness of pro se litigants to obtain or comply with training
- Increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers.
- Mistaken filings – filers without legal training selecting the wrong title for a filing (lawyers already do this, requiring quality control protocols by clerk staff), filing things multiple times, or failing to attach required documents or attaching the wrong thing.
- Pro se filers may view corrective changes of their filing choices by clerk staff as inappropriate or malicious (not an issue if filer does not make those choices and instead papers are scanned in by staff, because then staff is naming the document, etc.)
- PACER and automatic real-time case notification subscription services that would disseminate to the public confidential or inappropriate information included in filings immediately upon filing, before clerk's office staff can screen (if filed Friday eve may be days before staff can review), and once filed may require an order of court to seal or eliminate.
- Burdens or confusion for parties who must respond to mistaken or uncorrected filings
- Misappropriation of login and password information – by accident or intentional. Anyone can use a filer's login/pw, the system provides no way to identify whether access was by the person to whom it was issued or by someone else.
- Absence of control on abuse and mistakes that is provided by legal training and rules of professional responsibility – risk of multiple filings, filings in multiple cases (under the versions of CM/ECF now in place, a person who has the credentials to file in his own case may, without limitation, file in other cases in which he is not a litigant), denial of service attacks, introduction of malware or viruses into CM/ECF and PACER systems.

Additional concerns were raised about pro se criminal, 2254 or 2255 filers using CM/ECF, a practice that appears not to have been tested anywhere. Although members discussed the efforts of one district that had started a limited program allowing electronic filing by pro se 1983 plaintiffs in custody in some corrections facilities, the Committee members were not aware of a single district that has allowed electronic filing by a pro se criminal defendant in a criminal case, a pro se petitioner in a 2254 case, or a pro se applicant in a 2255 case. In addition

to all of the general concerns listed above for pro se filers, special concerns for these cases include:

- The possibility that a filing (in the filer's case or other cases once the filer has access to the system and can file anything in any case) might reveal confidential information about victims, witnesses, and cooperating defendants, and become immediately accessible.

- The inability of parties who are in custody to file electronically or receive electronic confirmations. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file or receive electronic confirmations. Even if some do have email access at one time, they often move from facility to facility, and in and out of custody. Committee members from various districts stated that the majority of incarcerated pro se filers in their districts would not have the ability to file electronically.

- The inability to file case-initiating documents without credit card information.

- The impact of e-filing rules on victims, law enforcement agents, and other third parties (e.g. asset owners) that file documents in criminal cases, individuals who may face similar (or different) challenges.

(2) *Constitutional concerns*

Second, in addition to the implementation concerns listed above, the Criminal Rules Committee believed that a carve-out for pro se filers would be advisable given the constitutional obligation to provide court access to prisoners and those accused of crime. The proposed amendment to the civil rule would effectively require pro se criminal defendants and pro se litigants in custody to e-file, unless they first demonstrated good cause to allow paper filing, or could point to a local rule, adopted prior to the effective date of the mandatory e-filing amendment, that permitted or required them to paper file. Members anticipated that no court would require a showing of good cause by those in custody or accused in order to avoid e-filing requirements, because of constitutional concerns. As noted in the next paragraph, members were not persuaded that existing local rules presently provide the express exemption from e-filing that pro se defendants and prisoners would need.

(3) *Reliance on local rules to exempt pro se filers, particularly those accused or in custody.*

The Criminal Committee's understanding was that most districts have not already passed local rules expressly requiring criminal and prisoner pro se litigants to use paper filing. (They haven't needed to - the current rules make paper filing the presumptive method unless local rule says otherwise.) The Criminal Rules Committee feared that adoption of the civil rule proposal would compel most districts to pass new local rules, prior to the effective date of the civil rule change, in order to continue their current practice. The Committee recognized that local rules could be adjusted to exempt from e-filing pro se criminal defendants and petitioners in habeas and 2255 cases, but there was a strong consensus that a national rule should not be adopted that

would require a revision of the local rules in the vast majority of districts. (A report on local e-filing rules for civil cases that was prepared for the Rules Office in 2013 suggests that even in *civil* cases - the report did not address local rules affecting the criminal, habeas, and 2255 cases the Committee was most concerned about -- very few districts would choose to permit pro-se prisoner e-filing. For example, of the 85 districts that had adopted local rules mandating e-filing in civil cases, all but one exempted all pro se litigants, and 59 districts explicitly barred pro se prisoners from e-filing in civil cases.)

The Criminal Committee's Request

For these reasons, the Criminal Rules Committee unanimously concluded that any presumptive e-filing rule should carve out pro se filers, at least those who are criminal defendants or in custody.

In the event the Civil Rules Committee decides that a presumptive e-filing rule that does not exempt pro se filers is appropriate for the Civil Rules, the Criminal Rules Committee wanted us to convey its hope that the Civil Rules Committee would coordinate the timing of such a change with the Criminal Rules Committee. Coordination might include a delay in publishing the proposed Civil Rule so that any proposed adjustments to the Criminal, habeas, and 2255 Rules could be drafted, and published at the same time as an amendment to the Civil Rule.

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October 14, 2014

Professor Catherine T. Struve
Reporter
Advisory Committee on the Federal Appellate Rules
University of Pennsylvania Law School

Re: Possible Amendments Relating to Electronic Filing - FRAP 25 and CM/ECF Proof of Service

Dear Professor Struve:

The October meeting materials include a section regarding the possible amendment of FRAP 25(d) to provide that no certificate of service be required when service is accomplished by means of a Notice of Docket Activity in CM/ECF. On October 3 you sent me an email suggesting that I survey the appellate clerks to ask them why their local rules continue to require a certificate of service in such instances. In response to your email, I sent the clerks the relevant sections of the meeting materials and surveyed them on their current practices, as well as their thoughts regarding amendment of FRAP 25(d).

With respect to the question of why the various local rules require a proof of service despite the fact that service is accomplished through the Notice of Docket Activity, the simple answer is that none of the clerks thought we could dispense with it in light of the national service rule. When I drafted the first set of standing orders and local rules for our circuit (we were the first appellate court to implement electronic filing), I consulted many district court local rules, as well as the district court model rules and FRAP, and I concluded that proof of service was a requirement. Many of the circuits looked to our standing orders and local rules as they drafted their procedures and reached the same conclusion (or adopted our provisions without further analysis of the question). The Second Circuit, being one of the last courts to implement CM/ECF, took a slightly different approach, indicating, as you point out at page 17 of the materials, that "filling out the 'service' section in CM/ECF constitutes compliance with Appellate Rule 25(d)'s requirement for a proof of service." The clerk of

the Second Circuit informs me that their local rule works without any problems.

When I surveyed the clerks regarding the amendment, their responses fell into two camps. The majority of clerks approve of the proposal to do away with a separate proof of service in those cases where all of the case participants are CM/ECF filers. In their experience, the requirement of a separate proof of service adds little value for the clerk's office or the case participants, causes confusion among counsel and creates extra work for the clerk's office as the proof of service is often omitted and must be obtained from counsel to complete the filing. These clerks note that each filer receives a Notice of Docket Activity at the time they make a filing and that the Notice of Docket Activity provides information about each case participant's CM/ECF or paper service status. Additionally, attorneys can use a standard CM/ECF report called "Attorney Service Preference Report" before they make a filing to ascertain every participants's CM/ECF or paper service status. So long as Rule25(d) continues to require filers to complete a proof of service when one or more of the participants must be served by traditional means, these clerks believe that the rule could be amended to eliminate the requirement of a proof of service when all case participants are CM/ECF filers.

A substantial minority of the clerks, while generally in favor of an amendment, believe, as your memo suggests, "that important values are served by continuing to require the certificate of service." These clerks point out that the proof of service requirement "forces the filing attorney to stop, look at the service list, and think about who may need to be served in paper." They believe that clerk's offices will have to check every filing in every case for proper service since the absence of a certificate of service does not establish that there are no non-CM/ECF filers in the case. They believe that the proof of service provides a starting point for the clerk's office's review of the service of the filing. They also point out that when a case is initially docketed the cast of participants may not be fully known or may include district court filers who have not registered to file in the appellate court (a separate process from becoming an authorized filer in the district court). In such instances, an attorney filer may mistakenly believe a case participant is a CM/ECF filer in the court of appeals when they are not, and the case participant may be inadvertently overlooked for filing and service. The proof of service in these instances gives the appellate court clerk's office important information about case participants when it is establishing the service list for the case and linking parties and attorneys at docketing.

My personal feeling is that it is time to eliminate this requirement for cases where all participants are CM/ECF filers. With or without a certificate of service, our offices must check every filing against the service list to make sure that service has been accomplished

for all case participants. While the certificate of service might be a useful starting point, other tools exist, such as the docket sheet, the Notice of Docket Activity and service reports, which we can and do use. If offices are not undertaking this review - and I gather from some of the responses that they are not - they should be. At case docketing a careful review of the lower court or agency file must be performed to determine the service list, and we do not rely on a Notice of Docket Activity to provide the necessary case participant information. The list of case participants changes frequently throughout the life of a case, and it is the clerk's responsibility to monitor the case and update that information on a timely basis.

I look forward to discussing this issue at the coming meeting. I hope this information is useful to you and the Committee members.

Sincerely,
Michael E. Gans
Clerk of Court

From: Catherine T Struve
To: Catherine T Struve
Subject: FW: Proposed change to Federal Circuit ECF rules
Date: Thursday, April 09, 2015 10:42:23 PM

To: Rules_Support@ao.uscourts.gov
Date: 03/09/2015 10:09 PM
Subject: Proposed change to Federal Circuit ECF rules

I, Robert M. Miller, am a petitioner for three cases before the US Court of Appeals for the Federal Circuit. I also have an appeal being heard by the Ninth Circuit.

The Ninth Circuit permitted me, a pro se appellant, to file briefs electronically. However, Federal Circuit rules currently prohibit pro se petitioners from doing so. I filed an unopposed motion to use Electronic Case Filing (ECF) for two of my cases at the Federal Circuit, and the Court denied both motions.

Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules, and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.

I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Respectfully submitted,

Robert M. Miller, Ph.D.

TAB 7B

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 13-AP-H

This item concerns possible amendments to Rule 41 that would (1) clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Part I of this memo summarizes the progress of the Committee's discussions through fall 2014. Part II discusses a proposal submitted to the Committee by Judge Richard C. Tallman and summarizes recent deliberations by the Rule 41 Subcommittee.[1] Part III sketches possible language for an amendment to Rule 41.

I. The Committee's initial discussion of possible amendments to Rule 41

Appellate Rule 41(b) provides that "[t]he 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," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

The Committee has been considering whether these rules warrant amendment in light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). A developing consensus supports amending Rule 41 to clarify that stays of the mandate under Rule 41(b) cannot occur through mere inaction and instead require entry of an order; I discuss this issue in Part I.A. The Committee has also discussed the possibility of amending Rule 41 to address the question of a court of appeals' authority to stay the mandate following denial of certiorari; I summarize that discussion in Part I.B.

[1] The Rule 41 Subcommittee includes Judge Taranto, Justice Eid, and Professor Barrett.

A. Clarifying that Rule 41(b) stays require an order

In *Bell*, the Supreme Court said that "[i]t is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction." 545 U.S. at 805. The Rule provides merely that "[t]he court may shorten or extend the time." The court of appeals in *Bell* purported to stay the issuance of the mandate after denial of certiorari without notifying the parties, and the State in that case proceeded to set an execution date in a capital case without realizing that the mandate never had issued. The Supreme Court assumed, *arguendo*, "that a court may stay the mandate without entering an order" before holding that the court of appeals abused its discretion.

The original version of the Rule stated that "[t]he mandate of the court shall issue 21 days after the entry of judgment *unless the time is shortened or enlarged by order*." The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b). As with all the restyling Committee Notes, the Note to Rule 41 states that most of the changes were "intended to be stylistic only." Both the Subcommittee and other members of the Committee have expressed support for amending Rule 41(b) to clarify that an order is required in order to extend the time for issuance of the mandate.

There are good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell*, the lack of notice was one of the factors that contributed to the Court's finding that staying the mandate was an abuse of discretion.[2] Requiring any stay of the mandate under Rule 41(b) to be accomplished by court order would address this problem. If an attorney receives a CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate, that will alert the attorney to the non-issuance of the mandate. It is also possible that requiring formal entry of a stay order would facilitate review of the court of appeals' decision to stay the mandate.[3]

Although a circuit could address this issue by local rule, the dearth of local provisions on point[4] suggests that local rulemaking on the topic is unlikely. Moreover,

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[2] *See Bell*, 545 U.S. at 804.

[3] *See Henry v. Ryan*, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[U]nless the en banc panel issues a formal stay of the mandate, our unorthodox actions might very well evade Supreme Court review. If the en banc panel issues such a stay, then Arizona could seek Supreme Court review of the stay. If it doesn't, then our failure to issue the mandate may escape review for an indeterminate period of time ....").

[4] For a rare example, see Eleventh Circuit IOP 6 accompanying Appellate Rule 35. That provision addresses instances when a judge directs the clerk to withhold the mandate during a poll with respect to sua sponte rehearing en banc. See Eleventh Circuit IOP 6 accompanying Eleventh Circuit Rule 35 ("If a petition for rehearing or a petition for

the importance of providing notice to litigants weighs in favor of applying this requirement in all the circuits. And it is difficult to conceive of local variations that would justify treating this question differently in different circuits.

Although it is not clear how often courts fail to issue mandates in the absence of a formal stay order, a notable example occurred in the Ninth Circuit in 2014. In *Henry v. Ryan*, a capital habeas case, the en banc court entered an order that had the effect of staying the mandate in *Henry* pending the court of appeals' en banc rehearing proceeding in a different case. The opinions concurring in and dissenting from this order disagree on several points – one of which was whether the court's failure to issue the *Henry* mandate in due course after the denial of panel rehearing and rehearing en banc constituted a stay of the mandate. *Henry* and its implications are discussed in depth in the memorandum by Judge Tallman which is treated in Part II of this memo. Judge Tallman supports the adoption of an amendment providing that a stay of the mandate requires an order.[5]

The sketch in Part III would, inter alia, amend Rule 41 to provide that an order is required for a stay of the mandate.[6]

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rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate.").

[5] In his memo – a copy of which is enclosed – Judge Tallman states that

> the courts of appeals' practice of staying mandates by inaction fosters confusion, wastes judicial resources, undermines the litigants' interests in finality, and can violate principles of comity and federalism. *See, e.g.*, *Bell v. Thompson*, 545 U.S. 794 (2005). My circuit's recent experience in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), reemphasizes the need for transparency on this issue, *see id.* at 1067 (Tallman, J., dissenting).

Memorandum from Judge Richard C. Tallman to Judge Steven M. Colloton, March 11, 2015 ("Tallman memo"), at 1. Judge Tallman notes that amending the Rule to require an order "will promote transparency," and "will also require the court of appeals to communicate clearly to the district court when it relinquishes appellate jurisdiction, thus providing the district court a clear directive as to when it may resume control over the case." *Id.* at 9. Greater transparency, in turn, will help to ensure that stays of the mandate are "subject to review and oversight by colleagues and the Supreme Court." *Id.* at 11.

[6] One additional question is whether reinserting into Rule 41 a reference to the requirement of an order would imply that other Appellate Rules do *not* require an order for another type of action by the court of appeals. If no other Appellate Rules require orders by the court of appeals, then a negative implication might arise from the mention of an order in amended Rule 41. However, it turns out that a number of Appellate Rules do refer to actions that can be taken by "order." Many rules specify provisions that a court of appeals can institute "by local rule or by order in a particular case." *See, e.g.*, Appellate Rule 5(c). Perhaps one might argue that, in that formulation, "by order" is necessary (for parallelism) to match "by local rule." But the same is not true of other examples. *See, e.g.*, Appellate Rule 45(d) ("Unless

B. Addressing the court's authority (if any) to stay the mandate after denial of certiorari

The Committee's discussion at its fall 2014 meeting focused in particular on the authority of a court of appeals to stay the mandate after the Supreme Court denies certiorari. The Supreme Court has twice declined to say whether such authority exists under the current Rule.[7] In assessing whether to amend Rule 41 to address the question, the Committee considered two possible types of amendment.[8] Under one approach, Rule 41 could be revised to require that a court of appeals must issue the mandate immediately after a denial of certiorari, with no exceptions. Under the other approach, Rule 41 could be revised to authorize a court of appeals to stay the mandate, even after the denial of certiorari, in extraordinary circumstances.

At the fall 2014 meeting, some participants expressed interest in pursuing the latter approach. In addition to the basic choice between the two approaches, questions also were raised about the choice of language to express the standard (i.e., could a phrase other than "extraordinary circumstances" be found?) and whether the court of appeals

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the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office."). There are also many instances when rules refer to an event occurring "unless the court orders otherwise." *See, e.g.*, Appellate Rule 15.1.

[7] In *Bell* and *Schad*, the petitioners argued that the mandatory language of Rule 41(d)(2)(D) admits of no exceptions, and that a court of appeals thus has no discretion to stay the issuance of the mandate. The respondent in *Bell* countered that Rule 41(d)(2)(D) "is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari." 545 U.S. at 803. He argued that Rule 41(b) grants a court of appeals authority to stay its mandate for other reasons following the Supreme Court's denial of certiorari and rehearing. In both *Bell* and *Schad*, the Court assumed, arguendo, that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the court of appeals in both cases abused its discretion in doing so. The Court ruled that any authority to stay the mandate after denial of certiorari may be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551.

[8] The background for the Committee's discussion of these issues included the Subcommittee's prior study of both policy arguments and possible doctrinal constraints. With respect to the latter point, subcommittee members had queried whether a court of appeals' authority to stay its mandate arises only from Rule 41 or whether additional sources ground that authority. In my October 3, 2014 memo to the Committee (a copy of which is enclosed), I noted support for the view that the courts of appeals have some inherent authority to stay their mandates, and I also noted some case law citing a statutory source for such stay authority. The subcommittee further discussed whether a rule adopted pursuant to the Rules Enabling Act could validly alter the scope of any such inherent and/or statutory authority; in the October 2014 memo, I suggested that such a rule could channel a court's inherent authority to stay the mandate but probably could not eliminate it (or, at least, could not do so without leaving in place an effective substitute to address instances where the integrity of the court's judgment is at stake).

should be required to make findings concerning the extraordinary circumstances in order to justify the issuance of the further stay.

The amendment sketched in Part III includes the "extraordinary circumstances" test; but, for reasons explained in Part II of this memo, the sketch applies that test broadly rather than only to stays entered after the denial of certiorari.

II. Judge Tallman's suggestion and the Subcommittee's further discussions

Since the time of the Committee's fall 2014 discussions, the Rule 41 proposal has benefited from input by Judge Tallman and from further discussions by the Rule 41 Subcommittee. In addition, *Henry v. Ryan* – which the Committee discussed at its fall 2014 meeting – has come to its conclusion. I summarize those developments here, and report that the Subcommittee – after taking into account Judge Tallman's proposed amendment to Rule 41 – favors adding the "extraordinary circumstances" test as a more general requirement for stays of the mandate.

As the Committee previously noted, *Henry v. Ryan* illustrates that the issues treated in this memo continue to be salient. Henry, under sentence of death pursuant to an Arizona judgment, appealed the federal district court's denial of habeas relief.[9] Henry relied, inter alia, on *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The court of appeals affirmed in June 2013, reasoning that even assuming there was an *Eddings* error, Henry had not "shown that any error would have 'had substantial and injurious effect or influence in determining' [his] sentence."[10] In November 2013, the court of appeals denied panel rehearing and rehearing en banc.[11] Although Henry did not at that point request a stay of the mandate, the mandate did not issue. In March 2014, the court of appeals granted en banc review in a different case, *McKinney v. Ryan*, that presented the question "whether *Eddings* error is structural."[12] In April 2014, Henry asked the panel that had decided his appeal to reconsider its November 2013 denial of rehearing in light of the en banc proceeding in *McKinney*; this motion apparently was the first time that a filing by Henry mentioned a stay.[13] The panel denied Henry's motion, but a judge of the

[9] *See Henry v. Ryan*, 720 F.3d 1073, 1077 (9th Cir.), *reh'g denied*, (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2729 (2014).

[10] *Id.* at 1089 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

[11] *See Henry v. Ryan*, 748 F.3d 940, 941 (9th Cir.), *reh'g en banc granted*, 766 F.3d 1059 (9th Cir.), *and on reh'g en banc*, 775 F.3d 1112 (9th Cir. 2014) (en banc).

[12] *Henry v. Ryan*, 766 F.3d 1059, 1060 (9th Cir. 2014) (Fletcher, J., concurring in grant of reh'g en banc).

[13] The motion's title did not mention a request for a stay, but its conclusion stated that "the Court should grant Mr. Henry's motion for reconsideration of the denial of his petition for rehearing, vacate its decision denying the petition for rehearing, and stay the proceedings pending the resolution of the en banc proceedings in *McKinney*." Motion for Panel Reconsideration of Order Denying Petition for Panel Rehearing in Light of *McKinney v. Ryan* and *Poyson v. Ryan* at 8, 775 F.3d 1112 (9th Cir. 2014) (en banc) (No. 09-99007), ECF

court requested a vote on whether to take that denial en banc. Next, the Supreme Court denied Henry's petition for certiorari, and, on the same day, Henry moved in the court of appeals for a stay of the mandate pending the outcome of the en banc call.[14] Subsequently, "a majority of [the] nonrecused active [Ninth Circuit] judges" voted to rehear en banc the denial of Henry's April 2014 motion.[15] (Judge Fletcher, concurring in the grant of rehearing en banc, argued that the "extraordinary circumstances" test for staying a mandate applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari.[16]) The State then sought (inter alia) a writ of mandamus from the Supreme Court, quoting Judge Tallman's en banc dissent and arguing that the failure to issue the mandate after the denial of certiorari constituted an abuse of discretion under *Schad* and *Bell*.[17] The Supreme Court asked the court of appeals to file a response to the mandamus petition;[18] but before the due date of the response, the court of appeals concluded its en banc proceedings in Henry's case, denied Henry's request for a stay, and directed issuance of the mandate.[19]

Judge Tallman's memo notes the events in *Henry* and proposes 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."[20] Judge Tallman explains that his concerns are particularly strong in criminal cases: "[W]ithholding the mandate without an order and as a matter of routine undermines the parties' interests in finality. This harm is particularly salient in the criminal and habeas corpus context, where governments (both state and federal) have a substantial interest in the finality of convictions."[21]

No. 99.

[14] *See* Motion to Stay Mandate at 11, 775 F.3d 1112 (9th Cir. 2014) (en banc) (No. 09-99007), ECF No. 107.

[15] *Henry v. Ryan*, 766 F.3d 1059, 1059 (9th Cir. 2014).

[16] *Id.* at 1063 (Fletcher, J., concurring in grant of reh'g en banc) ("The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that 'extraordinary circumstances' within the meaning of *Bell* and *Schad* are not required."). As I argued in footnote 5 on page 4 of my October 3, 2014 memo (a copy of which is enclosed), Judge Fletcher's reading of *Bell* seems unconvincing.

[17] *See* Petition for a Writ of Mandamus and/or Prohibition, or a Writ of Certiorari at 16-23, In re *Ryan*, No. 14-375 (U.S. 2014).

[18] *See* Letter from Scott S. Harris, Clerk of the Court, Supreme Court of the U.S., to Molly Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Dec. 8, 2014).

[19] *See Henry v. Ryan*, 775 F.3d 1112 (9th Cir. 2014) (en banc).

[20] Tallman memo, *supra* note 5, at 1.

[21] Tallman memo, *supra* note 5, at 8. Highlighting the salience of the issue for capital cases, Judge Tallman reports that "there are 1,000 inmates on death row" in jurisdictions within the Ninth Circuit. *Id.*

Judge Tallman's initial sketch, enclosed with his memorandum, proposed amending the last sentence of Rule 41(b) to read: "The court may shorten or extend the time only by order and only in extraordinary circumstances." Judge Tallman subsequently reviewed the draft language that the Committee had considered at its fall 2014 meeting, and he stated that he would not object to a proposal to add a reference to stays based on "extraordinary circumstances" in Rule 41(d)(2)(D). But he emphasized the importance of including the extraordinary-circumstances requirement in Rule 41(b) as well. Noting Judge Fletcher's argument in *Henry* that that requirement applies only to stays under Rule 41(d)(2) and not to other stays under Rule 41(b), Judge Tallman observed that without an amendment to include the extraordinary-circumstances requirement in Rule 41(b), "the courts of appeals can and will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2) (otherwise said, in cases where no certiorari petition is filed)."

The Subcommittee conferred by telephone to discuss Judge Tallman's suggestions. Subcommittee members agreed that Judge Tallman had identified a gap in the current Rule and that it was worth adding an extraordinary-circumstances requirement to Rule 41(b). It was noted that such a requirement should be drafted in such a way as to avoid a clash with current Rule 41(d)(2)(A), which authorizes stays of the mandate pending the filing of a petition for certiorari and which sets out a test for such stays ("good cause" and a "substantial question") that is distinct from the extraordinary-circumstances test. The idea would be to list the extraordinary-circumstances test and the Rule 41(d)(2)(A) test as alternative bases for a further stay. The Subcommittee considered whether listing those two bases would exclude the possibility of stays of the mandate in other circumstances where a stay might be desirable. Suppose, for example, that six days after the time to petition for rehearing expires, a party moves for a post hoc extension of the time to petition for rehearing and also moves to stay the mandate. The motion to extend the time for the rehearing petition would be governed by Rule 26(b)'s "good cause" test, yet under the proposed amendment the motion to stay the mandate would be governed by the "extraordinary circumstances" test. Subcommittee members felt, however, that compelling cases could be dealt with under the extraordinary-circumstances test.

In the course of the Subcommittee's discussions, other possibilities for improvement came to light. In particular, members questioned what work present Rule 41(d)(1) is doing. As previously noted, Rule 41(b) provides that "[t]he 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," and also that "[t]he court may shorten or extend the time." Rule 41(d)(1) provides that "[t]he timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise." Given that Rule 41(b) sets the mandate's presumptive issuance date (in a case where there is a timely rehearing petition or stay motion) at *7 days after* entry of the order denying the petition or stay motion, it is not clear why it is necessary for Rule

41(d)(1) to specify that the mandate is *stayed until* disposition of that petition or motion.[22]

The existence of these parallel provisions in Rules 41(b) and 41(d)(1) appears to be an artifact of the way in which the Rule developed over time. Original Rule 41(a) contained forerunners to both current Rule 41(b) and current Rule 41(d)(1). However, in the original Rule, the forerunner to current Rule 41(b) merely set the default date for issuance of the mandate (measured from entry of judgment) and authorized court-ordered alterations in that date; that part of the Rule made no mention of petitions for rehearing.[23] In 1994, Rule 40 was amended to provide a 45-day period for rehearing petitions in "civil cases in which the United States or an agency or officer thereof" was a party. In the light of that amendment, the original Rule's presumptive deadline for issuance of the mandate (21 days after entry of judgment) required adjustment. Thus, in 1994 the first sentence of Rule 41(a) was amended to set the presumptive deadline for the mandate's issuance at "7 days after the expiration of time for filing a petition for rehearing unless such a petition is filed"; meanwhile, no material change[24] was made in the last two sentences of then-Rule 41(a) (which already discussed the mandate's timing in connection with dispositions and denials of rehearing petitions).[25] The 1998 amendments extensively restructured Rule 41,

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[22] Admittedly, Rule 41(d)(1) refers to "disposition" of the motion or petition, whereas Rule 41(b) refers to denial. But that difference seems immaterial. If a motion to stay the mandate is disposed of but not denied, that would presumably mean that the court has disposed of the motion by granting it – in which event the court has "extend[ed] the time" for issuance of the mandate under Rule 41(b). If a rehearing petition is disposed of but not denied, that means that the court has granted either panel rehearing or rehearing en banc; in such instances, there seems to be no reason for Rule 41 to set a deadline for issuance of the mandate on the judgment entered upon the prior panel opinion. As the 1998 Committee Note to Rule 41(b) observes, "[i]f a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment."

[23] Original Rule 41(a) provided:

> Date of Issuance. **The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order**. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. **The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.**

(Emphases added.) Original Rule 41(b) addressed stays of the mandate pending applications for writs of certiorari.

[24] "Shall" became "must."

[25] As amended in 1994, Rule 41(a) provided:

> (a) Date of Issuance.— **The mandate of the court must issue 7 days after**

breaking Rule 41(a) into Rules 41(a), (b), and (d)(1) and giving those provisions substantially[26] their current language. What had been the first and last sentences of Rule 41(a) became Rule 41(b). What had been the penultimate sentence of Rule 41(a) became Rule 41(d)(1). New Rules 41(b) and 41(d)(1) were amended to refer to petitions for en banc as well as panel rehearing, and to refer to motions to stay the mandate. The 1998 Committee Note does not discuss the overlap between Rules 41(b) and 41(d)(1).

Based on these considerations, the sketch shown in Part III below deletes Rule 41(d)(1) as redundant and re-numbers Rule 41(d) accordingly.[27] It adds the extraordinary-circumstances requirement in Rules 41(b) and (d)(4), and it specifies in Rule 41(b) that any stay of the mandate requires an order.

Two possible features of proposed Rule 41(d)(4) deserve special mention.[28] Proposed Rule 41(d)(4) would specify an extraordinary-circumstances test for staying the mandate after denial of certiorari. First, should that Rule reiterate that such a stay requires an order? Given that Rule 41(b) would be amended to specify the need for an

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> **the expiration of time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order.** A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. **The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.**

(Emphases added.)

[26] A style amendment to Rule 41(b) in 2002 added the words "petition for" before "rehearing en banc," presumably in the interests of parallelism.

[27] Re-numbering the subparts of Rule 41(d) will require no changes to cross-references in other Appellate Rules. (There is only one cross-reference to Rule 41 – in Rule 27(a)(3)(A) – and that cross-reference is to the rule as a whole.) The re-numbering would complicate research concerning caselaw addressing the subparts of Rule 41(d), but the subparts of that Rule have not been cited with great frequency. As a very rough measure, on March 25, 2015 I performed the following Westlaw search: ("41(d)(1)" "41(d)(2)") /p mandate. In the CTA database that search produced 50 hits; in the SCT database it produced two (*Bell* and *Schad*).

[28] In addition to the features discussed in the text, one other detail bears noting: Current Rule 41(d)(2)(D) refers to issuance of the mandate "immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Proposed Rule 41(d)(4) refers instead to the court of appeals' issuance of the mandate "upon receiving a copy of" that Supreme Court order. Subcommittee members felt that the phrase "upon receiving" was preferable. This does not seem like a substantive change; in line with Rule 25(a)(2)(A)'s general principle that "filing is not timely unless the clerk receives the papers within the time fixed for filing," I would think that "filed" in the current Rule refers to the time when the court of appeals receives the order.

order, reiterating the reference to an order in Rule 41(d)(4) might be viewed as redundant – or it might be viewed as a useful (or even necessary) reminder, and as a way to avoid arguments about whether Rule 41(b) already requires an order in the post-certiorari-denial context. Second, should the Rule require a finding concerning the extraordinary circumstances that justify the further stay? Requiring such a finding might improve the court's deliberative process by prompting articulation of the basis for the stay, and might also facilitate review of the grant of the stay. On the other hand, such a requirement may be unnecessary; a party seeking to defend the court's issuance of the further stay would articulate the grounds for it.

If the Rule should require a finding, would the use of some variant of the word "find" accomplish that, or should the Rule specify in more detail the nature of the finding? Most of the Appellate Rules' existing references to findings concern findings by the district court (the exception is an oblique reference in Rule 48, concerning the use of masters in ancillary proceedings in the court of appeals), and all but one of those references simply mention a finding, without elaboration.[29] The exception is Rule 24(a)(3)(A), which requires the district court to "state[] in writing its reasons for the certification or finding."

Also, if Rule 41(d)(4) is to require a finding concerning extraordinary circumstances, should Rule 41(b) explicitly require such a finding as well? Arguably, the requirements in both provisions should be parallel; on the other hand, perhaps the

[29] Here are the rules in question:

- Rule 4(a)(6)(A):
  - "the [district] court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry"
- Rule 4(a)(6)(C):
  - "the [district] court finds that no party would be prejudiced"
- Rule 4(b)(4):
  - "Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal …."
- Rule 24(a)(3)(A):
  - "the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding …."
- Rule 24(a)(4)(C):
  - "The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following: … (C) finds that the party is not otherwise entitled to proceed in forma pauperis."
- Rule 48(a):
  - "A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court."

heightened interests in finality after denial of certiorari justify imposing the additional requirement of a finding in that context but not in the other contexts covered by Rule 41(b).

III. A sketch of the current proposal to amend Rule 41

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(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 by order. The court may extend the time only [in] [if it finds][30] extraordinary circumstances or pursuant to Rule 41(d).

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate Pending Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

[30] The second bracketed alternative is included here in case the Committee concludes that a requirement of a finding should be stated in both Rule 41(b) and Rule 41(d)(4).

~~(D)~~ (4) The court of appeals must issue the mandate immediately upon receiving ~~when~~ a copy of a Supreme Court order denying the petition for writ of certiorari ~~is filed~~, unless [[it finds that][31] extraordinary circumstances justify [ordering] a further stay] [it orders a further stay based on extraordinary circumstances].

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Prior to 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances. [The court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances.]

Subdivision (d). Two changes are made in subdivision (d).

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[31] Subcommittee members noted that it might be useful to be more specific about the requirement for findings. The language sketched in the text – "unless it finds that extraordinary circumstances justify [etc.]" – is in keeping with a number of the existing references to findings in the Appellate Rules. However, those references concern findings by the district court, not by the court of appeals, and perhaps the relatively unusual context of requiring a finding by the court of appeals would call for more specificity. For example, the Rule could say "unless it expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless it issues an order identifying the extraordinary circumstances that justify a further stay."

Subdivision (d)(1) – which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing – has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order [and findings concerning the facts constituting extraordinary circumstances].

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

IV. Conclusion

The amendment sketched in Part III of this memo would (1) restore the requirement that stays of the mandate require an order; (2) fill a gap in the current rule by making 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).

Encls.

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TAB 7B(1)

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CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

TO: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

FROM: Judge Tallman, Circuit Judge, Ninth Circuit Court of Appeals

DATE: March 11, 2015

RE: Memorandum in Support of Proposed Changes To Federal Rule of Appellate Procedure 41

I propose an amendment to Federal Rule of Appellate Procedure 41 that would permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances. *See* Appendix A (Rule 41 redline). As the Supreme Court has recognized, the courts of appeals' practice of staying mandates by inaction fosters confusion, wastes judicial resources, undermines the litigants' interests in finality, and can violate principles of comity and federalism. *See, e.g.*, *Bell v. Thompson*, 545 U.S. 794 (2005). My circuit's recent experience in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), reemphasizes the need for transparency on this issue, *see id.* at 1067 (Tallman, J., dissenting). An appropriate amendment to Rule 41(b) would achieve such transparency.

Rule 41 describes when a court of appeals' mandate must issue. With limited exceptions, the Rule requires a court of appeals to issue its mandate "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 . . . ." Fed. R. App. P. 41(b). When a party has filed a writ of certiorari and the court of appeals has delayed the mandate pending the Supreme Court's decision on the writ, "[t]he 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." Fed. R. App. P. 41(d)(2)(D).

But the Rule also gives a court of appeals discretion to stay its mandate in certain circumstances. For example, "[a] party may move to stay the mandate pending the filing of a petition for writ of certiorari." Fed. R. App. P. 41(d)(2)(A). The motion must "show that the certiorari petition would present a substantial question and that there is good cause for a stay." *Id.* The court of appeals has discretion to grant a stay, and the stay usually will not exceed ninety days. Fed. R. App. P. 41(d)(2)(B). If the party that originally sought the stay files a writ of certiorari, "the stay continues until the Supreme Court's final disposition." *Id.* Outside of the certiorari context, Rule 41(b) gives a court of appeals more general authority to stay the mandate: The rule provides that "[t]he court may shorten or extend the time" for issuance of the mandate. Fed. R. App. P. 41(b).

Several courts of appeals interpret this provision broadly: They use it to stay

issuance of the mandate by inaction (meaning, without an order) and in unexceptional circumstances.[1]

The Ninth Circuit did this recently in *Henry*, 766 F.3d at 1059, a death penalty habeas case. On November 1, 2013, a majority of the three-judge panel voted to deny Henry's petition for rehearing and petition for rehearing en banc, noting that "no judge has requested a vote on whether to rehear the matter en banc." Although Henry did not file a motion to stay the mandate, the mandate did not issue, and the court did not enter an order *sua sponte* staying the mandate.

Henry sought and obtained an extension from the Supreme Court to file his petition for writ of certiorari. After filing his certiorari petition on March 31, 2014, Henry filed with the Ninth Circuit on April 2, 2014, a "Motion for Panel Reconsideration of Order Denying Petition for Panel Rehearing" in light of two other capital cases that the Ninth Circuit had voted to rehear en banc. The panel entered an order denying this motion on April 8, 2014. On April 11, 2014, the panel entered an order stating that "an active judge has requested a vote on whether to take en banc the panel's denial of Henry's motion to reconsider our November

[1] The Supreme Court has questioned whether Rule 41(b) even permits such a practice. *Bell*, 545 U.S. at 803–04 (assuming *arguendo* "that the Rule authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order"). This memo—like the Court in *Bell*—assumes that (as currently written) it does.

1, 2013, order denying the petition for panel rehearing." During this and other ongoing case activity in Spring 2014, the Ninth Circuit continued to stay the mandate by inaction.

The Supreme Court denied Henry's petition for certiorari on June 9, 2014. That same day, Henry filed his first motion to stay the mandate, pending the Ninth Circuit's decision to rehear en banc the panel's April 11, 2014 decision to deny his motion to reconsider. The Ninth Circuit did not immediately issue the mandate, nor did it rule at that time on Henry's motion to stay the mandate.

In September 2014, the Ninth Circuit ordered "that this case be reheard en banc" and designated it as a related case to another death penalty habeas case, *McKinney v. Ryan*, 745 F.3d 963 (9th Cir. 2014). Shortly thereafter, the Arizona Attorney General's office filed with the Supreme Court a petition for writ of mandamus asking the Court to require the Ninth Circuit to issue its mandate in *Henry*. It argued that the circumstances did not warrant the Ninth Circuit withholding the mandate. On December 8, 2014, the Supreme Court requested by letter that the Ninth Circuit Clerk file a response to the mandamus petition by January 7, 2015.

The Ninth Circuit's en banc panel heard oral argument in *McKinney* on December 15, 2014, and subsequently held a conference to discuss both

McKinney and *Henry*. In a December 30, 2014, order, the Ninth Circuit held that further en banc consideration in *Henry* was unnecessary, denied Henry's June 9, 2014, motion for a stay of the mandate, and directed the Clerk to issue the mandate. The mandate finally issued that day. The Ninth Circuit Clerk responded to the Supreme Court in a December 31, 2014, letter: "[W]e have issued the mandate in this case. The Court would be happy to provide any further information that would be of assistance." Because the Ninth Circuit issued the mandate in *Henry* before its show cause response was due, the Supreme Court dismissed the writ as moot.

The Sixth Circuit created similar problems by failing to issue the mandate in *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004), *reversed sub. nom. by Bell v. Thompson*, 545 U.S. 794 (2005) ("*Bell*"). In *Thompson v. Bell*, also a death penalty habeas case, the Supreme Court denied Thompson's petition for rehearing on January 20, 2004. The Sixth Circuit did not immediately issue its mandate, nor did it issue an order staying the mandate. *See Bell*, 545 U.S. at 800. "The State, under the apparent assumption that the federal habeas corpus proceedings had terminated, filed a motion before the Tennessee Supreme Court requesting that an execution date be set. The court scheduled Thompson's execution for August 19, 2004." *Id.* On August 17, two days before the scheduled execution and five

months after receiving final disposition on the case from the Supreme Court, the Sixth Circuit "issue[d] an amended opinion that vacated the District Court's denial of habeas and remanded for an evidentiary hearing on the ineffective-assistance-of-counsel-claim." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (discussing *Bell*).

The Supreme Court reversed the Sixth Circuit in *Bell*, 545 U.S. 794. It held that the Sixth Circuit abused its discretion for, among other things, withholding the mandate for five months without issuing an order explaining its rationale for doing so. *See Bell*, 545 U.S. at 813–14. In so holding, the Court identified several harms that accompany the practice of staying the mandate without an order and as a matter of routine.

First, the "failure to issue an order or otherwise give notice" of its decision to stay the mandate keeps the parties in the dark with regard to the status of their appeal. *See Bell*, 545 U.S. at 805. "A court speaks through its judgment and orders." *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 741 F.2d 41, 44 (4th Cir. 1984). Thus, "[w]ithout a formal docket entry[,] neither the parties nor [other] Court[s] . . . have any way to know whether the court ha[s] stayed the mandate or simply made a clerical error." *Bell*, 545 U.S. at 805. Tennessee's experience in *Bell* exemplifies this: The State assumed that the Supreme Court's denial of rehearing ended Thompson's appeal, and it spent considerable time and

money preparing for execution before the Sixth Circuit issued its amended opinion granting Thompson habeas relief.

Second, the practice of withholding the mandate creates confusion among the court of appeals judges and with the district court. The Ninth Circuit's failure to issue the mandate in *Henry* not only resulted in a months-long delay in Arizona's ability to carry out its judgment, but it also caused an enormous expenditure in judicial resources to discuss and resolve the issue. For example, the September 4, 2014, order taking the case en banc was accompanied by an 18-page concurrence and a 14-page dissent, both discussing the merits of the court's authority to hear the case in light of the restrictions or lack thereof contained in Rule 41. *See Henry v. Ryan*, 766 F.3d at 1060 (Fletcher W., J., concurring); *id.* at 1067 (Tallman, J., dissenting). Arizona's mandamus petition requesting issuance of the mandate, resulting in a request for a response from the Supreme Court, generated additional work for and dialogue among all of the Ninth Circuit judges. Also, a primary purpose of the mandate is to transfer jurisdiction from the court of appeals to the district court; "[u]ntil the mandate issues . . . the case ordinarily remains within the jurisdiction of the court of appeals." 16AA The Late Charles Alan Wright, et al., *Federal Practice & Procedure Juris.* § 3987 (4th ed. 2014). Thus, when the court of appeals withholds the mandate without an order, it creates

uncertainty in the district court as to when it may resume jurisdiction over the case.

Finally, withholding the mandate without an order and as a matter of routine undermines the parties' interests in finality. This harm is particularly salient in the criminal and habeas corpus context, where governments (both state and federal) have a substantial interest in the finality of convictions. Indeed, "when state-court judgments are reviewed in federal habeas proceedings, finality and comity concerns, based in principles of federalism, demand that federal courts accord the appropriate level of respect to state judgments by allowing them to be enforced when the proceedings conclude." *Schad*, 133 S. Ct. at 2551 (citing *Bell*, 545 U.S. at 812–13); *see also* 28 U.S.C. § 2244(b)(3)(C) (prohibiting a state habeas petitioner from filing a second or successive petition in all but several limited circumstances); 28 U.S.C. § 2255(h) (same, but pertaining to federal prisoners). In addition to "preserving the federal balance," finality is essential "for the retributive and deterrent functions of criminal law," and to "enhance[] the quality of judging" by promoting accountability. *Calderon v. Thompson*, 523 U.S. 538, 555 (1998).

The issue is of some significance. In the Ninth Circuit alone there are 1,000 inmates on death row. To remedy these problems, I propose amending Rule 41(b) so that it clarifies the issues and embodies Supreme Court precedent that a court of

appeals may stay a mandate only by order[2] and only in exceptional circumstances. *See* Appendix A (Rule 41 redline).

The amended Rule 41(b) will promote transparency: If the court of appeals seeks to stay its mandate, it must tell the parties and other courts that it is doing so. An order communicating the stay would have forestalled much of the harm in *Bell* and *Henry*. In *Bell*, Tennessee would have known that the Sixth Circuit was reconsidering its prior habeas opinion, and it likely would have delayed preparations for Thompson's execution. In *Henry*, Arizona would not have felt it necessary to pursue its mandamus petition with the Supreme Court. Rather, it could have simply asked the Circuit Justice to lift the stay. The amended rule will also require the court of appeals to communicate clearly to the district court when it relinquishes appellate jurisdiction, thus providing the district court a clear directive as to when it may resume control over the case.

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[2] Although Rule 41 as initially implemented permitted the courts of appeals to stay the mandate only by order, that requirement was dropped in the 1998 amendments. *Compare* Fed. R. App. P. 41(a) (1994 ed.) ("The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged *by order*." (emphasis added)), *with* Fed. R. App. P. 41(b) (1998 ed.) ("The court may shorten or extend the time."). The committee apparently thought that the change would be stylistic. *See* Fed. R. App. P. 41(b) (1998 ed.) Advisory Committee's notes (describing the several substantive changes to the rule and making no mention of the "by order" language). Unfortunately it has created ambiguity.

By requiring "exceptional circumstances," the amended Rule 41(b) will give due deference to the litigants' interests in finality. When the court of appeals seeks to stay its mandate, the exceptional circumstances standard requires it to explain why the court's interest in delaying the case trumps the parties' interest in concluding the appeal. The clear standard would also comport with the Supreme Court's warning that, "[d]eviation from normal mandate procedures is a power of last resort, to be held in reserve against grave, unforeseen contingencies." *Schad*, 133 S. Ct. at 2251; *see also id.* ("Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action."); *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992) (en banc) ("[B]ecasue of Fed. R. App. P. 41(b)'s express direction that the mandate shall issue immediately upon denial of certiorari, the mandate could only be stayed upon the same exceptional circumstances justifying a recall of the mandate." (quotation marks omitted)).

Finally, the amended Rule 41(b) will not impact the authority of the courts of appeals to stay the mandate in cases where such a stay is warranted. Even under the amended rule, a court of appeals may delay its mandate by order when the circumstances of the case warrant such a delay. Rather than curb the courts'

power, an amended rule would make the courts of appeals' rationale for delaying the mandate transparent and subject to review and oversight by colleagues and the Supreme Court.

For the above reasons, I hope your committee will endorse my proposed amendment to Federal Rule of Appellate Procedure 41.

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

TO: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

FROM: Judge Tallman, Circuit Judge, Ninth Circuit Court of Appeals

DATE: March 10, 2015

RE: Proposed Changes To Federal Rule of Appellate Procedure 41

Federal Rule of Appellate Procedure 41

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(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 only by order and only in extraordinary circumstances.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of

mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(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.

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 13-AP-H

Appellate Rule 41(b) provides that "[t]he 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," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

Since the time of the Committee's spring 2014 meeting, a subcommittee composed of Justice Eid, Judge Taranto, and Professor Barrett has been considering whether these rules warrant amendment in light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). In particular, the subcommittee has focused on two principal questions – first, concerning the authority (if any) of a court of appeals to stay the mandate following a denial of certiorari, and second, concerning the action (if any) required in order to implement any such stay. Based on the subcommittee's discussions, this memo presents options for the Committee's consideration.

Part I of this memo discusses a proposed change to clarify that stays of the mandate under Rule 41(b) cannot occur through mere inaction and instead require entry of an order. Part II discusses three possible approaches to the question of a court of appeals' authority to stay the mandate following denial of certiorari.

I. Clarifying that Rule 41(b) stays require an order

In *Bell*, the Supreme Court said that "[i]t is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction." 545 U.S. at 805. The Rule provides merely that "[t]he court may shorten or

extend the time." The court of appeals in *Bell* purported to stay the issuance of the mandate after denial of certiorari without notifying the parties, and the State in that case proceeded to set an execution date in a capital case without realizing that the mandate never had issued. The Supreme Court assumed, *arguendo*, "that a court may stay the mandate without entering an order" before holding that the court of appeals abused its discretion.

The original version of the Rule stated that "[t]he mandate of the court shall issue 21 days after the entry of judgment *unless the time is shortened or enlarged by order.*" The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b). As with all the restyling Committee Notes, the Note to Rule 41 states that most of the changes were "intended to be stylistic only." The Committee may wish to consider whether Rule 41(b) should be amended to clarify whether a court of appeals may extend the time of issuance of the mandate by inaction or whether it must issue an order to extend the time.

The subcommittee members perceived good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell*, the lack of notice was one of the factors that contributed to the Court's finding that staying the mandate was an abuse of discretion.[1] Requiring any stay of the mandate under Rule 41(b) to be accomplished by court order would address this problem. If an attorney receives a CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate, that will alert the attorney to the non-issuance of the mandate. It is also possible that requiring formal entry of a stay order would facilitate review of the court of appeals' decision to stay the mandate.[2]

Assuming that the Committee agrees that it would make sense to require a formal order for a Rule 41(b) stay, the question arises whether that requirement should be in the national Rules or whether it should be left to local circuit requirements. There are several reasons why a national rule amendment may be preferable. First, the importance of providing notice to litigants weighs in favor of applying this requirement in all the circuits. Second, it is difficult to conceive of local variations that would justify treating this question differently in different circuits. Third, a survey of applicable local provisions discloses that only the Eleventh Circuit has actually imposed such a

[1] *See Bell*, 545 U.S. at 804.

[2] *See Henry v. Ryan*, No. 09-99007, 2014 WL 4397948, at *14 (9th Cir. Sept. 4, 2014) (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[U]nless the en banc panel issues a formal stay of the mandate, our unorthodox actions might very well evade Supreme Court review. If the en banc panel issues such a stay, then Arizona could seek Supreme Court review of the stay. If it doesn't, then our failure to issue the mandate may escape review for an indeterminate period of time ....").

requirement on itself in its local rules, and even that provision does not cover all the circumstances that might arise.[3]

One might also ask whether this issue arises with sufficient frequency to warrant a rule amendment. A rather labor-intensive study would likely be necessary to measure systematically the frequency with which courts fail to issue mandates in the absence of a formal stay order. However, recent developments in the Ninth Circuit suggest that the issue may recur with some regularity. In *Henry v. Ryan*, a capital habeas case, the en banc court recently entered an order that has the effect of staying the mandate in *Henry* pending the court of appeals' en banc rehearing proceeding in a different case. (I enclose a copy of the relevant order and opinions in *Henry*.) The opinions concurring in and dissenting from this order disagree on several points – one of which is whether the court's failure to issue the *Henry* mandate in due course after the denial of panel rehearing and rehearing en banc constituted a stay of the mandate.[4]

If the Committee were inclined to amend the Rule to clarify that an order is required for a Rule 41(b) stay of the mandate, it could propose amending Rule 41(b) as follows:

> **(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 by order.

II. Addressing the court's authority (if any) to stay the mandate after denial of certiorari

The Court has twice declined to decide whether Rule 41 requires a court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying the petition for writ of certiorari in a case. In *Bell* and *Schad*, the petitioners

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[3] Eleventh Circuit IOP 6 accompanying Appellate Rule 35 addresses instances when a judge directs the clerk to withhold the mandate during a poll with respect to sua sponte rehearing en banc. See Eleventh Circuit IOP 6 accompanying Eleventh Circuit Rule 35 ("If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate."). *Compare* Ninth Circuit Advisory Committee Note to Rule 25-2 (advising litigant to tell Clerk if, inter alia, "the mandate has not issued within 28 days after the time to file a petition for rehearing has expired").

[4] *Compare Henry v. Ryan*, No. 09-99007, 2014 WL 4397948, at *3 (9th Cir. Sept. 4, 2014) (Fletcher, J., concurring in grant of reh'g en banc) ("Acting on behalf of the panel, the clerk's office in this case stayed the mandate pursuant to Rule 41(b), as it routinely does in all capital cases."), *with id.* at *9 (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[N]o order staying the mandate was ever entered by the panel or by the Clerk's office. Withholding issuance of the mandate is not the same as entering a stay order.").

argued that the mandatory language of Rule 41(d)(2)(D) admits of no exceptions, and that a court of appeals thus has no discretion to stay the issuance of the mandate. The respondent in *Bell* countered that Rule 41(d)(2)(D) "is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari." 545 U.S. at 803. He argued that Rule 41(b) grants a court of appeals authority to stay its mandate for other reasons following the Supreme Court's denial of certiorari and rehearing. In both *Bell* and *Schad*, the Court assumed, arguendo, that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the court of appeals in both cases abused its discretion in doing so. The Court ruled that any authority to stay the mandate after denial of certiorari may be exercised only in "extraordinary circumstances."[5] *Schad*, 133 S. Ct. at 2551.

The subcommittee discussed the possibility of amending Rule 41 to clarify whether a court of appeals has discretion to stay the mandate after a denial of certiorari. Two options, of course, are identified by the competing views of the current Rule described by the Court in *Bell*: Rule 41 could be revised to require that a court of appeals must issue the mandate immediately after a denial of certiorari, with no exceptions. Or Rule 41 could be revised to authorize a court of appeals to stay the mandate, even after the denial of certiorari, in extraordinary circumstances.

As to each of these options, the subcommittee discussed both policy arguments and possible doctrinal constraints. With respect to the latter point, subcommittee

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[5] In *Henry v. Ryan*, Judge Fletcher argued that the "extraordinary circumstances" test applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari. *See Henry*, 2014 WL 4397948, at *5 (Fletcher, J., concurring in grant of reh'g en banc) ("The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that 'extraordinary circumstances' within the meaning of *Bell* and *Schad* are not required."). I am not convinced by Judge Fletcher's reading of *Bell v. Thompson*. Judge Fletcher relied in part on this passage from *Bell*:

> While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. *See, e.g.*, *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson*, 552 F.2d 1033 (C.A.4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "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."

Bell, 545 U.S. at 806. It seems to me that, in fact, the *Bell v. Thompson* Court presents the "rare" examples of *First Gibraltar Bank* and *Alphin* as illustrations of cases that might present the requisite extraordinary circumstances. Both *First Gibraltar Bank* and *Alphin* involved instances in which Congress altered governing statutory law after the issuance of the panel opinion and before the denial of certiorari. *See infra* note 19.

members queried whether a court of appeals' authority to stay its mandate arises only from Rule 41 or whether additional sources ground that authority. In Part II.A, I note support for the view that the courts of appeals have some inherent authority to stay their mandates, and I also note some case law citing a statutory source for such stay authority. The subcommittee further discussed whether a rule adopted pursuant to the Rules Enabling Act could validly alter the scope of any such inherent and/or statutory authority; in Part II.B, I suggest that such a rule could channel a court's inherent authority to stay the mandate but probably could not eliminate it (or, at least, could not do so without leaving in place an effective substitute to address instances where the integrity of the court's judgment is at stake). Finally, with these bounds in mind, I turn in Parts II.C and D to a discussion of policy and drafting issues.

A. Inherent and/or statutory authority for a stay of the mandate after denial of certiorari

Although the caselaw is sparse, there is some reason to believe that, even apart from Rule 41, the courts of appeals have inherent authority to stay their mandates under sufficiently compelling circumstances. Moreover, there is some (again, sparse) caselaw support for the view that stay authority also stems from 28 U.S.C. § 2106.

Prior to *Schad*, the Ninth Circuit had held that the courts of appeals have inherent authority to stay their mandates in appropriate circumstances. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) ("[A] circuit court has the inherent power to stay its mandate following the Supreme Court's denial of certiorari."); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("This inherent authority is not undercut by the time limits specified in Fed. R.App. P. 41(b).").[6] In *Schad*, however, the Court expressly disapproved of *Beardslee*, stating that "*Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed." *Schad*, 133 S. Ct. at 2552. *Bryant* and *Beardslee*, thus, are not entirely reliable precedent for the proposition that the courts of appeals possess inherent authority to stay their mandates. However, *Bryant* and *Beardslee* both concerned instances where the impetus for the stay was a change in the governing law that postdated the filing of the petition for certiorari.[7] Might there be other, more compelling, circumstances in which inherent authority to stay the mandate would exist?

The particular institutional concern with the integrity of court judgments could ground an argument that the court of appeals has inherent authority to stay a mandate in order to investigate a claim of fraud on the court of appeals. It is well established that a

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[6] *See also United States v. Black,* 733 F.2d 349, 351 (4th Cir. 1984) ("Although this court did not explicitly recall or stay the mandate, we had inherent power to do so."). (In *Black*, the statement concerning stay of the mandate was dictum, because the mandate had issued. *See id*.)

[7] *See Bryant*, 886 F.2d at 1527-28 (enactment of statute postdated filing of certiorari petition); *Beardslee*, 393 F.3d at 901 (Ninth Circuit decision in a separate case postdated filing of certiorari petition). For discussion of the possibility that an amendment of governing statutory law during the pendency of a certiorari petition justifies a further stay of the mandate under Rule 41(b), *see infra* footnote 19 and accompanying text.

federal court has "inherent power ... to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). This is true in a case where the court of appeals discovers (after issuance of its mandate) that a fraud was committed upon it. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944) (holding that "undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered"); *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946) (discussing a case in which the court of appeals in 1944 vacated a 1935 decision due to bribery of a panel judge, and noting that "[t]he inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question"). These cases indicate that the courts of appeals have inherent authority to *recall* their mandates in order to investigate claims of fraud on the court – and one could argue that the greater power (to recall the mandate) should logically include the lesser power (to stay the mandate).

During the subcommittee's discussions, the All Writs Act was mentioned as a possible statutory source of authority for stays of the mandate. 28 U.S.C. § 1651(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act does empower a federal appellate court to issue a writ directed to a lower court to *enforce* the appellate court's judgment.[8] I have not, however, found cases that employ the All Writs Act as authority for a court of appeals to *stay* its mandate.

A different possible statutory source of a court of appeals' authority to stay its mandate might be found in 28 U.S.C. § 2106,[9] which provides that "[t]he Supreme Court

[8] *See, e.g.*, *Fed. Home Loan Bank of San Francisco v. Hall*, 225 F.2d 349, 385 n.12 (9th Cir. 1955) ("An appellate court has unquestioned power under 28 U.S.C.A. Sec. 1651(a) to enforce compliance with its decree by directly enjoining action contrary thereto.").

[9] 28 U.S.C. § 2101(f) can be read to authorizes stays of the mandate, but the Section 2101(f) stay power focuses only on stays to permit a litigant to seek certiorari review. Section 2101(f) provides:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, *or require such further proceedings to be had as may be just under the circumstances*." (Emphasis added.) The Second Circuit has relied upon the latter portion of Section 2106 as authority for staying its mandate in cases where the court of appeals deems it just to allow a criminal defendant time to consider whether to withdraw his or her appeal in light of the implications of the court's ruling.[10] The Supreme Court did not discuss Section 2106 in either *Schad* or *Bell*.

B. Altering inherent and/or statutory authority by rule

To the extent that a court of appeals' authority to stay its mandate emanates from sources other than Rule 41, the ability of the rulemakers to alter that authority by amending Rule 41 depends in part on the source of the additional authority. So long as such an amendment complied with the scope restrictions set by the Rules Enabling Act,[11]

Section 2101(f) addresses a stay of "execution and enforcement of" a judgment or decree. At least one case treats a Section 2101(f) stay as an action distinct from staying or recalling a mandate. *See United States v. Barnett*, 330 F.2d 369, 369-70 (5th Cir. 1963) (en banc, per curiam opinion) ("After setting aside a stay of execution of this Court's mandate pursuant to 28 U.S.C.A. § 2101(f) by one of the Judges of this Court, the Court then directed that its mandate be recalled and amended ...."). Other authorities suggest some degree of overlap between a Section 2101(f) stay and a Rule 41(b) stay. *See, e.g.*, *CFTC v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (denying application to vacate stay of court of appeals' mandate and noting preliminarily that the stay had been sought from the court of appeals "under 28 U.S.C. § 2101(f) and Fed.Rule App.Proc. 41(b)"). In any event, Section 2101(f) stays exist specifically for the purpose of permitting a party to obtain a writ of certiorari, so this statute would not seem to authorize a further stay of the mandate after denial of certiorari.

[10] *See United States v. Bohn*, 959 F.2d 389, 395 (2d Cir. 1992) ("Since appellants could not necessarily have anticipated the risks that their 'victory' would entail, we deem it appropriate ... to afford them the opportunity to accept their current sentences instead of facing the risk of imprisonment."); *United States v. Figueroa*, 647 F.3d 466, 471 (2d Cir. 2011) ("[W]e will stay our mandate for an additional thirty days beyond the normal interval provided by Federal Rule of Appellate Procedure 41(a) [*sic*] —or beyond the disposition of any timely petitions for rehearing, whichever period is longer—to allow defense counsel to confer with appellants one final time regarding the risks of pursuing their sentencing challenges on appeal.").

[11] *See* 28 U.S.C. § 2072(b) (providing that rules promulgated pursuant to the Rules Enabling Act "shall not abridge, enlarge or modify any substantive right"). Might a case arise in which the application of a rule limiting the court of appeals' stay authority overstepped this scope limitation? For example, if a court of appeals were in future to be presented with evidence that its affirmance of the denial of habeas relief in a capital case had rested on fraud on the court of appeals, would a rule removing all ability to stay or recall the mandate abridge the prisoner's substantive rights? It seems possible that the application of a complete bar on stay or recall of the mandate might violate substantive rights in such a

the amendment could supersede any contrary statute.[12] Whether the rule amendment could validly displace a court's inherent authority to stay its mandate seems to me to depend on the scope and effect of such displacement.

Because such a rule would be promulgated pursuant to the delegation of authority under the Rules Enabling Act, and because Congress presumably cannot delegate more authority than it possesses itself,[13] I analyze this question by asking whether Congress would have authority to enact legislation limiting the courts' inherent stay powers. Congress does possess the ability to alter the functioning of some inherent powers of the Article III courts:

> The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it. Nonetheless, there are limits to what Congress can do in regulating the courts' inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court. It cannot, however, wholly withdraw that power or, even short of that, impose regulations that would cripple courts in its exercise.[14]

It seems possible to argue, analogously, that a rule imposing procedural requirements on the court of appeals' stay or recall of its mandate could be valid, whereas a rule that entirely eliminated the court of appeals' power to stay or recall a mandate could be invalid as applied to some situations – as where questions arose concerning whether the judgment was obtained by fraud.

In this connection, it may be useful to note the treatment of a parallel issue in Civil Rule 60. A request for relief from a judgment under Civil Rule 60(b)(3) on grounds of fraud must be made within a reasonable time, which can be no later than a year after entry of judgment. *See* Civil Rule 60(c)(1). But that time limit explicitly does not

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situation – though, granted, such a situation would be very rare. And a rule that channeled, rather than eliminated, the stay and recall powers would be much less vulnerable to an Enabling Act challenge.

[12] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with [rules promulgated pursuant to the Rules Enabling Act] shall be of no further force or effect after such rules have taken effect."). Concededly, the rulemakers have in recent years sought legislative changes when adopting rule amendments that were expected to supersede existing statutes. See for example the Appeal Time Clarification Act of 2011, Pub. L. No. 112-62, Nov. 29, 2011, 125 Stat. 756, which took effect on the same day as the 2011 amendments to Appellate Rule 4(a)(1)(B).

[13] I do not explore here whether supervisory authority possessed by the Supreme Court with respect to the lower federal courts could be argued to supplement the authority delegated by Congress in the Rules Enabling Act.

[14] Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 842-43 (2008) (footnotes omitted).

circumscribe the court's authority to vacate a judgment due to fraud on the court: Rule 60(d)(3) provides that Rule 60 "does not limit a court's power to ... set aside a judgment for fraud on the court." The 1946 Committee Note to Rule 60(b) explains that "the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause," and cites the *Hazel-Atlas* case "[a]s an illustration of this situation."[15]

This brief discussion suggests that a rule amendment entirely removing the ability of a court of appeals to stay or recall its mandate after denial of certiorari might constitute an impermissible infringement on the courts' inherent powers. On the other hand, a rule that removed authority to stay the mandate but left intact the authority to recall it would seem considerably less problematic, because the ability to recall the mandate would seem to leave the court with an effective substitute for the stay power.

C. Policy questions

As noted above, the subcommittee considered three possible approaches to Rule 41's treatment of the court of appeals' authority to stay its mandate after the denial of certiorari: first, proposing a rule amendment that would remove such authority; second, proposing a rule amendment that would limit such authority to extraordinary circumstances; and third, taking no action to address this issue.

The first approach – amending Rule 41 to require issuance of the mandate in all instances immediately after denial of certiorari – would serve the interest of finality and winning litigants' reliance interests, and would be a good fit in the general run of cases. As the *Bell v. Thompson* Court observed, "As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation.... By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent." 545 U.S. at 806.

Such an approach, however, would foreclose the possibility of a stay in a truly extraordinary and compelling case – for example, an instance in which the winning litigant was later found to have perpetrated a fraud upon the court of appeals. In such an extraordinary circumstance, as noted above, the courts of appeals are recognized to have the authority to *recall* their mandate;[16] and, as I argued in Part II.B, a rule amendment could be vulnerable to challenge if it were to purport to remove both the authority to stay

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[15] For a helpful discussion of the sometimes-murky distinction between fraud on the court and other types of fraud, see 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2870.

[16] *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("In light of 'the profound interests in repose' attaching to the mandate of a court of appeals … the power can be exercised only in extraordinary circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3938, p. 712 (2d ed.1996))).

the mandate and the authority to recall it in such a circumstance. The proposal considered by the subcommittee would remove only the stay authority, and not the recall authority.[17] One might ask, therefore, what purpose would be served by requiring the court to issue the mandate only to immediately recall it. On the other hand, one might ask why it is necessary to authorize the courts of appeals to stay a mandate after denial of certiorari if there is an existing vehicle to consider an extraordinary case through recall of the mandate.

The second approach would amend Rule 41 to specify that a court of appeals can stay its mandate after denial of certiorari only in extraordinary circumstances. Such an approach would avoid any question of encroachment on a court's inherent power to stay the mandate, because the circumstances that fall within the heartland of the inherent power – such as the discovery of a fraud on the court of appeals – would presumably count as extraordinary circumstances. A safety valve allowing for stays in extraordinary circumstances would permit courts of appeals to address the rare cases in which a compelling need for a stay arises, without requiring recourse to the more cumbersome device of first issuing and then recalling the mandate. So, for example, if the court of appeals had decided an appeal based on a controlling federal statute and Congress amended that statute after the panel decision and before the denial of certiorari, the court of appeals could extend an existing stay after the certiorari denial in order to permit time to consider the effects of the statutory change.[18] As this example suggests, the requisite extraordinary circumstances would be rare. It seems possible that a rule explicitly noting the possibility of a further stay post-certiorari denial might increase the frequency of requests for such stays; but the additional workload for the courts of appeals might not be all that great, because in most instances such requests would warrant denial without much analysis.

The third approach would be to take no action on this issue. During the subcommittee's discussions, a member asked whether the question of post-certiorari-denial stays of the mandate arises outside the context of capital cases. If not, the member suggested, then the Court's decisions in *Bell* and *Schad* may have settled the questions that are likeliest to arise. In fact, questions concerning post-certiorari stays have arisen outside the death-penalty context. The two decisions cited by the *Bell* Court as examples of extraordinary circumstances – *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (5th

[17] A subcommittee member expressed concern that a rule amendment removing the stay authority could be read by courts to limit, as well, the recall authority. To address this concern, language could be added to the Committee Note disclaiming intent to affect the recall authority. Admittedly, courts vary in their willingness to consult Committee Notes when interpreting a rule. But, for the reasons suggested in Part II.B, interpreting a rule removing stay authority to also eliminate recall authority would render the rule vulnerable to serious challenge when applied to an instance where the courts traditionally have possessed inherent authority to recall their mandate in order to address fraud on the court. Accordingly, even without reference to a Committee Note, I would hope that a court would interpret the rule to avoid such a validity problem.

[18] *See, e.g.*, *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989) ("Congress's action while this case was pending on certiorari justifies a stay of the mandate ....").

Cir. 1995) (per curiam), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977) – were civil suits in which the court of appeals stayed its mandate to allow for consideration of legislative changes that occurred during the pendency of the certiorari petition.[19] And the rare instances in which a court of appeals has recalled its mandate include a number of civil cases.[20] But though these cases demonstrate that the question does sometimes arise outside the context of death penalty litigation, capital cases do seem to form a large proportion of the case law.[21]

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[19] In *First Gibraltar*, the court of appeals initially held in April 1994 that federal law "preempted Texas homestead law insofar as Texas law prohibits federal savings associations from taking enforceable security interests in homestead property through [reverse annuity mortgages] and line of credit conversion mortgages." *First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032, 1049 (5th Cir. 1994), *opinion vacated and superseded*, 42 F.3d 895 (5th Cir. 1995). In July 1994, the Texas state officials filed a petition for certiorari. In September 1994 Congress enacted legislation that, inter alia, exempted certain state homestead provisions from preemption by the statutory framework that was at issue in *First Gibraltar*. Meanwhile, the court of appeals had stayed its mandate "for two independent reasons; first, to permit an en banc poll ... and second, to allow the State to petition for certiorari." *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 897 (5th Cir. 1995). After the Supreme Court denied certiorari in October 1994, the stay of the mandate enabled the court of appeals to alter its judgment in order to account for the new legislation. *See id.* at 898, 902.

In *Alphin*, the court of appeals initially ruled that plaintiffs who obtained an injunction but not damages on their claims under Section 2 of the Sherman Act could not recover attorney fees. *See Alphin v. Henson*, 538 F.2d 85, 86 (4th Cir. 1976) (per curiam), *opinion withdrawn in part*, 552 F.2d 1033 (4th Cir. 1977). In June 1976 the court of appeals stayed its mandate to permit the plaintiffs to seek certiorari review. In September 1976 Congress enacted legislation that made clear that a damages recovery was not a precondition to the award of attorney fees in such cases. On November 15, 1976, the Supreme Court denied certiorari; on November 17, the plaintiffs sought leave from the court of appeals to file a second rehearing petition; on November 19, the court of appeals further stayed its mandate pending determination of the plaintiffs' request; and on November 22 the court of appeals received notice of the denial of certiorari. The stay of the mandate enabled the court of appeals to alter its judgment to direct the award of attorney fees to the plaintiffs. *See Alphin v. Henson*, 552 F.2d 1033, 1035-36 (4th Cir. 1977).

[20] *See, e.g.*, *Butler v. Acad. Ins. Grp., Inc.*, 36 F.3d 1091, at *3 n.5 (4th Cir. 1994) (unpublished per curiam opinion) ("[W]hen we remanded the case to the district court to allow Butler to challenge the award of damages on Academy's counterclaim, we failed to envision a situation where Academy would end up owing Butler money. We see no reason to punish Butler for the cumulative effect of the district court's error and this court's lack of sufficient imagination by imposing this barrier to his recovery. We accordingly relax this portion of our mandate to allow the district court to enter judgment in favor of Butler."). *See generally* 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. § 3938 (discussing recall of the mandate).

[21] For death penalty cases in addition to *Bell* and *Schad*, see *Henry v. Ryan*, No. 09-99007, 2014 WL 4397948 (9th Cir. Sept. 4, 2014); *Beardslee v. Brown*, 393 F.3d 899, 902 (9th Cir. 2004) (finding that "exceptional circumstances exist justifying a temporary stay of the issuance of the mandate"), *disapproved by Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013)

D. Drafting issues

In this part, I offer sketches of proposed amendments that would implement the first and second options discussed in Part II.C. Before setting out those sketches, I briefly outline two considerations that informed the drafting. The first concerns the possible effect of Appellate Rule 2 on limitations imposed by Appellate Rule 41. The second concerns the difference in wording between Rules 41(d)(2)(B) and 41(d)(2)(D).

Appellate Rule 2 states that "a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." According to the original Committee Note to Rule 2: "The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review." Any proposal to amend Rule 41 to make mandatory the issuance of the mandate should consider whether the availability of authority to suspend the rules under Rule 2 would frustrate the purpose of an amendment, and whether Rule 2 should amended as well. For illustrative purposes, I include proposed amendments to Rule 2 in the sketches that follow.

The subcommittee also discussed a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until *the Supreme Court's final disposition*." Rule 41(d)(2)(D)

("*Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed."); *Coe v. Bell*, 210 F.3d 371 (6th Cir. 1999) ("The issuance of a mandate upon receipt of a Supreme Court order denying certiorari is a ministerial act this court is compelled to perform pursuant to Rule 41(d)(2)(D). To stay the mandate following denial of certiorari is therefore an extraordinary act equivalent to a decision by this court to recall the mandate.").

For an interesting example where the court of appeals denied the *state*'s request for a stay of the mandate, *see Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992) (en banc) ("Any stay of mandate would have to be justified upon the same grounds as would justify a recall of mandate. In this case, the result of the application of subsequent Supreme Court authority would not change the result of our *en banc* opinion."). In *Adamson*, the court of appeals had held Adamson's death sentence to be unconstitutional; the Director of Arizona's Department of Corrections petitioned for certiorari; the Supreme Court rejected similar constitutional challenges to Arizona's death penalty regime in other cases, but denied certiorari in Adamson's case (apparently because, with two Justices taking no part, there were not enough votes to grant certiorari, vacate, and remand for reconsideration in light of the decisions in the other cases); the State sought to stay the court of appeals' mandate in *Adamson* to allow for reconsideration in light of the recent Supreme Court rulings; and the court of appeals denied the request and issued the mandate. *See id.* at 616-17; *id.* at 621-22 (Brunetti, J., joined by Alarcón and Beezer, JJ., dissenting).

directs, as noted above, that "[t]he 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.*" *Schad* illustrates that when rehearing is sought in the Supreme Court after a denial of certiorari, the "Supreme Court's final disposition" can occur later than the date when "a copy of a Supreme Court order denying the petition for writ of certiorari is filed." The court of appeals in *Schad* pegged the endpoint of its stay to what turned out to be the later of these points (the "final disposition" in the Supreme Court), and the Court did not appear to criticize this choice.

The subcommittee discussed whether it would be desirable to amend Rule 41(d)(2)(D) to refer to "the Supreme Court's final disposition," and the tentative conclusion was that it would not be desirable. The difference in wording likely stems from the fact that Rule 41(d)(2)(B) encompasses instances when the Supreme Court *grants* certiorari – so that a reference to the "final disposition" includes those cases in which the Court issues a decision on the merits. As a matter of current practice, it seems likely that the Clerk's Office promptly issues the mandate as a matter of course upon receipt of the order denying certiorari.[22] It is very rare for the Supreme Court to grant rehearing of the denial of certiorari.[23] A rule that authorized the court of appeals routinely to delay issuance of the mandate (beyond the time when a copy of the order denying certiorari is filed) merely because a rehearing petition is pending in the Supreme Court would therefore authorize delays in issuing the mandate in many cases where there is no reasonable prospect that the initial denial of certiorari will be disturbed.[24]

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[22] Mr. Gans confirmed that such is the practice in the Eighth Circuit. *See also* D.C. Circuit Handbook XIII.C ("Upon notification of the denial of the petition by the Supreme Court, this Court's mandate will be issued promptly."); Sixth Circuit Rule 41(c) ("Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.").

[23] *See* Supreme Court Rule 44.2 (grounds for petition for rehearing of order denying petition for certiorari "shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 15.I.6(b), pp. 841-45 (10th ed. 2013).

[24] Moreover, if there is a real prospect that five Justices will vote to grant rehearing of the denial of certiorari, the petitioner could seek an order suspending the order denying certiorari. *See* Supreme Court Rule 16.3 ("The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice."); *Boumediene v. Bush*, 550 U.S. 1301, 127 S. Ct. 1725, 1727 (2007) (Roberts, C.J., in chambers) ("This most extraordinary relief will not be granted unless there is a 'reasonable likelihood of this Court's reversing its previous decision and granting certiorari.'" (quoting *Richmond v. Arizona*, 434 U.S. 1323 (1977) (Rehnquist, J., in chambers))); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 6.XX.43, pp. 521-22 (10th ed. 2013).

1. Option One (barring stays after denial of certiorari)

Here is a very rough sketch of possible amendments to implement the first policy option noted above (barring further stays of the mandate after a denial of certiorari). The sketch includes an amendment to Rule 2 in order to avoid the possibility that a court would simply invoke Rule 2 in order to suspend the operation of the relevant provisions in Rule 41.

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rules 26(b) and 41(d)(2)(D).

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(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. Subject to Rule 41(d)(2)(D),[25] tThe court may shorten or extend the time by order.

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

[25] Would it be clearer to omit "Subject to Rule 41(d)(2)(D)" from Rule 41(b) and instead insert at the start of Rule 41(d)(2)(D) the phrase "Notwithstanding Rule 41(b)," ?

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(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.

2. **Option Two (stays after denial of certiorari only in extraordinary circumstances)**

Here is a very rough sketch of possible amendments to implement the second policy option noted above (permitting further stays of the mandate after a denial of certiorari only in extraordinary circumstances).

Rule 2. Suspension of Rules[26]

On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rules 26(b) and 41(d)(2)(D).

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

[26] Although I reproduce the Rule 2 amendment here as well, it is unclear that such an amendment would be particularly necessary; how many cases would arise in which a court would find no extraordinary circumstances but would nonetheless be willing to invoke Rule 2 to suspend the relevant portion of Rule 41?

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(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. Subject to Rule 41(d)(2)(D),[27] ~~t~~The court may shorten or extend the time by order.

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

[27] Would it be clearer to omit "Subject to Rule 41(d)(2)(D)" from Rule 41(b) and instead insert at the start of Rule 41(d)(2)(D) the phrase "Notwithstanding Rule 41(b)," ?

(D) Unless it finds that extraordinary circumstances justify it in ordering a further stay, tThe 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.

III. Conclusion

If the Committee is inclined to consider amendments to Rule 41 to address matters discussed here, the clarification proposed in Part I of this memo seems like the most straightforward change: Requiring stays of the mandate to be accomplished by order would serve an important notice-giving function while not impeding in any significant way the ability of the court of appeals to exercise its stay authority. By contrast, the questions addressed in Part II of this memo seem more challenging.

Encl.

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 08-AP-R (disclosure requirements)

Date: March 31, 2015

This item focuses on local circuit provisions that impose disclosure requirements broader than those requirements found in the Appellate Rules. The Committee has been discussing whether any of the additional requirements in these local rules should be considered for inclusion in the Appellate rules. At its last meeting, the Committee considered several areas in which certain circuits had imposed additional disclosure requirements. These included:

- Judge's connection with a prior or current participant in the litigation (including lawyers);
- Disclosures in criminal appeals;
- Disclosures in bankruptcy appeals;
- Disclosure by intervenors;
- Disclosure of an ownership interest other than stock;
- Disclosure of ownership interests held other than by publicly traded corporations;
- Disclosure by public entities not in the corporate form;
- Disclosure of affiliates; and
- Greater disclosure by amici.

In addition, at the Standing Committee meeting, one of the members asked the Committee to consider whether the parties should be required to disclose the witnesses in any proceeding in the lower court.

This memo provides, for discussion purposes only, some drafting language for adding disclosure requirements in the areas that the Committee has discussed. Part One of this memo sets forth background and a brief discussion of the cost/benefit analysis attendant to disclosure requirements. Part Two sets forth the drafting possibilities, and discusses some considerations

that the Committee might take into account in determining whether to pursue an amendment to the existing disclosure requirements in the Appellate Rules.[1] Part Three sets forth a draft, for discussion purposes only, on how the Appellate Rules would have to be amended to accommodate all the colorable additional disclosure requirements that have been discussed by the Committee.

I. Rules on Disclosure, and the Cost-Benefit Analysis:

A. Appellate Rules

Two Appellate Rules deal with disclosure. **Rule 26.1(a) provides:**

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

Appellate Rule 29(c)(1) provides disclosure requirements for amici. It is essentially an absorptive provision: it imposes the same disclosure requirements as are imposed on a party:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> > (1) If the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; [2]

[1] The memo does not treat all the options for greater disclosure provided by the local rules. The options treated are those that received at least preliminarily positive comments in memos prepared by Subcommittee members, or as reflected in the minutes from the last meeting. It also treats the one suggestion made by a Standing Committee member when the topic of disclosure rules was raised at the June Standing Committee meeting.

[2] The Appellate Rules Committee has previously considered a suggestion that Rule 29(c)(1) should be clarified because the language "like that required" might be thought to mean that the disclosure requirements for amici might be somehow different from the disclosure requirements for parties. But the Committee decided not to proceed with any such amendment, on the ground that the language was intended to and does mean that the disclosure requirements for parties and amici are coextensive.

B. Statute

These disclosure rules --- and any consideration of whether to expand upon them --- must be evaluated in light of the statute that predominantly regulates recusal and disqualification decisions. That provision is **28 U.S.C.§ 455**, which provides in pertinent part as follows:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> **(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.[3]

In addition, **28 U.S.C. § 47** provides that ""[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."

C. Cost-Benefit Analysis for Disclosure Rules

The general requirement of section 455 --- recusal should occur where impartiality might reasonably be questioned --- is broad and fuzzy enough that almost any scenario of a judge's relationship to a matter is at least potentially one that would call for disclosure. For example, if a corporate party has an affiliate, and the judge has an ownership interest in the affiliate, one can probably spin a factual situation in which the relationship is so close, or the effect on the affiliate is so profound, that impartiality might reasonably be questioned. A review of the local rules that require greater disclosure, conducted by Cathie Struve's research assistant in 2013, in fact concluded that every single one of the additional requirements could facilitate a judge's recusal decision. That is not an irrational conclusion given the breadth of the "impartiality might reasonably be questioned" standard.

So disclosure rules provide a benefit in informing the judge's recusal decisions. But of course these rules impose costs on the parties; investigation and disclosure of all the required details (affiliates, participating law firms, trade associations, etc.) adds to the expense of litigation. Thus, it would seem that a disclosure requirement should not be added simply because it might in some attenuated circumstance give a judge relevant information for recusal. It is hard to know where to draw the line, but if you have to spin an unlikely scenario to conclude that the information could be relevant to a recusal decision, then perhaps the disclosure should not be required. Another factor is the type of information demanded --- the more it is readily at hand, the more acceptable the disclosure requirement.

[3] Canon 3(C) of the Code of Conduct for United States Judges also governs disqualifications, but it is substantively identical to section 455.

II. Areas for Additional Disclosure

A. Judge's Connection With a Prior or Current Participant in the Litigation

The local rules in some circuits focus on two types of connections between a judge and a participant in the litigation: 1) a judge's prior participation in the case; and 2) lawyers who have previously appeared in the case. Both these connections are certainly in some cases relevant to disqualification/recusal considerations. They will be discussed in turn.

1. Prior Participation

Section 47 requires recusal if the judge tried the case or issue. Section 455(b)(2) provides that a judge must recuse himself where he served as lawyer in the matter. Section 455(b)(3) provides that if the judge was previously employed by the government, he must recuse if he participated as "counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy." Finally, section 455(b)(1) requires recusal when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding" and section 455(b)(2) requires recusal where the judge has been a material witness.

But while the statute does specifically regulate a judge's prior participation, the factors listed cannot easily be made the subject of disclosure requirements. Some of these connections would be probably be beyond a party's ability to know. For example, how is a party to know that the judge in his former life as a government lawyer "expressed an opinion concerning the merits of a particular case or controversy"? And how is a party to know whether the judge has personal knowledge of disputed evidentiary facts? It is probably for this reason that the local rules providing additional disclosure provisions on this subject are focused on the judge's actual participation in the proceeding or in related state proceedings.

The Eleventh Circuit provision might be a good model for discussion. As incorporated into Rule 26.1, and amended slightly to cover related state court proceedings, it would read like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** provides a list of the trial judges in the proceeding and in any related state proceeding.

2. Lawyer Participation

Under section 455(b)(2), a judge must recuse if "a lawyer with whom he previously practiced law" was involved with the case during their association. A judge must also recuse if he or his spouse, or anyone within three degrees of relationship of either of them, or a spouse of such a person, is an attorney in a proceeding. Given the connection between participating lawyers and grounds for recusal --- and the possibility that a judge has family members who are lawyers within the specified degree of relationship --- it is probably not surprising that five circuits seek information about lawyers' participation in the case. The cost of such a disclosure would not seem high as it should be information that the party has fairly easily at its disposal.

The most direct and comprehensive language on the subject is found in Federal Circuit Rule 47.4. As added to Rule 26.1, it would look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

B. Disclosures in Criminal Appeals

The disclosure provisions in the Criminal Rules are found in Rule 12.4. Rule 12.4(a)(1) is identical to Appellate Rule 26.1. Rule 12.4(a)(2) is an additional provision that requires the government to file a statement identifying an organizational victim, and also requires the government to disclose the ownership information required by Rule 12.4(a)(1) "to the extent it can be obtained through due diligence."[4]

[4] That language is a recognition that the government might not have ready access about whether the victim has a parent or 10% or more ownership by a public company. In contrast, parties would clearly have that information, so a due diligence standard is unnecessary in Rule 26.1(a). It should be noted, however, that adding

The minutes of the last Committee meeting describe a discussion led by Judge Chagares, who stated that some attorneys were under the impression that the Rule 26.1 disclosure requirements do not apply to criminal appeals. Judge Chagares concluded that an amendment to Rule 26.1 that would specify that it applies to criminal appeals would be unnecessary, because the rule plainly does apply, and because the Committee's work on the question had sensitized Circuit Clerks as to its applicability.

Therefore, the only question remaining for criminal cases is whether to add a provision regarding disclosure of organizational victims. It would seem that the need for disclosure is not dramatic. There are not many appeals involving corporate victims, and recoveries by organizational victims in criminal cases would seldom be so substantial as to raise an inference of impartiality.

On the other hand, there is no apparent explanation for having disclosure requirements as to victims in criminal trials, but not in criminal appeals. So if the Committee were to proceed with an amendment, it would have the positive effect of providing uniformity across the two sets of rules.

There is a drafting problem, however. A provision about an organizational victim does not fit well within the structure of the existing rule. It can't be efficiently incorporated into subdivision (a), and it is probably not worth it to make it subdivision (b) and move everything else down, as renumbering (or relettering) imposes transaction costs. The best solution is to add a subdivision at the end of the rule.

If Criminal Rule 12.4(a)(2) were added to the Appellate Rules, it might look like this (in a rule that adds, in building block fashion, to what has been added above).

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;
>
> **(b) Time for Filing; Supplemental Filing.**

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certain disclosure requirements may raise a question of what kind of effort a party must undertake to find the information – in which case the addition of a due diligence standard might be warranted.

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(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged][5] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

C. Disclosures in Bankruptcy Appeals

As Judge Chagares noted at the last meeting, not every person or entity involved in a bankruptcy proceeding is treated as a party for purposes of disclosure issues. The Code of Conduct Committee's Advisory Opinion No. 100 states that the following participants in a bankruptcy proceeding have a sufficient relationship to that proceeding to be considered parties for purposes of the disclosure rules: 1) the debtor; 2) members of the creditors' committee; 3) the trustee; 4) parties to an adversary proceeding; and 5) participants in a contested matter.

The clarification provided by Advisory Opinion No. 100 is not currently set forth in either the Appellate Rules or the Bankruptcy Rules on disclosure. In 2008, the Codes of Conduct Committee suggested that the Bankruptcy Rules Committee "may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters."[6] But the Bankruptcy Rules Committee has never adopted, and is not currently considering, any change to its disclosure rule. The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules.

That said, if the Committee were interested in clarifying who the "parties" are in a bankruptcy, then it may wish to consider language along the lines of the Third Circuit Rule. As applied to the working draft as it has been set forth thus far, the language might be added as follows (it only works as a separate subdivision):

[5] "Alleged" is used in the Criminal Rules. There is an argument that "alleged" is not the right term at the appellate level.

[6] Letter from Chair of Codes of Conduct Committee to Chair of Rules Committee, May 8, 2008, at 2.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

> **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
>
> **(2)** lists the trial judges in the proceeding and in any related state proceeding;
>
> **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

(b) Time for Filing; Supplemental Filing.

*** * ***

(c) Number of Copies.

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(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

The Eleventh Circuit adds a requirement that "other entities whose stock or equity value may be substantially affected by the outcome of the proceedings" must be disclosed. But this language seems pretty fuzzy. There could be a lot of collateral damage in a bankruptcy proceeding and it would often be difficult to determine at the time disclosure is required what

kind of effect there will be. And it will certainly be difficult to determine if the effect may be "substantial" --- whatever that means. So it is probably better to avoid such fuzzy language.

D. Disclosure of an Ownership Interest Other Than Stock

Currently the only financial interest in a party or amici that must be disclosed is the parent corporation and "any public corporation that owns 10% or more of its stock." There are local rules that require disclosure of ownership interests other than stock. For example, the D.C. Circuit requires disclosure of any publicly held company "that has a 10% or greater ownership interest (such as stock or partnership shares)." Because recusal rules focuses on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit.

An amendment that would expand the disclosure requirement beyond stock ownership would be straightforward. As applied to our already-altered Rule 26.1(a), it might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that ~~owns 10% or more of its stock~~ **has a 10% or greater ownership interest in the party,** or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

E. Disclosure of Ownership Interests Held Other Than By Publicly Traded Corporations

Currently the 10% ownership disclosure requirement applies only if that interest is held by a publicly traded corporation. The Fourth Circuit recognizes that the financial interest that might be relevant to recusal is not limited to ownership by a publicly traded corporation. That is, nothing in 28 U.S.C. § 455 distinguishes between businesses organized as corporations and those organized in another way, such as a real estate investment trust.

Neal Katyal suggested, in his memo to the Committee prepared for the Subcommittee, that it is unlikely that parties are using the term "corporation" to avoid disclosure where the ownership interest is held by an entity in another form. That is a plausible conclusion, but it would seem hard to answer that question empirically with any certainty. In any event, if the Committee were to decide to amend the rule to expand disclosure requirements beyond corporate ownership, that amendment might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ **entity** that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ **entity**;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

F. Disclosure By Public Entities Not in the Corporate Form

As discussed at the previous meeting, the rule limiting the disclosure requirements to corporations is hard to square with the fact that a judge's ownership interest in an entity doing business other than in the corporate form --- such as an LLC or a trade association --- could in some cases be grounds for recusal. That is to say, for recusal purposes there is no substantive distinction between corporations and other non-governmental entities. The financial-interest prohibition in 28 U.S.C. § 455(b)(4) applies to all "parties" to a proceeding, and is not dependent on corporate form.

Neal Katyal stated in his previous memo on the subject that it is unlikely that parties believe they are exempt from disclosure requirements when the entity is not in corporate form. Again, this conclusion is very difficult to address empirically. If the Committee does decide to expand the parties' (and, by absorption, amici's) disclosure requirements to include entities other than in corporate form, the rule could be amended as follows:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

It should be noted that if a change is made to require entities other than corporations to disclose, there will have to be conforming changes to Rule 29 (as discussed below) and to Rule 28(a)(1), which states that the brief must include "a corporate disclosure statement if required by Rule 26.1." The conforming change would be easy: just delete the word "corporate."

G. Disclosure of Affiliates

When Rule 26.1 was amended in 1998, the Advisory Committee specifically declined to require disclosure of a party's affiliates. The Committee Note explains that "disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary" because "the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of the same corporation." Nothing has been presented to indicate that the interests supporting disclosure have somehow become more compelling since 1998. Moreover, the Committee on Codes of Conduct has advised that a judge need not automatically recuse simply because the judge owns stock in a subsidiary and the parent corporation is a party.[7] If that is so, then it follows that recusal is not required when the judge has an ownership interest in a party's corporate affiliate.

When it comes to affiliates, the question is whether the judge's interest in the affiliate "will be substantially affected by the outcome of the proceeding" under section 455(b)(4). The affiliate connection in general is more attenuated than when the judge has an ownership interest in a parent of the party, and so it is questionable whether affiliate status should be elevated to the same status as parent-sub, i.e., automatic reporting of the relationship. As stated above, many relationships that the judge might have --- financial, familial, etc. --- might in extreme cases be substantially affected by the outcome of the proceeding. But at some point the burdens of disclosure outweigh the benefits to judges, because the information disclosed will so rarely lead to recusal.

Nonetheless, if the Committee did wish to include corporate affiliation in the disclosure requirements, the rule amendment might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and

[77] Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009).

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

H. Intervenors

Intervenors obviously have an interest in the proceeding, and so theoretically intervenors should be subject to the same disclosure requirements as are imposed on a party. Three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially.

There are some strong arguments, though, for not amending the rule to deal specifically with intervenors. Probably the strongest argument is that intervention at the appellate level is so rare that it is not worth treating with a disclosure rule. It is true that the *government* intervenes at the appellate level with some frequency, but intervention on appeal by non-governmental corporate parties appears very rare. It is notable that in 2010, the Committee was asked by the DOJ representative to consider a rule on intervention, because the Appellate Rules have no general provision governing intervention along the lines of Civil Rule 24. The minutes of the meeting indicate that the Committee's discussion "did not produce any suggestions for moving forward with a rulemaking proposal on this item"; in 2011 the proposal on intervenors was taken off the Committee's agenda. Given the fact that the Committee has decided not to establish standards for intervention generally, it seems a bit odd to amend the disclosure rules to cover it. It seems odder still that Rule 26.1 should be amended to cover intervenors given the absence of movement on the subject by the Civil Rules Committee. It can be argued that a more systematic solution would be to consider a general rule on intervenors with a disclosure provision in that rule, or to consider a disclosure rule that tracked an amendment in the Civil Rules to that effect.

Another reason for questioning the need for an amendment treating intervenors is that when they do intervene, they have the same rights as a party to the proceeding. *See, e.g., City of Cleveland v. Nuclear Regulatory Commission*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). If that is the case, then it is probable that a corporate intervenor is *already subject* to the disclosure requirements that apply to parties under Rule 26.1. Thus, imposing a disclosure requirement on intervenors specifically may be superfluous and even confusing, because the amendment would raise an inference that the Committee had determined that intervenors are *not* parties to the appeal. At a minimum, more thought should probably be given to the status of intervenors and

whether they are properly considered as parties before a disclosure amendment on the subject is proposed.

If the Committee were to decide to specify that the disclosure requirements apply to intervenors, it should be done by adding another subdivision to Rule 26.1. Lumping intervenors with parties results in balky drafting, especially if new disclosure requirements are to be added. For example, instead of having a provision requiring disclosure of an ownership interest "in the party" the rule would have to say "ownership interest in the party or intervenor." And so forth. Also, it needs to be specified in the amendment that intervenors are only subject to disclosure requirements if they would have those obligations as parties --- so, for example, an individual intervenor should not be subject to any disclosure obligations.

Here is what a separate subdivision covering intervenors might look like (as added to all the additions that have been discussed previously in this memo):

(a) Who Must File. ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:

(1) identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;

(2) lists the trial judges in the proceeding and in any related state proceeding; and

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

(b) Time for Filing; Supplemental Filing.

*** * ***

(c) Number of Copies.

*** * ***

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

● the debtor, if not named in the caption;

● the members of the creditors' committees;

● the parties to an adversary proceeding; and

● the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[8]

I. More Disclosure by Amici

At the last meeting, Committee members noted that the interest of a judge in an amicus could warrant recusal. It was also noted that there have been instances in which parties engineered the participation of an amicus in order to generate a recusal. These concerns about amici are currently addressed in Rule 29(c)(1), which provides that a "corporation" must file "a disclosure statement like that required of parties by Rule 26.1."

The same issues of greater disclosure that have previously been discussed as to parties --- e.g., extension to non-corporate entities, different ownership interests, affiliates, etc. ---would appear to apply equally to amici. There does not seem to be any reason to try to impose a disclosure obligation on an amicus that would not be imposed on a party. For example, there would be no reason to conclude that an amicus must disclose affiliates, while a party is not required to do so. Indeed that is the very point of the absorptive Rule 29(c)(1) --- whatever parties must disclose, amici must disclose. That absorption would seem to be efficient and elegant rulemaking.

But that absorption works currently because the only disclosure requirement is that of a corporation, which must disclose its parent and any publicly held corporation that holds more than 10% of stock. The relevance of that interest is obvious for both parties and amici, and both parties and amici will be disclosing individualized and not cumulative information. Absorption is

[8] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, because that information will already have been disclosed by the parties and an intervenor may not have easy access to that information.

more problematic if some of the extra disclosure requirements considered above are added to Rule 26.1. For example, the provisions discussed above, if enacted, would require parties to disclose the trial judges in the proceeding or in any related state proceeding, and the names of law firms and lawyers that have appeared or will appear in the proceeding. There would be no reason to impose those obligations on an amicus, because the parties will already have made those disclosures and the information demanded is not logically related to the amicus role and may be difficult for the amicus to access. The point here is not that a judge's interest in a party should be treated differently from an interest in an amicus, but rather that parties have access to information and will have disclosed that information independently of the amicus and so there is no reason to impose the requirement on the amicus.

In sum, if additional disclosure requirements on amici are to be imposed, Rule 29(c)(1) will have to be changed so that there is a proper fit between it and an amended Rule 26.1. There would be three problematic additions to Rule 26.1 considered so far as applied to current Rule 29(c)(1): 1) covering all non-governmental public entities (because Rule 29(c)(1) currently applies only to corporations); 2) requiring disclosure of trial judges in the proceeding; and 3) requiring disclosure of all participating lawyers. (All of the other possible extensions could be absorbed without changing the language of Rule 29(c)(1)). Assuming these three extensions were to be added, Rule 29(c)(1) could be changed as follows:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> (1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:
>
> (A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and
>
> (B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2) and (3). [9]

Finally, in one respect it might be argued that amici should have an independent disclosure obligation: would it not be useful to disclose whether entities or lawyers not on the brief have actually contributed in some way (financially or otherwise) to the amicus's cause? The

[9] It could be argued that the rule's language requiring a statement "like that" made by parties, could be flexible enough to allow some differences and so it would be unnecessary to say anything about differences in disclosure. But failing to specify the different disclosure provisions is confusing, and moreover the Appellate Rules Committee has already determined that the term "like that" does not indicate any differences in disclosure requirements between parties and amici.

answer is, probably yes, as the judge's relationship to those with such interests could be pertinent to the recusal decision. It should be noted, though, that Rule 29 currently *does* require at least some disclosure of participation in the amicus brief. Rule 29(c)(4) already requires amici to provide "a concise statement of the identity of the amicus curiae and its interest in the case" --- and more importantly, Rule 29(c)(5)(C) requires all non-governmental amici to file a statement that indicates whether

> "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."

It could be argued that the language of Rule 29(c)(5) could be usefully amended to require disclosure of all the lawyers who worked on the brief, in order to determine whether the judge needs to exclude due to a family relationship. If such a changes were made, it would be best to add it as a new subpart might look like this:

> (C) 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 ; and
>
> (D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

J. Witness Lists

When the Committee's consideration of disclosure rules was discussed at the January Standing Committee meeting, a Committee member from the Ninth Circuit suggested that it would be useful to amend Rule 26.1 to require disclosure of the names of witnesses who testified in the proceeding. Certainly a scenario could be crafted in which the judge's relationship with one of the witnesses at trial is a strong enough connection as that his impartiality "might reasonably be questioned." 28 U.S.C. §455(b). Also, 28 U.S.C.§455(b)(5)(iv) requires a judge to recuse himself where a person who is within the necessary degree of relationship is "likely to be a material witness in the proceeding." That statutory provision is not addressed to appellate judges but rather to trial judges --- the provision looks forward and not backward. It seems to be grounded in the concern that a witness could receive preferential treatment by the trial judge. The relationship of an appellate judge to a witness in the case appears to be more attenuated. But it might be concluded that section 455(b)(v) has some relevance because it generally shows a concern about certain relationships between judges and witnesses.

That said, it is certainly the rare case in which an appellate judge's relationship to a trial witness raises cause for concern. On the other hand, the disclosure requirement would simply be producing a witness list, and that seems a minimal burden. It is of course for the Committee to determine whether the costs of disclosure with regard to witness lists outweighs the benefit of providing information to judges that could in some few cases be relevant to a recusal decision.

If witness lists are added to the disclosure requirement, the addition might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party ~~to a proceeding~~ or intervenor in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and
> >
> > **(4)** lists the names of all witnesses who have testified on behalf of the party in the proceeding.

Under the drafts as set forth above, the witness list requirement would not apply to amici --- requiring amici to disclose this information would be burdensome on the amici and duplicative to the court. Nor would intervenors be subject to this requirement.

K. Reporting by Individuals?

There remains a concern about adding new disclosure requirements beyond corporate ownership that has not yet been discussed. The additional requirements – list of judges, list of lawyers, list of witnesses --- are not tied to the nature or identity of the *party*. And yet the disclosure requirement at the threshold is definitely dependent on the nature of the party. Only corporate parties (and, if added, other entities) are required to make disclosures. And yet the risk

of recusal because of trial judge participation, lawyer participation, and witness participation are the same regardless of whether the parties are business entities or individuals. So logically, individual parties should have disclosure requirements when it comes to these additional, non-business grounded recusal factors.

To date, however, none of the local rules require individuals to report, even though the information that needs to be reported goes well beyond corporate ownership in many of these rules. So the rules are logically inconsistent but at least avoid the concern that individual parties --- at least certain of them --- might be especially burdened by disclosure obligations.

If the Committee were to determine that individual parties should disclose non-business related factors, then Rule 26.1 would need substantial amendment. There would be a conflict with the opening clause ("Except for governmental units and individuals"). The draft incorporating all the other changes, set forth immediately below, would probably have to be subdivided: business entities would disclose ownership information in one subdivision and then individuals would be added to the requirement for disclosing the other information. Relettering would probably be required. Joe Kimble would surely be required.

Because this memo has ended up to be complicated enough, I chose not to give the Committee two separate drafts, one for exempting individuals and one for including them. The version below does not cover individuals.

III. Discussion Draft of All Possible Changes Discussed in This Memorandum

Rule 26.1. ~~Corporate~~ Disclosure Statement[10]

(a) Who Must File; <u>What Must Be Disclosed</u>.[11] ~~Any nongovernmental corporate~~ **<u>Except for governmental units and individuals, any</u>** party to a proceeding in a court of appeals must file a statement that<u>:</u>

> **<u>(1)</u>** identifies any parent **<u>or affiliated</u>** corporation and any publicly held ~~corporation~~ <u>entity</u> that ~~owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the party,</u> or states that there is no such ~~corporation~~ <u>entity;</u>
>
> **<u>(2)</u>** <u>lists the trial judges in the proceeding and in any related state proceeding; and</u>
>
> **<u>(3)</u>** <u>lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and</u>
>
> **<u>(4)</u>** <u>lists the names of all witnesses who have testified on behalf of the party in the proceeding.</u>

(b) Time for Filing; Supplemental Filing.

*** * ***

(c) Number of Copies.

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<u>(d) Organizational Victim in a Criminal Case.</u> <u>In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.</u>

---

[10] "Corporate" is no longer descriptive if the rule governs other business entities.

[11] The caption of this subdivision is insufficiently descriptive --- even today --- because the subdivision covers not only the "who" but the "what."

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

● the debtor, if not named in the caption;

● the members of the creditors' committees;

● the parties to an adversary proceeding; and

● the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[12]

Rule 29. Brief of an Amicus Curiae

*** * ***

(c) Contents and Form. An amicus brief must comply with Rule 32. * * * . An amicus brief need not comply with Rule 28, but must include the following:

(c) Contents and Form. * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:

(A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and

(B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2)-(4).]

* * *

[12] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, witness lists, etc., because that information will already have been disclosed by the parties.

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a),[13] a statement that indicates whether:

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

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

(C) 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; and

(D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

[13] This is odd phrasing. Why not just say who is excepted? "Unless the amicus curiae is the United States or its officer or its agency or a state . . ." If the rule ever does get amended, that would seem to be a stylistic and user-friendly improvement.

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 08-AP-H

During the past several years, the Civil and Appellate Rules Committees – and the Civil / Appellate Subcommittee – have discussed the possibility of amending the Rules to address the topic of "manufactured finality." This topic concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims.

Last fall, the Civil / Appellate Subcommittee reconvened and took up the topic once again. The Subcommittee is chaired by Judge Scott M. Matheson, Jr., and includes Judge Fay, Douglas Letter, Kevin Newsom, and Virginia A. Seitz (a member of the Civil Rules Committee).

I enclose the Subcommittee report; rule amendment sketches; and notes of Subcommittee conference calls concerning manufactured finality. These materials were written by Professor Cooper and appeared first in the Civil Rules Committee's spring 2015 agenda book. (In that agenda book, these materials appeared together with the Subcommittee materials concerning Civil Rule 62. I have separated out the two topics, and the Civil Rule 62 materials appear separately in this volume.)

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APPELLATE-CIVIL SUBCOMMITTEE REPORT: MANUFACTURED FINALITY

The two projects of the Appellate-Civil Subcommittee reported here began in the Appellate Rules Committee. As often happens, potential solutions to problems identified by the Appellate Rules Committee seem to lie as much in the Civil Rules as in the Appellate Rules. Joint subcommittees have proved invaluable in focusing the work of both committees.

Both of the present topics have lingered for some time. Manufactured finality was considered in some depth by an earlier Subcommittee. The provisions of Rule 62 addressing stays of execution pending post-judgment motions and appeal have been considered in the Appellate Rules Committee and then transferred to the Subcommittee. Manufactured finality is discussed here. Rule 62 comes next.

"Manufactured finality" refers to attempts to accelerate the time when an appeal can be taken following an interlocutory ruling that is not independently appealable under any other elaboration of the final decision requirement of 28 U.S.C. § 1291 or under the statutes that permit interlocutory appeals.

Many circumstances may lead a party to prefer an immediate appeal to test an interlocutory order that is not appealable without more. A few common illustrations set the stage. A plaintiff may have several demands for relief. An order dismissing some of them may leave only fragments that, standing alone, do not seem to warrant the costs and uncertainties of continuing litigation. Even if the plaintiff can afford to litigate the rest of the way to a final judgment, banking on the prospect that the interlocutory order will be reversed, the cost may be high, and can easily be wasted whether the result on appeal is reversal or affirmance. And delay is an inevitable cost. So too, the court may dismiss some theories that support a single claim, leaving only theories that the plaintiff thinks weaker either as a matter of law or as a matter of available evidence. Or the court may enter an in limine order excluding the most important -- and perhaps indispensable -- parts of the plaintiff's evidence.

Faced with these, and often enough more complicated circumstances, an attempt may be made to "manufacture" finality by arranging voluntary or stipulated dismissal of all, or substantial parts, of what otherwise remains to be done in the trial court.

Three rough categories of manufactured finality can be identified. Most decisions agree that most of the time a final judgment cannot be manufactured by dismissing without prejudice everything that remains unfinished in the action. Most decisions agree that most of the time a dismissal with prejudice of all

unfinished parts of an action does establish finality. And most circuits reject the approach of "conditional finality" that has been accepted in the Second Circuit and apparently the Federal Circuit. This tactic dismisses all unfinished parts of the action with prejudice, subject to the condition that they can be revived --the prejudice dissolves -- if the interlocutory orders thus made final are reversed on appeal.

The question whether to propose rules provisions addressing manufactured finality is beset by two major concerns.

One major concern is that the cases have recognized circumstances in which a dismissal without prejudice does achieve appealable finality. A rule that rejects finality for all dismissals without prejudice might come at significant cost. These concerns are reflected in the memorandum attached below.

A related concern is that a rule recognizing that a dismissal with prejudice can achieve finality accomplishes nothing useful. Courts understand that now. A rule that states that only a dismissal with prejudice can achieve finality, on the other hand, runs into the same problems as a rule that rejects finality for all dismissals without prejudice.

Discussions of conditional prejudice have tended to divide practicing lawyers from judges. It may be that the division is more accurately described as between practicing lawyers and trial judges on one side and appellate judges on the other. Practicing lawyers believe that a dismissal with conditional prejudice can be a valuable means of achieving finality. Since most appeals lead to affirmance, the opportunity to revive the parts of the action that were dismissed with conditional prejudice will not cause as much risk of repeated appeals in the same action as might be feared. The party who is willing to risk all that remains in the action on the opportunity to win reversal of the interlocutory orders made before the dismissal will be able to continue only if there is reversible error. If the alternative is to persist in litigating to a true final judgment the parts that would be dismissed with conditional prejudice, both the trial court and the opposing party pay a price that is not redeemed even if the eventual appeal leads to affirmance. And those proceedings are likely to become pure waste on reversal of the interlocutory orders that would have been reviewed on a conditional-finality appeal.

Judges (at least appellate judges), on the other hand, fear that dismissals with conditional prejudice will threaten the core values of the final-judgment rule. As with an avowedly interlocutory appeal, the result may be added cost and delay and a risk that the appellate court will have to revisit familiar terrain on a subsequent appeal.

One way of viewing the conditional prejudice issue is to ask whether there is a real need to address it by rules amendments.

There is no indication that the Second Circuit regrets its approach. Apart from the Federal Circuit, the other circuits that have confronted the question refuse to allow manufactured finality on these terms. Is there a need to adopt a rule that prohibits reliance on conditional prejudice by the courts that find it a useful adjustment of the final-judgment rule?

The Subcommittee, building on work by an earlier subcommittee, has discussed these issues at length. The competing arguments on all sides continue to defy confident resolution. Four alternatives are presented for Committee consideration. The Subcommittee does not recommend a choice among them.

The first alternative is to do nothing. The reasons for doing nothing are easily summarized. Most situations are governed by two clear rules that are generally recognized. A voluntary dismissal without prejudice, even if it sweeps away an entire action, does not achieve finality. A voluntary dismissal with prejudice that sweeps away an entire action does achieve finality. Little would be accomplished by adopting a rule that states either or both of these points. And so simple a rule would create a risk of undoing decisions that now recognize finality in circumstances that would not seem to fit within the new rule. The most obvious example is conditional prejudice, discussed further below. Other examples are described in the attached memorandum discussing the choices between simple rules, complex rules, or no rules.

The argument for going ahead with simple rules is direct. It is important to have clear rules of appeal jurisdiction. And uniformity across the circuits is an important component of clarity -- no matter how clear the rules may seem within any particular circuit, disuniformity will encourage attempts to manufacture finality that backfire against sloppy or risk-taking lawyers. This argument, however, is subject to challenge on the ground that no rule text will be so perfect as to exclude all opportunities for interpretation and thus for disuniform interpretation.

The second alternative is to adopt a rule that says only that a plaintiff -- or perhaps any party asserting a claim for relief -- can achieve appeal finality by dismissing with prejudice all claims and parties that remain the action. Although this rule is accepted as a general matter now, recognition in rule text would provide guidance for lawyers who are not expert in the complexities of the final-judgment rule. It also would provide reassurance for lawyers who are familiar with the idea, but feel pressure to confirm their understanding by expensive research.

This simple rule would leave ambiguities at the margin. The clearest example is a dismissal with conditional prejudice. Is that with prejudice or without prejudice? Other examples occur in cases that, on one theory or another, recognize de facto prejudice. One illustration is a dismissal without prejudice in circumstances that seem to preclude any new action because the applicable limitations

period has run. Litigants and lawyers would face new uncertainties in the attempt to reconcile existing decisions with the new rule text.

The third alternative is to adopt a rule that says that only a dismissal with prejudice achieves finality. This rule would actually do something, as compared to a rule that recognizes finality on a dismissal with prejudice but that does not expressly foreclose other means of manufacturing finality. But the ambiguities would remain, and expressly foreclosing all but dismissals with prejudice would raise the stakes of uncertainty.

A fourth alternative is to adopt a rule that recognizes or requires that a voluntary dismissal be with prejudice and that also expressly addresses conditional prejudice. Either answer could be given. Conditional prejudice could be recognized as a valid path to finality. This answer might be adopted in a form that would defer to courts that recognize conditional prejudice now, and leave the choice open for courts that have not expressly rejected it, without requiring other circuits to change their views. That path would leave disuniformity. Instead, the rule might require all courts to recognize conditional prejudice. That path likely would stir significant opposition. Or conditional prejudice could be rejected, not so much because of any sense that it has proved undesirable when recognized as because of a desire to achieve national uniformity. A clear majority of the decisions that address the question reject conditional prejudice. There is no indication that it is frequently used in circuits that do recognize it. Uniformity, on this view, would be achieved at little cost, and indeed would be an added benefit if conditional prejudice is in fact a bad means of achieving finality.

A choice among these alternatives will be influenced by a more general sense of the need to prevent further erosion of the final-judgment rule. The rule is far more complicated than the initial statement that finality requires complete disposition of an entire case, leaving nothing to be done in the trial court apart from execution of a judgment that provides relief. Expansions, exceptions, and occasional evasions are familiar in practice. The complication reflects case-specific, or at times more general, rebalancing of the competing needs that allocate jurisdiction between trial courts and appellate courts. An openly ad hoc approach that allows a court of appeals to assert jurisdiction whenever a present appeal seems a good idea would destroy the balance achieved by a general requirement of finality. But many more restricted qualifications are recognized by statute, court rule, and interpretation of 28 U.S.C. § 1291 itself. The choices are seldom easy. But it may be difficult to identify any general practical losses incurred by ongoing and somewhat divergent approaches to manufactured finality. If so, the more abstract desire for more precise rules in this particular corner of appeal jurisdiction may not be enough to justify the potential costs of more precise rules.

The attachments include several things. Initial sketches of simple rules that ignore all potential complications come first. Next is a memorandum addressing some of the complications of manufactured finality. Notes on three Subcommittee conference calls addressing manufactured finality are set out with Notes on two conference calls addressing stays of execution following the discussion of Rule 62.

MANUFACTURED FINALITY DRAFTS

These drafts illustrate the narrowed range of approaches that have emerged from Subcommittee discussions. They do not attempt to capture in rule text the subtle distinctions that may be found in some cases. Something might be said in a Committee Note to suggest that flexibility is possible at the margins, but more than a hint of qualifications could derail the project.

One potential approach has been put aside. There is no current enthusiasm for adopting a simple rule stating that a voluntary dismissal without prejudice does not establish an appealable final judgment. That proposition is broadly accepted as a general matter, leaving little to be accomplished by adopting an Enabling Act Rule. A simple rule, moreover, might thwart appeals that have been allowed and that perhaps should remain available. "Constructive" or "de facto" prejudice may be found when other circumstances will prevent a new action, or at least a new action in the federal courts.

A simple rule could recognize that a voluntary dismissal with prejudice establishes an appealable final judgment. That proposition is accepted in many cases, but it could be useful to establish it by a formal rule for the benefit of those who want reassurance or who, absent guidance by rule, would devote substantial effort to determining what the cases say. This approach could be expanded to state that finality can be achieved by a voluntary dismissal only if it is with prejudice. The rule can be kept simple by requiring dismissal of everything -- all claims and all parties -- that remain in the action after the order or series of orders a claimant wishes to appeal. The Committee Note would be simple to write if the rule is intended to close off every variation of manufactured finality that has emerged here or there in the cases. Writing the Note could be more difficult if it seems better to leave some reason for departures.

Conditional prejudice also can be addressed in rule text. If the choice is to prohibit this means of achieving finality, it may be important to add the prohibition to rule text. Otherwise a court that likes the idea could interpret "with prejudice" to include conditional prejudice, perhaps even in defiance of a Committee Note that attempts to insist on unconditional prejudice. And if the choice is to recognize conditional prejudice, rule text is necessary to overcome the cases that reject it.

[Only] With Prejudice

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.* * * *

(C) *Appealable Finality*. A [plaintiff][party asserting a

868 claim for relief][10] may establish a final decision
869 [for purposes of appeal] by a voluntary dismissal
870 [only] if the dismissal is with prejudice to all
871 claims and parties remaining in the action.[11]

872
873 COMMITTEE NOTE

[10] There may be three choices. Limiting the rule to dismissal by a plaintiff would capture many of the cases, and seems easier to put into effect. Often a plaintiff can dismiss all claims against all parties without further confusion. If the case is complicated by counterclaims, crossclaims, third-party claims, or whatever, it still may be possible to arrange a stipulation of all parties.

If the rule applies to any party asserting a claim, it may be more difficult to work out. A defendant whose counterclaim has been hamstrung but not dismissed, for example, may have a hard time of it in attempting to arrange dismissal of all other claims and parties. And attempting to develop a rule that allows a defendant to manufacture finality on less complete terms is likely to prove more complicated than it is worth. Addressing other sorts of claims would be still more complicated.

All of the discussion has focused on parties asserting a claim for relief. That seems to reflect the cases. It remains to decide whether comparable provisions should be adopted for a defending party who is not asserting any claim. A defendant, for example, might believe that an order striking a defense, or partial summary judgment, or even just an order excluding important evidence, leaves so little hope of prevailing that it is better to submit to an adverse judgment and appeal the adverse rulings. The answer may be that a judgment against a defendant is inherently "with prejudice" and final, no matter whether entered on a stipulation that reserves the right to appeal or on a partial default. If that works, this potential wrinkle can be passed by.

[11] The rule text would look better if it read "may establish a final judgment [only] by voluntarily dismissing with prejudice * * *." But if we keep "only," the rule might seem to exclude means of achieving finality other than voluntary dismissal. A stipulated judgment reserving the right to appeal interlocutory orders would be an example.

As drafted, this provision reaches both unilateral dismissal by notice and dismissal by stipulation signed by all parties who have appeared, Rule 41(a)(1)(A)(ii). Should we distinguish, so that a stipulation of all parties can achieve finality? That could be seen as an end-run around Rule 54(b) if the dismissal is without prejudice. But if all parties prefer to shift the forum to the court of appeals, should the rules stand in the way?

28 U.S.C. § 1291 establishes jurisdiction of appeals from "final decisions." A final decision is traditionally reached when the district court has completed everything it intends to do in an action. This traditional concept of finality has been relaxed in some circumstances; the "collateral-order" doctrine is a clear example. Rule 54(b) authorizes entry of a partial final judgment before the district court has disposed of all parts of a multi-claim or multi-party action. Avowedly interlocutory appeals are permitted by some statutes, most notably 28 U.S.C. § 1292. And outside of appeals, review occasionally can be had by extraordinary writ, see 28 U.S.C. § 1651.

A party who has lost an important interlocutory ruling may wish to appeal even though none of these established alternatives is available. The final decision rule represents a balance of competing considerations that usually serves the interests of the judicial system and the parties. But it may lead to prolonged, expensive, and unnecessarily duplicated proceedings. It is not surprising that a party may seek to establish an appealable final decision by means within the party's control. Voluntary dismissals have been a common ploy.

If it could establish finality, a voluntary dismissal without prejudice would impose relatively low costs on a party who wishes to manufacture a final decision. Unless a statute of limitations bars a new action, affirmance of the disputed interlocutory ruling imposes delay and the costs of initiating a new action, but the effect may be not much different from an explicitly interlocutory appeal. And so many cases reject most attempts to achieve appealability by a voluntary dismissal without prejudice.

A voluntary dismissal with prejudice is quite different. An interlocutory order, or a series of interlocutory orders, may leave little reason to continue the litigation. An in limine ruling excluding evidence may defeat any likely chance of success. An order dismissing some theories or claims, or partial summary judgment, may reduce the stakes to a level not worth litigating alone. The interests that are balanced by the final-decision requirement can be served, indeed advanced, if a claimant is prepared to surrender all claims and parties that survive the interlocutory orders. Allowing the interlocutory orders to merge into the final decision accomplished by the dismissal means only that if the orders are reversed, the case can continue on remand only as to the subjects caught up in those orders. There is no reviving the other matters or parties that have been dismissed with prejudice. Although many cases recognize this means of achieving finality, clear notice in rule text will provide guidance and reassurance, and reduce unnecessary research costs.

[Recognizing finality only upon dismissal with prejudice of all claims and all parties that remain in the action means that dismissal with prejudice as to less than all claims and parties, and dismissal without prejudice, do not establish a final decision.

{Nor can finality be established by showing that other constraints give a dismissal without prejudice the practical effect of a dismissal with prejudice. As one example, courts should not be forced to struggle with what may be difficult fact-bound arguments to determine whether a statute of limitations would bar a new action. As another example, the interests of opposing parties are served by denying finality if a dismissal attempts to support a federal appeal by barring any new action in the federal courts while being without prejudice to a new action in a state court.[12]}**]**

[A dismissal "with prejudice" is not accomplished by attempting to reserve the right to revive the matters dismissed with prejudice if the interlocutory order challenged by the appeal is reversed. Such "conditional prejudice" exposes the courts and adversary parties to the same risks that would flow from staying district-court proceedings pending an avowedly interlocutory appeal. Worse, the apparent dismissal with prejudice would defeat any occasion for the district court to continue its own proceedings when that seems the wise course pending what is, in effect, an interlocutory appeal.**]**

Court Control

This draft addresses a voluntary dismissal with prejudice by adding a new Rule 41(a)(1)(C). That makes it necessary to consider the question of court control. The issue is most likely to arise when all parties join in a stipulation of dismissal, see Rule 41(a)(1)(A)(ii). Should the court be able to reject an attempt by all parties to manufacture finality? This concern is most important if conditional prejudice is recognized. Allowing the parties to short-circuit continuing trial-court proceedings could be contrary to the interests of the judicial system.

One approach would be to add a requirement of court approval: "may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action and is approved by the court."

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[12] This is particularly difficult. One illustration: The federal plaintiff has a federal claim and either diversity or supplemental jurisdiction over parallel state claims. The defendant has a parallel action pending in state court. After partial summary judgment rejecting the federal claim, all parties may prefer to dismiss the balance of the federal action without prejudice to joining the federal plaintiff's claims as counterclaims in the state action. If they are astute enough to manage this task by stipulating to a judgment that preserves the opportunity to appeal the partial summary judgment in federal court, while leaving the way to advance the state-law claims only in the state court, there are strong reasons to allow them to do so. This is one of the several illustrations that test the "only with prejudice" approach.

Another approach would be more indirect, working through Rule 41(a)(2):

> **(2)** *By Court Order: Effect*. Except as provided in Rule 41(a)(1)(A) and (B), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

Dismissal under Rule 41(a)(1)(C) then would require approval, and the provision for proper terms would be explicit.

CONDITIONAL PREJUDICE

Conditional Prejudice Denied

If a Committee Note to a rule that recognizes finality only on a voluntary dismissal with prejudice does not seem protection enough, conditional prejudice could be expressly rejected in rule text:

> (C) *Appealable Finality*. A party asserting a claim for relief may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action. The dismissal may not be subject to revocation if an appeal results in vacatur or reversal of any order entered before the dismissal.[13]

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[13] At least on the first go-round, it is difficult to capture "conditional prejudice" in rule language. "conditioned" leads to a choice of what the dismissal is conditioned on. Is it affirmance -- affirmance perfects the prejudice? Or is it reversal -- reversal dissolves the prejudice? Still, the rule text would be simpler if the attempt made in this sentence is abandoned in favor of a simpler statement: "only if the dismissal is with unconditional prejudice * * *."

Probably it would not be enough to refer only to "reversal." The appellate court may vacate without reversing. "Vacatur" has an antique air about it, but the world may not be ready for "vacation or reversal." Even that phrase leaves an ambiguity. A court of appeals may remand without actually vacating or reversing, and in some circumstances may even retain jurisdiction pending further action in the district court. "Remand" might be added to the list, although that raises nice questions whether the conditional prejudice should be undone simply because of a remand that does not vacate or reverse.

COMMITTEE NOTE

Some opinions have allowed a party to establish finality, supporting review of interlocutory orders, by a dismissal with prejudice that is conditioned on the decision on appeal. If the orders are affirmed, the prejudice remains. But if one or more orders are reversed, the prejudice dissolves and the appellant is allowed to revive everything that had been dismissed. This tactic exposes the courts and adversary parties to the same risks that would flow from staying district-court proceedings pending an avowedly interlocutory appeal. Worse, the apparent dismissal with prejudice would defeat any occasion for the district court to continue its own proceedings when that seems the wise course pending what is, in effect, an interlocutory appeal. The amended rule rejects "conditional prejudice."

Conditional Prejudice Recognized

(C) *Appealable Finality*. A party asserting a claim for relief may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action. But a notice or stipulation of dismissal may provide that the dismissal will be vacated if an appeal results in vacatur or reversal of any order entered before the dismissal.[14]

COMMITTEE NOTE

Some opinions have allowed a party to establish finality, supporting review of interlocutory orders, by a dismissal with

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These questions may be related. There is no difficulty if the orders are affirmed, even though the case is remanded for entry of final judgment. Prejudice remains prejudice, no further condition about it. So "remand" alone will not do it.

[14] This version does not expressly address the question whether the dismissal should distinguish between elements that are dismissed with real prejudice and elements that are dismissed with conditional prejudice. An appellant may intend to abandon some claims -- or perhaps more likely some parties -- for good. Do we need that level of refinement, either in rule text or Committee Note?

A freestanding conditional prejudice rule could be drafted without adding the general provision for dismissal with prejudice, and without the "only with prejudice" provision.

prejudice that is conditioned on the decision on appeal. If the orders are affirmed, the prejudice remains. But if one or more orders are reversed, the prejudice dissolves and the appellant is allowed to revive everything that had been conditionally dismissed. Many other opinions have rejected this form of conditional prejudice. The amended rule accepts it. An interlocutory order that does not completely dispose of an action may leave a party in a position that barely supports the cost of further litigation, or does not support the cost except for the purpose of persisting to a conventional final decision that will afford an opportunity to appeal the order. A party confronting this dilemma may be willing to stake the entire litigation on its belief that the order is reversibly wrong. If the order is affirmed -- and most orders are affirmed -- the district court and the parties are spared the burdens of further litigation, and the court of appeals has not had to face repetitive appeals. If the order is reversed, litigation on remand can be shaped in ways that are more efficient and effective than whatever might have been done in the interval between the order and a traditional final judgment. And the dead loss of those intervening proceedings is avoided.

[The rule text and this much of a Committee Note do not address the question whether a dismissal with conditional prejudice should specify the order or orders to be appealed. If that seems a good idea, it seems likely better to add it to the Civil Rule than to amend Appellate Rule 3 to shift the specificity requirement to the notice of appeal. If explicit rule text is not adopted, it may be better to avoid the question in the Committee Note. But perhaps a bit of practice advice would be helpful?**]**

Manufactured Finality: Simple, Complex, or No Rules?

PREFACE

These notes are designed to frame the central choices that might be made in considering possible rules to address "manufactured finality."

One choice is to adopt clear, simple rules. Another is to adopt complex rules that respond to the nuances that may be found in the cases admirably recounted in Professor Struve's memorandums. And the third is to do nothing. Doing nothing would reflect a judgment that simple rules might defeat appeals that fit well within the purposes of the final-judgment rule, but that unacceptable uncertainties would hobble any attempt to craft complex rules.

"Manufactured finality" may embrace a variety of strategies adopted to achieve appellate review of an interlocutory ruling that, without more, is not yet appealable. The common element is an attempt to create a final judgment that can be appealed under § 1291. The appeal invokes the rule that once there is a final judgment, interlocutory orders "merge" into it and become reviewable. The strategies may depend on unilateral acts by a single party, or may depend on joint action of two or more parties.

Many issues arise from manufactured finality. Some are clearly resolved in the cases, at least for the most part, by general rules. There may be room for refinements, but these rules seem to work predictably and to achieve reasonable results. For these issues, the question is whether the modest gains in clarity that might be achieved by adopting explicit Enabling Act Rules would come at the risk of undue rigidity. Other issues are not so clearly resolved. In some areas, it may be fair to say that the cases are messy. For these issues the central question is whether it is possible to identify sound general approaches and to implement them effectively in Enabling Act Rules.

The argument that supports forgoing reliance on Enabling Act Rules to channel manufactured finality is essentially an argument for the virtues of the common-law process. Nuanced results can be better achieved by confronting specific cases than by general rules. The argument for adopting new rules is that rules of appellate jurisdiction should be clear, simple, and categorical. There are true advantages to such rules. Earlier drafts of illustrative rules may support the choice. They are attached.

CLEAR RULES

The clearest rule is that voluntary actions by the parties that resolve "with prejudice" all the claims among all parties that remain after an interlocutory order establish a final judgment and support review of the interlocutory order. Professor Struve's case-

law memorandums are clear.

The view may be found in some cases that a party who has voluntarily dismissed a claim with prejudice in order to establish finality, even if by court order, lacks "standing" to challenge a judgment that the party sought. Judge Tjoflat has expressed this view, urging that a party is not injured by an order that it invited. OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549 F.3d 1344, 1370-1371 (11th Cir.2008)(dissenting opinion). Most courts reject this view. But if indeed Article III defeats appeal standing, revision by court rule would require careful explanation. The task would begin with 28 U.S.C. § 2072(c), the source of authority for the current inquiry into manufactured finality. Section 2072(c) authorizes Enabling Act Rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." So long as there is an underlying dispute, standing is assured -- the OFS Fitel case, for example, involved an invited dismissal based on a disputed order that, as a discovery sanction, excluded expert testimony essential to establish the plaintiff's claim. Once finality is achieved, having had to ask for the order that established finality to support an appeal is not a waiver of the right to appeal, and does not moot the dispute.

Voluntary actions that dismiss parts of an action "without prejudice" often encounter an offsetting general rule that a dismissal without prejudice cannot achieve appealable finality. Here too, Professor Struve's memorandums provide a generous array of authority. Opinions often say that this tactic is no more than an attempt to "end-run" the final-judgment rule. But there are many variations on dispositions without prejudice, and some of them have succeeded in achieving appealable finality. Several of these variations are explored below.

It would be possible to supersede the opinions that have introduced some flexibility in dealing with the finality of judgments reached by party acts that leave the way open for future litigation. Either of two mirror-image approaches could be taken. One would be to adopt a flat rule that one or more parties can manufacture finality only by with-prejudice dismissal of all claims among all parties. The other would adopt a flat rule that a voluntary dismissal without prejudice does not support review of adverse interlocutory orders entered before the dismissal. Support for either approach could be found by analogy to the evolution of collateral-order finality toward a "categorical" approach designed to defeat case-specific determinations that immediate appeal is a good idea for a particular situation, whether or not it would be desirable in other but similar cases.

Another possibility is to craft rules that preserve some elements of a flexible approach. That task may not be easy.

And a third approach is to do nothing in the rules process. The potential advantage of doing nothing depends on a judgment about the value of preserving the process by which courts have struggled to accommodate the strong desire to preserve the values of a clear final-judgment rule with situations in which allowing "manufactured" finality seems to enhance the efficient allocation of authority between trial and appellate courts. If the cases are messy in some areas, there may be good reasons for the mess.

The next sections begin by describing established practices that should be protected against the potential unintended consequences of adopting clear but simple rules on appeals after dismissals with, or without, prejudice. The following section explores a number of circumstances that have prompted some courts to accept manufactured finality despite the prospect that a party may remain free to pursue further litigation after the appellate decision. The questions that pervade all of these examples are whether they might support specific rules that support manufactured finality, or whether they provide persuasive reasons for leaving courts free to carry forward a case-specific process that allows an occasional exception to a categorical approach.

Reactions to these multiple examples will be influenced by the value placed on the availability of appellate review, the costs that may be imposed on access to it, and the role of alternatives that enable astute counsel to achieve what others may not. One illustration is provided by Palmieri v. Defaria, 88 F.3d 136 (2d Cir.1996). Three days before trial the court entered an in limine order excluding many items of the plaintiff's intended evidence. At trial the plaintiff repeatedly stated that the evidence not excluded was insufficient. The court repeatedly invited the plaintiff to proceed to trial. Eventually the action was dismissed because the plaintiff refused to go to trial. The court of appeals was uncertain whether the order represented a voluntary dismissal without prejudice -- if so, appeal jurisdiction would be denied because that would be an end-run around the requirement of finality. In the alternative, the order might be a dismissal for failure to prosecute. In that event, the in limine ruling could not be reviewed because it did not merge in the dismissal, as it might have if there had been no possibility that the in limine ruling would be reconsidered during the course of trial. Rule 54(b) is not available in such circumstances because there was no disposition of a separate claim. Disobedience and contempt were not available. But review might have been had by proceeding to trial, offering no evidence, and inviting an adverse judgment as a matter of law. And review would have been had if the plaintiff had gone to trial, offered some evidence, and then rested, to be dismissed on judgment as a matter of law. The value of forcing this seeming waste effort would depend on the prospect that the evidence produced at trial would persuade the trial judge to reconsider the in limine ruling. It may be fairly debated whether that prospect was sufficient to deny any review.

ESTABLISHED PRACTICES TO BE PRESERVED

The topics noted in this section actually involve approaches that are likely to be accepted by most courts. They are included here because they must be kept in mind when drafting a rule designed to enshrine a "with prejudice" mandate for manufactured finality.

Functionally with Prejudice: An example is provided by Campbell v. Altec Indus., Inc., 605 F.3d 839, 841 n. 1 (1st Cir.2010). The plaintiff won an order allowing amendment of the complaint to withdraw the only claim that remained after summary judgment for the defendant. The plaintiff stated on the record that he would not renew the withdrawn claim. The order granting leave to amend did not say that the resulting dismissal was with prejudice. Finality was found in "the functional equivalent of a dismissal with prejudice of this claim." Another example is Fairley v. Andrews, 578 F.3d 518, 521-522 (7th Cir.2009), certiorari denied, 130 S.Ct. 3320. After a pretrial order excluding evidence, the plaintiffs acknowledged that they could not prove their case without the excluded evidence. The district court responded by entering judgment for the defendants so the plaintiffs could appeal. "The rule is simple: if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever." (This passage reflects a common rule that a choice to appeal is a binding election. An example from the same court is International Marketing, Ltd. v. Archer-Daniels-Midland Co., 192 F.3d 724, 727, 733 (7th Cir.1999): The plaintiff chose not to amend the complaint following dismissal with leave to amend as to some claims, instead dismissing all claims with prejudice. There was a final judgment, but the court would not allow the plaintiff to seek remand to take up the leave to amend.)

The concept of functional prejudice may become elusive. Professor Struve's memorandums trace cases that rely on the running of the statute of limitations as a bar that effectively establishes the equivalent of "with prejudice" for a "without prejudice" dismissal. But a cogent caution was expressed in Cochran v. Herring, 61 F.3d 20, 21-22 & n. 6 (11th Cir.1995), certiorari denied 516 U.S. 1073: "Statute of limitations matters often need much thought. And, an appellate court, such as this one, is poorly situated to litigate and decide, in the first instance, whether a statute of limitations has run to the point of barring an action." There may be tolling events not reflected in the record.

"High-Low" Agreements: A high-low agreement may be reached after a truly final judgment. A judgment for $1,000,000 faces appeals by both plaintiff, seeking more, and defendant, seeking to pay nothing. They might agree that on affirmance the defendant will pay $1,500,000, or on reversal will pay $500,000. A similar agreement might be reached after a trial on liability alone. Manufactured finality of this sort should be kept secure. Further trial

proceedings are avoided, both before appeal and after decision on appeal.

Failure to Prosecute: The cases are not entirely uniform, but the general rule seems to be that a party who feels aggrieved by an interlocutory order should not be able to obtain appellate review by withdrawing from all further proceedings and appealing a dismissal for failure to prosecute. The adverse judgment is as final as a dismissal with prejudice -- Rule 41(b) provides it is an adjudication on the merits unless the court orders otherwise. But a sullen refusal to participate creates unnecessary burdens for the court and adversary parties. It is better to insist that the offended party explicitly seek dismissal with prejudice. A rule that recognizes manufactured finality by a voluntary dismissal with prejudice should not upset the general practice. (And it also might be useful to distinguish the practice accepted in U.S. v. Procter & Gamble, 356 U.S. 677, 680-681 (1958): Facing an order to produce a grand-jury transcript in a civil action, the government asked that the order be amended to provide that failure to produce would lead to dismissal of the action. The Court accepted the amended order and dismissal as a means of establishing both finality and reviewability.)

Dispute About Authority To Dismiss: There should be no question about this one. In University of South Alabama v. American Tobacco Co., 168 F.3d 405, 408 n. 1 (11th Cir.1999), the university brought suit without asking the state attorney general to participate. The attorney general appeared and dismissed the action without prejudice. The university was allowed to appeal to challenge the attorney general's authority to effect the dismissal. Any rule that denies finality upon dismissal without prejudice will have to reflect this risk.

Dismissal Not by Appellant CSX Transp., Inc. v. City of Garden City, 235 F.3d 1325, 1327-1329 (11th Cir.2000) found finality. After summary judgment against the plaintiff, the defendant voluntarily dismissed without prejudice its third-party complaint. To deny finality here would deprive the plaintiff of any opportunity for appeal. Horn v. Berdon, Inc., Defined Benefit Pension Plan, 938 F.3d 125, 126-127 n. 1 (9th Cir.1991), is similar. After summary judgment for the defendants a counterclaim for indemnification was dismissed without prejudice by stipulation. Appeal jurisdiction was accepted: "[T]he revivable claim was solely for indemnification * * *. It could not have been heard by the district court after the court granted summary judgment."

Administrative Closing A court's response to an attempt to dismiss without prejudice may be found to be an administrative closing that in effect denies dismissal, leaving the way open to revive the pending action. It may be difficult to make this diagnosis with confidence, but it can avoid any need to struggle with variations on the approach to a dismissal without prejudice. See Morton Internat. Inc. v. A.E. Staley Mfg. Co., 460 F.3d 170, 176-483 (3d

Cir.2006); Richards v. Firestone Tire & Rubber Co., 928 F.3d 241 (7th Cir.1991).

Areas of Uncertainty

District Court Connivance: The district court may agree that an interlocutory appeal is desirable and cooperate in manufacturing finality. This cooperation should alleviate concerns that immediate appeal will interfere with the court's authority to manage the litigation. It may also represent a determination, informed by the district court's understanding of the case, that immediate appeal will serve the interests of the appellate court. (Rule 54(b) is not a perfect instrument.) But the perspective of the court of appeals may be different.

A tolerant approach is reflected in James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002). The district court approved a stipulation to dismiss the claims that remained after dismissal of most claims. The court accepted the appeal, finding that the district court's approval "is usually sufficient to ensure that everything is kosher," and "is an additional factor alleviating concerns about a possible manipulation of the appellate process." (Several Ninth Circuit opinions look to "manipulation" as a criterion in approaching manufactured finality. See the next paragraph.) PSN Illinois, LLC v. Ivoclar Vivadent, Inc., 525 F.3d 1159, 1164 & n.2 (Fed.Cir.2008), certiorari denied 129 S.Ct. 647, found a final judgment on entry of a stipulated judgment that dismissed counterclaims without prejudice. Golan v. Pingel Enterprise, Inc., 310 F.3d 1360, 1366 n. 3 (Fed.Cir.2002), applying Ninth Circuit law, found finality in an order based on the parties' stipulation to dismiss the remaining claims without prejudice. And Robinson-Reeder v. American Council on Educ., 571 F.3d 1333 (D.C.Cir. 2009), suggests that jurisdiction would have been established if the court had entered an order on the parties' stipulation dismissing the remaining claim without prejudice; the stipulation alone was not enough.

Many other decisions are less tolerant. American States Ins. Co. v. Dastar corp., 318 F.3d 881 (9th Cir.2003), dismissed the appeal after the district court approved a stipulation dismissing without prejudice the claim and counterclaim that remained alive. Although this device was "not as patently manipulative" as some other attempts to manufacture finality, it did not satisfy Rule 54(b) and created a danger of piecemeal litigation. (There was a dissent.) Rabbi Jacob Joseph School v. Province of Mendoza, 425 F.3d 207, 210-211 (2d Cir.2005), adopts a firmer view. The plaintiff sought to dismiss the remaining claim without prejudice and without leave to replead in the instant action. The court entered an order striking the language about repleading and ordering dismissal. This was not a final judgment, which can be achieved only by dismissing the whole action with prejudice. This is not a matter of prudence, but of appeal jurisdiction. Horwitz v. Alloy Auto Co., 957 F.2d 1431, 1435-1437 (7th Cir. 1992), is

similar: "Were it only a matter of our discretion we might have been willing to help them out, but there are good reasons the rules are the way they are."

Collaboration of the Parties: Many cases involve a stipulation by the parties that attempts to establish finality by dismissing without prejudice parts of the action that remain after a disputed interlocutory order. It might be urged that considerable respect should be given to the view of all parties that immediate appeal is desirable. But that view encounters difficulty not only with the settled rule that the parties' consent cannot establish jurisdiction but also with the underlying reasons for the rule. The rules of jurisdiction that allocate authority between trial courts and appellate courts are not as fundamental as the rules of subject-matter jurisdiction that limit the authority of all federal courts, but they reflect interests of the federal judicial system that often may be independent of the parties' interests.

So it is no surprise that most cases reject the joint attempts of all parties to manufacture finality by dismissals without prejudice. In Federal Home Loan Mort. Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 437-442 (3d Cir.2003), appeal jurisdiction was saved only by converting the dismissal to one with prejudice after oral argument on appeal.

Adonican v. City of Los Angeles, 297 F.3d 1106 (9th Cir.2002), is representative of Ninth Circuit cases denying jurisdiction.

But note the cases summarized above in which finality was found on entry of a court order adopting the parties' stipulation to dismiss without prejudice.

Party Collaboration: Winner Helps Loser: The approach to collaborative finality may be mollified if the court chooses to focus on the fact that the party who won an interlocutory order is willing to cooperate in achieving finality by dismissing the winner's own claims without prejudice.

Local Motion, Inc. v. Niescher, 105 F.3d 1278, 1279 (9th Cir.1997), found a final judgment when the plaintiff dismissed its remaining claims without prejudice and the defendant appealed. The court observed that a party who has lost on an interlocutory order cannot manufacture finality by dismissing remaining claims without prejudice, but dismissal without prejudice by a victorious party does not "use similar manipulation to thwart an appeal." (Remember the Ninth Circuit cases often use an open-ended approach that asks whether there is an attempt to manipulate jurisdiction.) A similar ruling was made in United Nat. Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918 n. 1 (9th Cir.1998), finding that a prevailing plaintiff's dismissal of a remaining claim without prejudice to facilitate appeal by the losing defendant is not manipulation of the appellate process. U.S. ex rel. Shutt v. Community Home & Health Care Services, Inc., 550 F.3d 764, 766 (9th Cir.2008) seems

similar. After the government won summary judgment on the False Claims Act claims it dismissed the common-law claims without prejudice. "A prevailing party's decision to dismiss its remaining claims without prejudice generally renders a partial grant of summary judgment final."

Less explicit reflections of this approach may be found in other cases. Equity Investment Partners, LP v. Lenz, 594 F.3d 1338, 1341-1342 n. 2 (11th Cir. 2010), accepted jurisdiction of the appeal -- after the court denied a motion by the IRS to add a new party to a crossclaim and counterclaim, the parties stipulated to dismiss the crossclaim and counterclaim without prejudice. The court found this was not an improper attempt to manufacture a final judgment, noting that the stipulation was prompted by the refusal to permit joinder of an indispensable party. The result was review and reversal only of the earlier order granting partial summary judgment to the IRS.

Other decisions seem contrary. In Heimann v. Snead, 133 F.3d 767 (10th Cir.1998), six of the plaintiff's seven counts were dismissed. The plaintiff and defendant agreed to dismiss the seventh count with prejudice and to dismiss the defendants' counterclaims without prejudice. Not final. In Best Buy Stores, L.P. v. Benderson-Wainberg Associates, L.P., 668 F.3d 1019, 1032-1033 (8th Cir.2012), the plaintiff won on contract claims and moved to dismiss its fraud claims without prejudice on condition that they could be revived if the defendants were successful on appeal. The district court refused and dismissed the fraud claims with prejudice. The court of appeals ruled that dismissal with prejudice was not an abuse of discretion. (The case seems an attempt at "conditional prejudice," but undertaken by the party who prevailed on the interlocutory ruling.)

Relaxed View of Without Prejudice: Hope v. Klabal, 457 F.3d 784 (8th Cir.2006), accepted jurisdiction when, after summary judgment for both defendants on all but one claim against one defendant, the plaintiff dismissed the remaining claim without prejudice. "Admittedly, this circuit has been less than clear" about these matters. But this case resembled others in which jurisdiction was accepted. The dismissal without prejudice left nothing for the district court to resolve. Earlier Eighth Circuit decisions are similar. See Helm Fin. Corp. v. MNVA R.R., 212 F.3d 1076, 1079-1080 (8th Cir.2000); and Great Rivers Co-op v. Farmland Indus., Inc., 198 F.3d 685, 688-690 (8th Cir.1999)(finding "the question is one of discretion, not jurisdiction"). Later cases, however, express remorse, see Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 519 F.3d 421, 425 n. 4, and the earlier relaxed approach may have been abandoned outright, see Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 842-843 (8th Cir.2013)(finality is achieved only if the appellant's claims "are unequivocally dismissed without prejudice").

Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1250-1253 (6th Cir.1997), on rehearing en banc 143 F.3d 263 (6th Cir.1998)

also seems to take a relaxed view, but it is difficult to make much of it.

"Unjoinder" Some cases take the view that dismissal without prejudice as to one defendant suffices to establish the finality of rulings as to another defendant. The explanation is that since the plaintiff did not have to join the later-dismissed defendant, "unjoinder" is a suitable step to finality.

A relatively early statement was provided in Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1105-1107 (8th Cir.1999), certiorari denied 527 U.S. 1039. The plaintiff sued the Tribe and a contractor. The Tribe was dismissed for immunity reasons. Voluntary dismissal without prejudice as to the contractor established finality. The court relied on the policy against splitting claims to explain that dismissal without prejudice of some claims against a single defendant does not establish finality as to other claims defeated by court order. It found this policy does not apply to "unjoining" a defendant the plaintiff need not have joined in the first place. The same approach was taken in Willkinson v. Shackelford, 478 F.3d 957, 962 (8th Cir.2007), allowing appeal when the plaintiff, after the district court dismissed the diversity-destroying defendant and refused to remand, voluntarily dismissed without prejudice as to the diverse defendant. The "unjoin" approach was also applied in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042, 1048-1050 (9th Cir.2001).

Special Circumstances for Without Prejudice Finality There may be some identifiable circumstances that warrant acceptance of finality achieved by voluntary dismissal without prejudice of whatever remains after an adverse ruling. Finality is recognized in some of the cases noted here, but not others.

Gannon Intern., Ltd. v. Blocker, 684 F.3d 785, 791-792 (8th Cir.2012), involved a motion to dismiss an entire action without prejudice to enable refiling in an action the defendants had brought against the plaintiff in a state court. The motion was made after the defendant moved for partial summary judgment but before the court ruled on the motion. The court granted the partial summary judgment and then granted the motion to dismiss without prejudice the parts of the action that remained. The court of appeals accepted jurisdiction. The motion to dismiss was made before the summary-judgment ruling, so it was not an attempt to evade the finality requirement. The plaintiff, moreover, asserted to the court it had no intent to refile the action in federal court.

In Dearth v. Mukasey, 516 F.3d 413, 415, 416 (6th Cir.2008), the defendants moved to dismiss for lack of venue or to transfer under § 1406. The plaintiff requested that the court dismiss without prejudice rather than transfer if it were otherwise inclined to transfer. The court declined to decide whether venue

was proper, concluded that it would transfer if venue were proper, and granted both motions. The appeal was dismissed because the plaintiffs were left in the same position as if they had never filed suit. But that left the plaintiffs without an opportunity to appeal the question whether venue was proper. A dismissal for improper venue is not on the merits, but is appealable. The result could be questioned.

Hood v. Plantation General Medical Center, 251 F.3d 932 (11th Cir.2001) began with one plaintiff who asserted two claims. One claim was dismissed for lack of standing. A second plaintiff was joined. The original plaintiff dismissed his remaining claim with prejudice. The second plaintiff dismissed its claims without prejudice. The appeal by the original plaintiff was dismissed. Because the second plaintiff remained free to refile, "the litigation is not finally over for all parties on all claims." Although dismissal for lack of standing ordinarily is not "on the merits" of the claim, it should preclude relitigation of the standing issue. The original plaintiff thus seems to have been caught in a finality trap -- the attempt to manufacture finality likely defeated any opportunity for appellate review of the standing ruling, in this action or any other. The decisions that allow a plaintiff to achieve finality by "unjoining" a defendant might be extended to allow the later, second plaintiff, to create finality for the original plaintiff by unjoining itself.

Great Rivers Co-op v. Farmland Indus., Inc., 198 F.3d 685, 688-690 (8th Cir.1999), raises the question whether a special approach may be appropriate in class actions. Rule 23(f) addresses appeals from an order granting or denying class-action certification. It seems to be working. But suppose the court dismisses some claims before deciding on certification, leaving only claims that do not seem worth pursuing even on a class basis? Or dismisses most claims after granting certification? Might it be appropriate to allow the class representatives to achieve finality by dismissing without prejudice what remains? Or, in a nice twist, by allowing dismissal without prejudice to other class members but with prejudice as to the class representatives? (This could be an attractive occasion for "conditional" prejudice -- if the dismissals are reversed, the class representatives who have proved the adequacy of their representation by the successful appeal might well be allowed to revive the dismissed claims on remand rather than search out new representatives.)

Prejudice only in Federal Court Erie Cty. Retirees Assn. v. County of Erie, 220 F.3d 193, 201-202 (3d Cir.2000), reflects a desire to protect the court of appeals rather than the adversaries. After summary judgment against part of their federal claim, the plaintiffs withdrew the remaining part without prejudice. The district court then declined supplemental jurisdiction over the state-law claims and dismissed them without prejudice. On appeal the plaintiffs responded to the court's question about appeal jurisdiction by withdrawing with prejudice the part of the federal

claim they had dismissed without prejudice. The plaintiffs also undertook to pursue the state-law claims only in state court. This established finality to review the summary judgment against the other part of the federal claim. Dismissal of the state-law claims without prejudice did not defeat finality because they could be pursued further only in a state court.

A like result was reached in Sneller v. City of Bainbridge Island, 606 F.3d 636, 638 (9th Cir.2010). Finality was achieved by dismissal of the remaining federal claims with prejudice and dismissal of the state-law claims without prejudice. The reason for dismissal, that any future suit on the remaining state-law claims would be brought in state court, "appears legitimate." (A dismissal without prejudice for the purpose of consolidating all remaining claims in a state-court action is not likely to establish finality if there is no assurance the claims cannot be brought again in a federal court. See Chappelle v. Beacon Communications Corp., 84 F.3d 652 (2d Cir.1996).)

Conditional Prejudice This topic provoked a split in the earlier subcommittee. A party seeking to appeal may seek to dismiss surviving claims with "conditional prejudice." Summary judgment is granted against the plaintiff's most important claims, for example, leaving only relatively minor claims that will not alone justify the burden of further litigation. The plaintiff prefers to stake all on its belief that the summary judgment is reversible error. It dismisses the surviving claims with prejudice, subject to the condition that they can be revived if -- and only if -- the summary judgment is reversed.

Conditional prejudice has an undeniable charm. It protects the trial court and the parties against the burden of litigating minor claims in order to achieve a final judgment and review of the major claims. Often it will protect the appellate court against the burden of repeated appeals in the same case because the trial court did not commit reversible error. If the summary judgment is affirmed, that is the end of the case and of the dispute.

The offsetting view is that a dismissal with conditional prejudice may lead to reversal, further proceedings on all claims on remand, and a later appeal that will force the court of appeals to renew its acquaintance with the case. The opportunity to review the whole case all at once, on the first appeal, is highly prized.

The Second Circuit accepts conditional finality. SEC v. Gabelli, 653 F.3d 49, 56-57 (2d Cir.2011), reversed on the merits, 133 S.Ct. 1216 (2013)(Professor Struve's case-law update explains why the Supreme Court's action does not count as approving finality through conditional prejudice); Purdy v. Zeldes, 337 F.3d 253, 257-258 (2d Cir.2003). The Federal Circuit also seems to have accepted it. Jang v. Boston Scientific Corp., 532 F.3d 1330, 1334 (Fed.Cir.2008); Doe v. U.S., 513 F.3d 1348, 1352-2354 (Fed.Cir.2008). Romoland School Dist. v. Inland Empire Energy

Center, LLC, 548 F.3d 738,747-751 (9th Cir.2008), employing the Ninth Circuit "manipulation" approach to manufactured finality, might be read to leave the question open.

Many other decisions reject attempts to manufacture finality through a dismissal with conditional prejudice. Professor Struve's memorandums establish the point.

Criminal Cases

If any rules amendments are confined to the Civil Rules, there is no need to worry about finality in criminal prosecutions.

But if amendments are made in the Appellate Rules, care should be taken either to exclude criminal prosecutions or to address them after separate consideration. One example: U.S. v. Kaufmann, 985 F.2d 884, 890-891 (7th Cir.1993). The jury convicted on one count, but failed to agree on two others. The court of appeals dismissed an appeal by the defendant even though the government informed the trial court that it would not proceed on the two remaining counts if the one conviction were affirmed. On remand the government dismissed the two remaining counts without prejudice. The court of appeals accepted this basis for finality, rejecting as "imperfect" the analogy to a dismissal without prejudice in a civil action, and observing that many other courts of appeals would have accepted the initial appeal even without dismissal of the remaining counts.

Appellate Civil Subcommittee Conference Call Notes

Appellate-Civil Subcommittee
Manufactured Finality Notes, Conference Call 12 December 2014

The Appellate-Civil Rules Subcommittee met by conference call on December 12, 2014. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson welcomed the members to the work of the newly reconstituted Subcommittee. Two topics were to be considered: apparent gaps in the Civil Rule 62 provisions for staying execution of a judgment and the array of questions that arise from efforts to "manufacture" a final judgment in order to win appellate review of an interlocutory order that otherwise is not subject to immediate appeal. Separate notes describe the discussions of these topics.

Discussion began by summarizing the alternatives that were discussed in an earlier joint subcommittee that eventually suspended consideration of manufactured finality. Relatively simple rules might be adopted to reflect points that have generated substantial agreement among the circuits. Or more complex rules might be adopted in an attempt to capture the nuances that have generated differences of opinion. One particular illustration would be a rule recognizing "conditional prejudice"-- dismissal of parts of a case with prejudice, subject to revival if the judgment on another point is reversed. Yet another possibility is to do nothing.

One simple rule would be to adopt a rule recognizing the general agreement that a party aggrieved by an unappealable interlocutory order can achieve appealable finality by dismissing everything that remains in the action with prejudice. This would require dismissal of all claims that remain among all parties. It should be possible to draft such a rule in clear terms. But it may not be possible to avoid undesirable implications for situations where it may be desirable to recognize finality manufactured by means that fall short of this absolute.

A similar simple rule would provide that finality cannot be achieved by dismissing without prejudice whatever remains after the contested ruling. Drafting might not be as simple. And the risk of intruding on desirable uses of manufactured finality seems greater. Examples are provided in the materials supplied for this call.

Beyond these starting points, a variety of complications can be found. Identifying them, describing them clearly in rule text, and sorting out the potentially useful exceptions from those that

should be prohibited will be a difficult task. It would be easy to wind up doing more mischief than good.

One specific situation is presented by "conditional prejudice." This concept is clearly recognized in the Second Circuit, and apparently in the Federal Circuit as well. Several circuits have rejected it. The practice is easily described. An in limine ruling excluding crucial evidence, a grant of important parts of a motion to dismiss, a grant of summary judgment against the most important claims, may leave so little in the case that the costs and risks of proceeding to final judgment on the remaining elements seem undue. The party who lost such a ruling may be willing to stake all on the belief that the ruling is reversibly erroneous. At the same time, the parts that remain may have potential value that easily justifies the cost of continued litigation if the adverse ruling is in fact reversed. Dismissal of what remains with prejudice, subject to revival only if reversal is won on appeal, may protect both the parties and the district court against the costs of litigating the parts that remain for the primary purpose of reaching a final judgment that can be appealed. And there is no cost to the court of appeals unless it determines that indeed there is reversible error as to an important -- usually the most important -- component of the case.

Compared to these possibilities, it might prove wise to do nothing. The law is generally clear as to dismissals with prejudice and also as to dismissals without prejudice. The complications that generate differences among the circuits do not seem to arise often, and in at least some circuits reasonably confident answers can be found on the questions most likely to arise. Allowing further development in the common-law process might be better than attempting to generate clear and easily accessible rules that, for all their clarity and accessibility, impose undesirable costs.

One nuance in the cases was offered as an example. Some decisions find that a dismissal of parts of a case without prejudice establishes a final judgment if a statute of limitations bars any further litigation on the dismissed parts. The idea is that this circumstance shows a "practical finality" that is equivalent to a dismissal with prejudice. But one court of appeals has observed that this is a tricky concept. It may be difficult to know what statute governs, both as a matter of the applicable source of limitations law and as a matter of determining which statutory period applies. Determining the time when a claim arose may be difficult, and may turn on questions of fact that a court of appeals cannot readily resolve. So too for "tolling" events. For that matter, applicable limitations law might allow revival of the dismissed claims as part of continuing proceedings in the same action on reversal of the final judgment achieved by the dismissal. That would become the equivalent of conditional prejudice. It could be tricky either to preserve or end this approach in a rule that generally rejects dismissal without prejudice as a means of manufacturing finality.

A somewhat similar difficulty might arise from a rule that recognizes dismissal with prejudice as a means of achieving finality. There has been a strain of concern that a party who invites a dismissal with prejudice lacks Article III standing to appeal -- invited injury is no injury. This view seems to have been abandoned in the Eleventh Circuit, the source of recent concern, but it might revive.

Discussion recognized that it may be difficult to draft a good rule. No rule will be perfect. But it is worth some effort to determine whether some of the issues can be made clear. Even things that experts know to be settled are not always accessible to other practitioners. A specific rule, or rules, would help. It is undesirable to forfeit legitimate appellate issues because a practitioner has been unable to frame an appealable judgment.

The role of the Rules Enabling Act in determining finality also was discussed. Section 2072(c) authorizes rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291." The Supreme Court regularly shows an interest in drawing the lines of appealable finality. Often it acts to rein in attempts to inject more flexibility than it thinks wise, despite the implicit views of the courts of appeals that more effective relationships with the district courts can be structured by recognizing some measure of flexibility. The collateral-order version of finality, for example, is moving more and more toward a "categorical" approach that recognizes finality only when all orders in a more or less clearly defined category should be treated as final. Thus attempts to allow collateral-order appeal from some orders that reject claims of attorney-client privilege were repudiated by a ruling that none are appealable under collateral-order theory. At the same time, the Court recognized the Enabling Act provision and suggested that the rulemaking process is a better means of elaborating finality concepts than the decisional process. There is ample room for the rules committees to work toward rules on manufactured finality if good rules can be drafted.

The risk that clear rules might thwart desirable exceptions must be taken into account. Clear rules, or not-so-clear rules, may prove desirable only if the way is left open for courts to continue to struggle with some of the nuances that are not ripe for resolution by court rule. One good beginning would be to study one or more draft provisions recognizing that finality can be achieved by dismissing with prejudice all that remains of an action.

So too, it was agreed that further work should be done on the concept of conditional prejudice.

The next step will be to review a number of alternative drafts of rules language that were prepared for work by the earlier subcommittee.

Appellate-Civil Subcommittee

The Appellate-Civil Rules Subcommittee met by conference call on January 23, 2015. Participants included Hon Scott Matheson, Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson opened the meeting by noting that sketches of possible rule language prepared a few years ago had been circulated to help focus discussion of the general alternatives being considered. One pair of alternatives is to recommend a simple rule -- one version would provide simply that a final decision can be achieved by a voluntary dismissal with prejudice that encompasses all claims and all parties. A more restrictive version of this simple rule would provide that this is the only way to achieve finality by voluntary dismissal. More complex rules also can be imagined. One would expressly prohibit, and another would expressly recognize, the opportunity to achieve finality by dismissing with "conditional prejudice" so that the dismissal remains with prejudice if the rulings challenged on appeal are affirmed, but becomes a dismissal without prejudice if the rulings are reversed. None of these approaches would attempt to capture in rule text the more complex situations in which voluntary action by a party has been found to establish finality for appeal. Whether those complex alternatives would be foreclosed by any of the simpler rules would remain uncertain, although a Committee Note might provide some guidance. Yet another alternative is to abandon the attempt to adopt an Enabling Act rule. Most courts agree that most of the time finality is achieved by a voluntary dismissal with prejudice that completely disposes of an action. Most courts also agree that most of the time finality is not achieved by a voluntary dismissal without prejudice. Conditional finality is clearly recognized in one circuit, and perhaps in another, and it might be concluded that there is no need to act on that front.

Discussion began by asking whether anything would be lost by adopting a simple rule that states that a party can establish a final judgment by voluntarily dismissing with prejudice all claims and parties remaining in the action. Some possible difficulties were suggested. If the rule is that simple, it would leave open any alternative approach to manufactured finality that proves acceptable to an appellate court. Many cases now have recognized finality by means that do not fit within this simple rule. At least some of the results may be desirable. Perhaps more importantly, leaving the way open to alternative means of manufacturing finality would leave the law as uncertain at the margins as it is now. And the rule text would not speak clearly to "conditional prejudice," a question that has continued to provoke divided opinions within the Subcommittee. A Committee Note might address conditional prejudice, one way or the other, but it seems unwise to attempt to resolve this question by a Committee Note that interprets

potentially ambiguous rule text.

Collective memory produced only a vague recollection of an inquiry about conditional prejudice that was addressed a few years ago to United States Attorneys in the Second Circuit. The clear sense was that they were not aware of any difficulties created by the Circuit's acceptance of conditional prejudice, but no details were recalled.

Support was expressed for a simple rule. The rule would "cover plenty of cases" and provide guidance for lawyers and courts. It would spare them the need to look for lots of cases to confirm the general practice and understanding. Unclear cases would remain, but there would be less uncertainty than we have now. "A basic proposition could cover a lot of cases." And many Enabling Act Rules leave uncertainty at the margins. One example is Criminal Rule 6(e) on grand jury confidentiality.

This member suggested that it also would be good to address conditional prejudice. It would be useful to accept a dismissal with conditional prejudice to support appeal on an important issue without having to continue to litigate less important issues through to final judgment. The cost to the court system would be low, since most appeals result in affirmance. The conditional prejudice then would become final prejudice. "I have seen lots of cases where litigants gamble on persisting to a traditional final judgment by litigating less important issues, believing that when the opportunity to appeal does arise they will win reversal on the earlier interlocutory orders and be able to reopen the entire case on remand."

A response noted that there are different views on conditional prejudice. In earlier discussions judges generally have opposed this means of establishing finality. Lawyers, on the other hand, are attracted to it. Conditional prejudice seems part way between unconditional prejudice, which does establish finality, and dismissal without prejudice, which does not.

This observation continued by suggesting that if the recommendation is to adopt a simple rule stating only that finality is achieved by a dismissal with prejudice of everything that remains in the case, "I would take my chances" as to the possible ambiguities. This text would not clearly address conditional prejudice. Nor would it clearly address such concepts as "de facto prejudice," as accepted in an occasional ruling that a dismissal without prejudice counts as a dismissal with prejudice because a new action would be barred by the statute of limitations.

Extending these observations, the same member recalled that the Appellate Rules Committee was uncertain about whether to recognize conditional prejudice. It favored a rule recognizing that a dismissal with prejudice establishes finality, but recognized that the most likely location for such a rule is in the Civil

Rules.

A variation was suggested by asking whether conditional prejudice would be more acceptable if it were subject to control by the district judge, or if it required agreement of the parties.

Another question asked why there is any need to supplement the opportunities for avowedly interlocutory review under § 1292(b), by mandamus, or by a Rule 54(b) partial final judgment. "What is the open space that should be filled"?

Section 1292(b) raises several high thresholds, and it requires both certification by the district court and permission from the court of appeals. Mandamus continues to be a genuinely extraordinary remedy -- it does not issue simply to correct reversible error. Rule 54(b) includes its own limits. There must be final disposition of at least a single "claim," or all claims among at least a pair of opposing parties. Two examples were offered of important rulings that would not fit within Rule 54(b). One, illustrated by some of the cases summarized for the Subcommittee, is an in limine ruling that excludes vitally important evidence. There may be no point in proceeding to trial without the evidence, but the ruling does not finally decide any claim. Another, which arises regularly, arises from the uncertainty surrounding the concept of a "claim." There is an analogy to the concept invoked by the claim-preclusion aspects of res judicata, but the analogy is not perfect. A plaintiff, for example, may claim a fraud worked by five misrepresentations. A ruling that three of them will not be considered is not a formal final decision on that claim, but may have the same effect.

Further discussion noted the occasionally conflicting interests of district courts and courts of appeals. There are circumstances in which the district court believes its own work will proceed more efficiently if one of its important rulings can be subjected to immediate review. The court of appeals may believe in the same case that its own work will proceed more efficiently if the district court completes all action in the case before there is any appeal. This difference of views at times leads to a determination that even though the technical requirements of Rule 54(b) are met, it was an abuse of discretion to enter a partial final judgment. And, in parallel, there may be other circumstances in which the district court is unreasonably unwilling to let the case go up for immediate appeal.

These considerations led back to the question whether control by the district court is better than control by the parties.

These concerns led one member to suggest that it will be safe to adopt a simple rule recognizing finality on unconditional dismissal with prejudice. Anything beyond that will present "real problems."

This observation led to the question whether it is appropriate to take an incremental approach when the committees are uncertain about some of the issues. Is it better to go forward with a simple rule that addresses only part of a problem, reserving more complex issues for development in the cases and possible future rulemaking? Or is it better to defer any rulemaking? The rules committees often do engage in incremental rulemaking. Civil Rule 23, for example, has been amended in some important respects, but without attempting to reexamine the most fundamental questions that surround class actions.

If an incremental approach is taken, the materials suggest a choice between two simple rules on dismissal with prejudice. One would say simply that a dismissal with prejudice of all remaining claims and parties establishes a final decision. It would not say that this is the only way to achieve a final decision. The alternative is a rule that says that such a dismissal is the "only" way to establish a final decision. The more modest incremental approach would be the first, omitting the exclusionary "only."

The first reaction is that a rule simply saying that finality can be achieved by voluntarily dismissing with prejudice everything that remains in the case would be "surplusage. All courts recognize" this means of establishing finality. If we mean to do something to clarify present practice, the incremental approach would be the rule that defines dismissal with prejudice as the only means of establishing finality. On this view, the "only" rule would defeat attempts to assert conditional prejudice. And it might also supersede the decisions that find what might be called "constructive prejudice," as in the cases that conclude a dismissal without prejudice is final because a statute of limitations would bar a new action. The same might happen with the occasional cases that have found finality on a dismissal without prejudice to bringing a new action in a state court, but on terms that foreclose bringing a new action in any federal court. The "only" rule could establish a bright line, and establish an incremental move beyond some present decisions.

The prospect of a bright line was greeted with enthusiasm. "I like bright lines. This helps the occasional practitioner" who does not regularly deal with appeal jurisdiction in the federal courts.

The Subcommittee then considered the question whether it should seek to present only a single proposal to the advisory committees, or whether it would be better to present a set of alternatives with the reasons that led the Subcommittee to prefer one of them. The Subcommittee agreed that it will be better to present at least the more prominent alternatives, with the full range of Subcommittee reasoning, to enable full debate in the Appellate and Civil Rules Committees.

That led to discussing the range of options that might be presented. The view was expressed that two or three choices might

be advanced, falling far short of the full range illustrated by the initial rules sketches.

The next suggestion was that the recommendation might be for the simplest rule, saying that finality can be achieved by dismissal with prejudice. The alternative saying that a party can achieve finality "only" by dismissing with prejudice all that remains in the case would be advanced for discussion, but not as a recommendation. Another member offered support for this view.

It was pointed out that "with prejudice" might be found ambiguous as to conditional prejudice. If the decision is that the Second Circuit should be told that it cannot any longer recognize finality achieved by a dismissal with conditional prejudice, it would be better to recommend rule text that clearly says that.

A recommendation to supersede conditional finality was supported by urging that the purpose of exploring manufactured finality has been to achieve uniformity across all circuits.

More generally, it was suggested that the important choice lies between a simple "may establish finality" rule and a more limiting "may establish finality only by" rule. A rule saying only that dismissal with prejudice suffices to establish finality may seem too trivial to warrant adoption. To be sure, this restatement of a proposition that is accepted by all the circuits might be helpful to lawyers who appear infrequently in federal court, but expanding the rules to guide neophytes to clearly established propositions may not be a desirable use of the Enabling Act.

This discussion was summarized by the suggestion that the Subcommittee should be ready to go to the advisory committees with a recommendation and a discussion of the most prominent alternatives. The questions would be whether to adopt any rule; whether the rule should be simple recognition of finality by dismissing with prejudice or should limit finality to dismissing with prejudice; whether conditional prejudice should be addressed, and in what way; and perhaps whether something should be said about the means of attributing "constructive" or "de facto" finality to a dismissal that formally is made without prejudice.

It was concluded that it will be useful to allow these issues to ferment for a few days, looking toward a Subcommittee recommendation of a recommended rule. Alternative rules will be described, and the policy considerations underlying the recommendation and alternatives will be described. One sensitive issue will relate to conditional finality. If the Subcommittee decides that dismissal with conditional finality is an undesirable means of establishing a basis for appeal, it will remain to decide whether the interest of uniformity -- and perhaps a fear that lawyers in other circuits will come to grief by looking to the Second Circuit, only to have conditional prejudice rejected in their circuit -- justifies telling the Second Circuit that it can

no longer adhere to its practice. The fact that this is an issue that tends to provoke differences of view between practicing appellate lawyers and judges may bear on this decision.

Appellate-Civil Subcommittee

The Appellate-Civil Rules Subcommittee met by conference call on February 13, 2015. Participants included Hon Scott Matheson, Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Hon. David Campbell; Douglas Letter, Esq.; and Kevin Newsom, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Discussion addressed drafts that illustrated several alternative approaches to manufactured finality. The drafts deliberately bypass the potential complexities that are reflected in the cases at the margins of manufactured finality.

The drafts also omit one alternative that has been considered in earlier deliberations. No draft says simply that finality cannot be achieved by dismissing without prejudice all that remains in an action. Two reasons underlie the choice to bypass this possibility. One is that this proposition is well recognized for most circumstances; little would be accomplished by casting it in rule text. The other is that a simple rule like this could have undesirable collateral effects. Some cases now recognize that a voluntary dismissal without prejudice has indeed achieved finality, and some of them may reach desirable results. And, although strained, there is a risk that such a rule would generate implications for dismissals with prejudice. The Subcommittee agreed unanimously that there is no need to continue to consider this alternative.

All the drafts address manufactured finality through a new Rule 41(a)(1)(C). The first draft presents a choice between two quite different approaches. One is to say simply that a party asserting a claim for relief may establish a final decision for purposes of appeal by a voluntary dismissal if the dismissal is with prejudice to all claims and parties remaining in the action. This simple approach recognizes a proposition that is readily recognized in case law. The reason to state it in explicit rule text would be to provide information for lawyers who do not often have reason to attempt to manufacture finality, and to provide reassurance for those who want to make quite sure what they are doing. The most likely source of uncertainty has been a minority view that a party who voluntarily dismisses lacks standing to appeal because the dismissal is what the party asked for. That view seems to have disappeared from the cases, but providing a clear rule will avoid the risk of resurgence. Clear jurisdictional rules are intrinsically desirable.

(Discussion did not reach a potential issue that was not reflected in the drafts. It may prove desirable to recognize district court authority to defeat manufactured finality. This could be accomplished by a slight revision of Rule 41(a)(2): "Except as provided in Rule 41(a)(1)(A) and (B), an action may be dismissed at the plaintiff's request only by court order, on terms

that the court considers proper.")

The first draft Rule 41(a)(1)(C) includes an optional word that substantially changes its effect. Under this version, a voluntary dismissal establishes finality "only" if the dismissal is with prejudice. This approach would reject the decisions that, in various circumstances, have found finality in a voluntary dismissal without prejudice. But it might not do so completely; some of the decisions rely on finding de facto prejudice in a dismissal that purports to be without prejudice. The draft Committee Note includes an illustration of language that might be used to reject a "practical prejudice" approach. Whether it is desirable to reject the cases that support this approach is an open question.

The "only with prejudice" text also may be ambiguous on the question of conditional prejudice. In form, the dismissal is with prejudice, but on condition that the prejudice dissolves if the pre-dismissal orders challenged on appeal are reversed. It seems difficult to characterize such a dismissal as "without prejudice," but it also may not seem to be "with prejudice." Addressing this question only in the Committee Note will open the recurring question whether the Note would become an attempt to legislate by Note, not by Rule.

The final two drafts are mirror provisions for explicit rule text addressing conditional prejudice. The first rejects conditional prejudice as a means of establishing finality: "The dismissal may not be subject to revocation if an appeal results in reversal of any order entered before the dismissal." The second accepts conditional prejudice: "But a notice or stipulation of dismissal may provide that the dismissal will be vacated if an appeal results in reversal of any order entered before the dismissal."

Discussion began by suggesting that some good might be gained by a rule saying simply that a dismissal with prejudice of all that remains in an action establishes finality. This simple rule would not insist that "only" a dismissal with prejudice will do; that question would be left to continuing development in the courts, and the Committee Note could say so. And some good would be accomplished in providing guidance for practitioners who do not often encounter these problems, and in providing reassurance for those who otherwise would invest resources in confirming that this potentially risky step will cut off everything that is dismissed but not the right to review of the pre-dismissal orders.

The next question asked why conditional prejudice would remain in limbo if the rule text says that only dismissal with prejudice establishes finality. Why might conditional prejudice count as real prejudice? The response was that it likewise does not count as without prejudice. It was suggested that this ambiguity could be readily fixed: "only if the dismissal is with <u>unconditional</u> prejudice * * *."

The arguments for and against recognizing conditional prejudice as a means of establishing finality were rehearsed. Opinions seem to divide between judges and lawyers, or perhaps more accurately between appellate judges who disfavor conditional prejudice and lawyers -- perhaps with trial judges as allies -- who favor conditional prejudice. The arguments for conditional prejudice have become familiar. Interlocutory orders may dramatically reduce the potential value of a case. If there is no opportunity for present appeal, the parties may be forced to litigate the way through to a final judgment on relatively minor theories or claims solely for the purpose of achieving a final judgment that supports review of the interlocutory orders. Recognizing finality by a dismissal with conditional prejudice may spare the parties and the trial court the burden of these continuing proceedings. If appeal leads to affirmance of the interlocutory orders, the parties and both courts have gained. And affirmance is more likely than reversal on most appeals, although the experience may be rather different when a party is so firmly convinced as to wager all on a dismissal with conditional prejudice. And if appeal leads to reversal, the proceedings on remand may come earlier, and be more efficient, than if the appeal and reversal were delayed while proceedings were exhausted on the matters that would have been dismissed with conditional prejudice.

The argument against conditional prejudice comes from the appellate perspective. There are at least enough complications and exceptions in the final-judgment rule as it is. We do not need any more risks that the same case will come before the appellate court twice, forcing inefficient refamiliarization with the record. Ample means exist to serve whatever genuine needs for interlocutory review may exist. Collateral-order doctrine, partial final judgments under Civil Rule 54(b), and openly interlocutory appeals by permission under § 1292(b) are the chief resources. Why do we need more?

Rule 54(b) was used as an illustration of possible needs for some alternative. It avowedly relies on the district judge as "dispatcher," responsible for determining whether efficient management of a particular case will be advanced or impeded by an immediate appeal as to some part. But it has conceptual limits. The district judge may focus too much on the value of uninterrupted trial proceedings, at the expense of the parties and at its own expense when an erroneous order is eventually reversed for further proceedings. More importantly, Rule 54(b) requires final disposition of all of a "claim," or of all claims between at least one identified pair of opposing parties. What is a "claim" for this purpose is not always clear. If it approaches the definition of "claim" for res judicata purposes, it reaches circumstances where a dismissal with conditional prejudice may make sense. A plaintiff, for example, may seek unitary relief on any of seven legal theories. An order that dismisses two of the theories leaves open the same request for relief, but those two theories may have been the strongest in relation to the ease and cost of proof. Or, and

more clearly, a critically important interlocutory order may not dispose of all of a single claim. Cases explored in earlier Subcommittee discussions provide illustrations. An in limine ruling may exclude important evidence, leaving only much weaker evidence to support a claim that still remains alive. Rule 54(b) cannot be used to enter a partial final judgment.

The next comment was that recognizing dismissal with conditional prejudice will, overall, save resources for the system. It will not often be risked. When it is used, affirmance will end the matter sooner, at lower cost. And reversal still may achieve a faster and less costly disposition than would result from dragging out trial court proceedings before the first appeal. It can be important to the litigants.

An analogy was offered to support further thought. As much as they honor the final-judgment rule, the courts of appeals have repeatedly collaborated in developing expansions, exceptions, and occasional evasions. The temptation to reach out to respond to particular and particularly attractive requests for appellate justice runs strong. Collateral-order reasoning has often been used to succumb to this temptation. But the Supreme Court has undertaken to discourage open-ended reliance on collateral-order theory. It has come to insist that collateral-order appeals can be allowed only when immediate appeal is justified in all of the cases that fall within the particular "category" of challenged orders. There is an implicit message that courts should be astute to protect against erosion of the final-judgment rule. Perhaps the same is true of manufactured finality -- if not the Supreme Court, the rulemaking committees should advance the cause of true finality.

The analogy to Rule 54(b) was pursued further. Rule 54(b) assigns primary responsibility to the district judge to weigh the values of the final judgment rule in determining, on a case-specific basis, the most efficient allocation of responsibilities between the trial court and the court of appeals. Should there be some similar safeguard in approaching manufactured finality by voluntary dismissal? If dismissal terminates with unconditional prejudice every claim and all parties that remain, there may be no need to invoke review by the judge. Still, it would be good to know what the orders of dismissal actually provide and whether, after the opportunities to dismiss under Rule 41(a)(1) without court action have been exhausted, judges at times refuse to allow a dismissal with prejudice. And if dismissal is attempted with conditional prejudice, absent stipulation by the parties, the same questions may be even more important.

This discussion was summarized by suggesting that a competition seems to exist between efficiency in the district court and efficiency in the court of appeals. "Without a rule, the courts of appeals win the debate." But if there is a circuit that is willing to recognize conditional-prejudice finality -- to risk some appellate efficiency for the sake of the district court and the

parties -- should we pursue a rule that tells them they cannot do that?

Discussions in the earlier joint subcommittee were recalled. There was almost a consensus of the judges and lawyers that it is important to have certainty as to appellate jurisdiction. Certainty is advanced by a uniform rule. Different practices in different circuits may confuse lawyers, generating uncertainty. Still, it can be argued that so long as each circuit has a clear rule, there is not much cost to the system simply because the clear rules differ.

It was suggested that some measure of certainty on manufactured finality could be achieved by a simple rule saying that dismissal with prejudice establishes finality. The Committee Note could say that most circuits do not recognize conditional prejudice. One or two do. The rule does not attempt to resolve that issue. The Subcommittee itself seems to hold divided views; the simple approach may be the most we can agree on. This approach was seconded by noting that this simple rule would not say that dismissal with prejudice is the "only" voluntary means to achieve finality.

A practical thought was ventured. A rule that recognizes conditional prejudice would encounter strong resistance in the Judicial Conference. A majority of the chief circuit judges come from circuits that do not recognize conditional prejudice. A rule that rejects conditional finality would have some clarity, but likely would not win unanimous support. Members of the Appellate and Civil Rules Committee, as well the Standing Committee, could easily divide on the question. And even in the Judicial Conference, a few chief circuit judges, and some district judges, might be attracted to conditional prejudice. Perhaps the simple rule, without "only" with prejudice, is the best approach.

The rejoinder asked whether it is worth the effort to adopt the simple rule without "only." It does no more than confirm what most lawyers and judges know and do now. And it might stir debate. It also might create confusion about conditional prejudice. If we are prepared to reject conditional prejudice, it is likely to be for the sake of uniformity more than because of a broadly based conclusion that it is a bad idea. And uniformity will be better achieved by a rule that says "only" by dismissal with prejudice, perhaps adding "unconditional prejudice" to make the point clear in rule text.

Discussion turned to the report that should be made to the April meetings of the Appellate and Civil Rules Committees. Discussion so far has suggested that it is valuable to have a uniform national rule, but has not shown agreement on what the uniform rule should be. Nor does it seem likely that further Subcommittee deliberations will generate greater certainty. The issues have been extensively studied for some time. Division continues as to conditional prejudice. One identifiable issue is

the importance of uniformity across the circuits on conditional prejudice. If uniformity does not seem so important as to justify telling the Second Circuit, and apparently the Federal Circuit, that they cannot do as they have been doing, we could decide it is better to propose no new rule. Or if uniformity seems more important, we could propose a rule that rejects conditional prejudice and see how it fares in the advisory committees, Standing Committee, and Judicial Conference.

This approach was seconded. "The Subcommittee has talked it out. There are nuances and complications, but we have the decision points." There is some support for a simple rule, without "only." That rule may not accomplish very much.

Further discussion examined the importance of uniform rules of appeal jurisdiction. Practicing lawyer members of the Subcommittees past and present, have been attracted to the virtues of dismissals with conditional prejudice, but have been attracted even more strongly to the values of uniform rules. Even when a rule that seems clear leaves some uncertainties -- and any of the simple rules drafts will leave some uncertainties -- it is important to advance toward greater clarity. This is true even if, as experience seems to be in the Second Circuit, conditional prejudice dismissals remain uncommon. And it is true even if clear rules on conditional prejudice can be found in the decisions of many circuits. Many lawyers will spend time looking for them. Some lawyers may find the Second Circuit rule that recognizes conditional prejudice and rely on it even though their appeals are in a circuit that has rejected it, or has not spoken to it. A clear rule will protect against such misadventures, and will reduce the amount of time devoted to trying to figure out just what opportunities there are.

Once again, doubt was expressed whether any rule should be pursued. Conditional prejudice is the central problem that continues to thread through these discussions. The variety of other complications that have attended voluntary dismissals undertaken to manufacture finality do not seem susceptible to rule-based solutions. Any simple rule may do more harm than good. And expressly rejecting conditional prejudice for the sake of advancing uniformity may not accomplish much in uniformity, given the remaining areas of uncertainty.

The outcome of this discussion was agreement to report several alternative models to the Appellate and Civil Rules Committees. One will be to do nothing. The second will be the simple rule that recognizes finality by voluntary dismissal with prejudice. The third will be the expanded rule that recognizes finality only by voluntary dismissal with prejudice. And the fourth will be a rule that explicitly rejects conditional prejudice: "[only] if the dismissal is with unconditional prejudice * * *." The Civil Rules Committee meets two weeks before the Appellate Rules Committee meets in April, and will report the results of its deliberations to the Appellate Rules Committee.

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 12-AP-D

This item arises from Kevin Newsom's suggestion that the Committee consider the topic of appeal bonds. Mr. Newsom proposed that amendments might usefully address gaps in the Rules' treatment of the topic. This topic centrally concerns Civil Rule 62, but most lawyers who deal with these issues are appellate lawyers. It thus seemed a matter well-suited to initial consideration by the Civil / Appellate Subcommittee.[1]

I enclose the Subcommittee report; rule amendment sketches; and notes of Subcommittee conference calls concerning possible amendments to Civil Rule 62. These materials were written by Professor Cooper and appeared first in the Civil Rules Committee's spring 2015 agenda book.[2]

I also enclose a sketch of an alternative rule amendment subsequently circulated by Mr. Newsom and not yet considered by the Subcommittee.

Encls.

[1] The Subcommittee is chaired by Judge Scott M. Matheson, Jr., and includes Judge Fay, Douglas Letter, Kevin Newsom, and Virginia A. Seitz (a member of the Civil Rules Committee).

[2] In that agenda book, these materials appeared together with the Subcommittee materials concerning manufactured finality. I have separated out the two topics, and the manufactured-finality materials appear separately in this volume.

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APPELLATE-CIVIL SUBCOMMITTEE REPORT: RULE 62 (STAY OF EXECUTION)

Discussion of Rule 62 stays of execution began in the Appellate Rules Committee. The initial focus was on the fit of Rule 62 with a convenient practice adopted by some appellate lawyers. Rather than arrange separate bonds to secure a stay pending post-judgment proceedings and then to secure a stay pending appeal, they arrange a single bond designed to secure a stay until completion of all appeal proceedings. It has not been clear how this strategy fits Rule 62.

A particular twist on the single-bond question arises from the fit between the 14-day automatic stay provided by Rule 62(a) and the Rule 62(b) provision for a stay "pending disposition of" post-judgment motions that may be made up to 28 days after entry of judgment. Before the Time Calculation Project the Rule 62(a) automatic stay lasted for 10 days, and 10 days also was the period for making the post-judgment motions. The automatic stay was redefined as 14 days (the prior conventions for counting meant that a 10-day period was always at least 14 days, and might run longer). The times for the post-judgment motions, however, were extended to 28 days because experience had shown that more time was needed in many complex cases. The result is an apparent "gap." A district judge wrote to the Civil Rules Committee that the gap creates uncertainty whether the court can order a stay after expiration of the automatic stay but before a post-judgment motion is made. The Committee concluded that a court has inherent power to stay its own judgment, and that there was no need to revise Rule 62(b) unless practice should show persistent confusion.

Consideration of these initial questions has led to other questions. Successive sketches of possible Rule 62 revisions have taken on ever more possible changes. Should the court be able to dissolve the automatic stay before it expires of its own force? Should it be able to require that the judgment creditor post security as a condition of dissolving a stay or refusing to grant one? Should it be able to recognize security other than a bond? To set the amount of security less than the judgment? And is it wise to carry forward the supersedeas bond provision of Rule 62(d) that many understand to create a right to a stay pending appeal? And, to return to the questions that launched the inquiry, why not recognize that a single security may be accepted for a stay that continues from expiration (or dissolution) of the automatic stay through issuance of the appellate mandate and disposition of proceedings on a petition for certiorari?

Subcommittee consideration of these questions is in mid-stream. It has been supported by detailed memoranda prepared by Professor Struve, Reporter for the Appellate Rules Committee. These memoranda reach beyond the questions that have been actively considered. The Subcommittee has yet to determine whether to recommend that consideration of Rule 62 extend beyond subdivisions (a) through (d).

The Subcommittee invites discussion of all of the issues it has identified, and any others that may deserve consideration.

One simple starting point is to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay and the time allowed to make the motions that support a stay under Rule 62(b). Rule 62(b) speaks of a stay "pending disposition" of these post-judgment motions. Are courts receptive to ordering a stay before a motion is filed under Rules 50, 52, 59, or 60, either in general or after an express representation that a motion will be, or is quite likely to be, filed? Would problems arise from extending the automatic stay to 28 or 30 days? Would the problems be reduced if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay?

How often do problems arise in agreeing on the form of security, whether a bond or something else? Are there practical difficulties in arranging a convenient and seamless form of security that runs from expiration of the automatic stay through final disposition of an appeal?

More generally, would it be desirable to amend Rule 62 to provide more explicit recognition of the district court's authority to modify, dissolve, or deny any stay? And its authority to set appropriate terms both for the form and amount of security? And to exact security as a condition of allowing immediate execution of part or all of a judgment?

These questions are set against the background of Appellate Rule 8(a)(1), which directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. When the court of appeals does act, Rule 8(a)(2)(E) says blandly that it "may condition relief on a party's filing a bond or other appropriate security in the district court." The combination of district-court primacy and appellate court flexibility suggest the possible value of recognizing a full range of district-court discretion in Rule 62.

The materials attached below are presented to stimulate initial discussion of experience with Rule 62 stays. The Subcommittee solicits advice and guidance on the need for revision, and the most profitable areas for continuing work.

The attachments include a pair of Rule 62 drafts that would replace present Rule 62(a), (b), (c), and (d). The second is a more ambitious approach than the first. Many other possibilities could be considered. Review of the drafts will be helpful.

The other attachments are notes on Subcommittee discussions. They show that the work is in progress, without having reached even tentative views on what recommendations may be made.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay of Judgment to Pay Money.[15] Unless the court orders otherwise,[16] no execution may issue on a judgment to pay money, nor may proceedings be taken to enforce it, until 14 [X][17] days have passed after its entry.[18]

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[15] "judgment to pay money" is not an established term of art. The idea is to work clear of any association with "money judgment," see Rules 67, 69. There is a further complication — Rule 54(a) defines "judgment" to include "any order from which an appeal lies." It does not purport to exclude an order that cannot be appealed. But there may be some confusion.

One alternative would be to refer to "an order to pay money." Or "an immediately enforceable order to pay money."

The choice of language may be affected by the question of contempt sanctions, see footnote 18.

[16] I'm not sure whether this authority to order immediate execution is provided in present Rule 62. But there may be circumstances where it is a good idea.

[17] The new rule text allows a motion for a stay immediately upon entry of judgment. This draft also omits any reference to post-judgment motions, so there is no apparent "gap" between this 14-day period and the 28-day period for motions under Rules 50, 52, and 59. [If we restore that part of present 62(b), we might think about the open-ended reference to Rule 60 -- should it be limited to a Rule 60 motion made within 28 days from entry of judgment?]

It remains an open question whether 14 days is the proper length for the automatic stay. Judgment debtors, particularly the slippery ones that we worry about, can do a lot to hide or dissipate assets even within 14 days. The longer the automatic stay, the greater the danger. On the other hand, 14 days may not suffice, as a practical matter, to arrange security. For that matter, the reasons for extending the time for post-judgment motions to 28 days may apply here as well: if a party needs that much time to prepare a good motion, it may need that much time to prepare a persuasive showing as to the need for security and the form and amount of security.

If the period is to be extended, 30 days might make sense. That would allow 2 days after expiration of the period for post-judgment motions to decide what to do next and, if appropriate, to arrange security.

[18] Should there be an automatic stay of a contempt order to pay money? A civil contempt order may order payment as compensation

(b) FURTHER STAY OF JUDGMENT TO PAY MONEY.[19]

(1) *By Court Order:* On appropriate terms for the opposing party's security,[20] the court may [at any time] stay the execution of a judgment to pay money -- or any proceedings to enforce it -- from expiration of[21] the automatic stay under Rule 62(a)[22] and until [the][a] time

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for injury caused by violating a specific decree. Or it may order payment to make good on a provision designed to coerce compliance -- "$1,000 a day until * * *."

An automatic stay under (a), or by supersedeas bond under (c), might impede effective exercise of the court's authority.

Present Rule 62 does not clearly address the question whether a money judgment for contempt is embraced by 62(a)(1), which provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders a stay. 11 Wright, Miller & Kane, F P & P 3d, § 2902, notes that some courts have ruled that a commitment for contempt is not covered by the automatic stay because a contempt proceeding is by its nature sui generis. The authors suggest that this may be desirable, but should be accomplished by revising the rule.

[19] The rule is cleaner if money judgments are separated from other forms of relief. "[A] judgment to pay money" should include any order to pay money, whether characterized as "damages," "disgorgement," or something else. That can be asserted in a Committee Note. The question of contempt remains open; see footnote 18. Some direction may be given in the Committee Note.

[20] This allows security other than a bond. And it allows the court to dispense with any security. When the stay extends through appeal, this provision confirms the authority courts have found in present Rule 62(d) to waive any bond for a supersedeas pending appeal.

[21] "from expiration of" is intended to begin with the time the Rule 62(a) stay ends. Ordinarily that will be 14 days after the judgment is entered. But the court might shorten the period. If the period is shortened for the purpose of permitting immediate execution, the court is not likely to issue a stay. Then a stay will depend on a prompt appeal and a supersedeas bond (see note 27 below on the question whether the court has discretion to set aside a supersedeas). But the automatic stay may be shortened for the purpose of allowing a stay on providing appropriate security.

[22] This provision supersedes the present provisions that address only stays pending disposition of post-judgment motions.

designated by the court[, which may be as late as issuance of the mandate on appeal].[23] The stay takes effect when the court approves any required security. [The court may{, for good cause,} dissolve the stay or modify the terms for security.][24]

(2) *By Supersedeas Bond.*[25] If an appeal is taken, the

The apparent "gap" between expiration of the automatic 14-day stay and the 28-day period allowed for motions under Rules 50, 52, and 59 is closed even if proposed 62(a) continues to limit the automatic stay to 14 days.

[23] This structure supports approval of a stay, and security, for the entire period between expiration of the automatic stay in Rule 62(a) and completion of all proceedings, including appeal.

The Committee Note would state that the court may set the time to run until issuance of the mandate resolving any appeal. (It may not be worth the complications to address what happens when the mandate does not simply affirm the judgment.)

The rule or Committee Note could suggest that the stay terminates if only an untimely appeal is filed. But that would multiply the opportunities to contest timeliness -- it seems better to leave resolution of timeliness to the court of appeals for the most part, although the district court should have discretion to terminate the stay if it finds immediate execution important and concludes that the appeal is untimely.

One advantage of the open-ended reliance on a time set by the court is that the time could include disposition of a petition for certiorari or lapse of the time for filing a petition. That could be pointed out in describing the time for issuing the appellate mandate.

[24] Present Rule 62 does not provide for dissolving a stay. If we make express provisions for entering a stay that can endure as late as issuance of the appellate mandate, it may be useful to recognize authority to modify or dissolve the stay. It seems appropriate to lodge this authority in the district court even if an appeal is pending.

[25] Although (1) authorizes the court to order a stay that endures through completion of all proceedings on appeal, present 62(d) provides that an appellant "may obtain a stay by supersedeas bond." Carrying that language forward absorbs whatever measure of right to a stay exists under the present rule. The discussion of integrating the provisions of Rule 62 has not yet suggested any need to reconsider this point, but further consideration should remain open.

appellant may obtain a stay of a judgment to pay money by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment].[26] The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond or other security.

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[27] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

"Other security" allows forms other than a bond, as in (1).

[26] This could be complicated further by allowing a bond or other security for a lesser amount; present Rule 62(d) has been read to allow the court to dispense with any bond at all, see note 20 above. A possible complication would be to recognize a partial stay, leaving the way open to execute for the difference between the amount of the judgment and the amount of the bond or other security.

[27] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

Alternative, More Efficient Drafting[28]

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF JUDGMENT TO PAY MONEY. Execution on a judgment to pay money, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.[29]

(2) *By Court Order.* The court may at any time order a stay until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(3) *By Supersedeas Bond.*[30] If an appeal is taken, the appellant may obtain a stay by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment]. The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court

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[28] This version picks up on suggestions made during the February 4 conference call, and may go further than intended in departing from present Rule 62 language. If we intend to do anything like this, it is better to get started now.

Being this bold for the first part of Rule 62 need not imply a need to go through the rest of the rule with a fine-toothed comb. But there is no apparent rush to get these first parts out for comment. We can go further if it appears we can do good without running much risk.

[29] The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

[30] This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

approves the bond or other security.

(b) TERMS [OF STAY].

(1) *Terms.* The court may set appropriate terms for the opposing party's security[31] for any[32] stay or on denying or terminating a stay.[33]

(2) *Dissolving or Modifying a Stay.* The court may[, for good cause,] dissolve the stay or modify [the terms set under Rule 62(b)(1)] [its terms].

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[34] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

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[31] Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

[32] "any" rather than "a" to emphasize that the court can terminate the automatic stay.

[33] This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

[34] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

Appellate-Civil Subcommittee
Civil Rule 62 Notes, Conference Call 12 December 2014

The Appellate-Civil Rules Subcommittee met by conference call on December 12, 2014. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson welcomed the members to the work of the newly reconstituted Subcommittee. Two topics were to be considered: apparent gaps in the Civil Rule 62 provisions for staying execution of a judgment and the array of questions that arise from efforts to "manufacture" a final judgment in order to win appellate review of an interlocutory order that otherwise is not subject to immediate appeal. Separate notes describe the discussions of these topics.

The stay provisions in Civil Rule 62 begin with Rule 62(a), which provides an automatic stay of execution and other enforcement proceedings for 14 days after entry. This period was set at 10 days until the Time Counting Project amendments took effect in 2009. The Project converted most 10-day periods to 14 days and eliminated the complex rules that disregarded Saturdays, Sundays, and legal holidays in calculating time periods shorter than 11 days. So it was done for the automatic stay.

One set of 10-day periods, however, was reset to 28 days -- the periods to move for judgment as a matter of law under Rule 50, for amended or additional findings under Rule 52, or for a new trial or amended judgment under Rule 59. The 28-day period was chosen to allow enough time to prepare careful motions, but also to end before expiration of the 30-day period that governs most notices of appeal. Rule 62(b) provides that on appropriate terms for security, the court must stay execution and enforcement proceedings, pending disposition of any of these motions. The result is a period of as much as 14 days between expiration of the automatic stay and the time allowed to file a motion that will require a stay.

Two obvious questions are posed by this "gap." One is whether the court has authority to stay the judgment after expiration of the 14-day automatic stay and before any post-judgment motion is filed. The Civil Rules Committee believes that inherent authority is fully equal to the job, but it may prove useful to adopt an explicit provision to make this clear. The related question is whether it would be better to extend the automatic stay to 28 days, restoring the earlier practice that avoided any need to involve the court during this period.

Extending the automatic Rule 62(a) stay to 28 days would not be an entirely neat cure. Rule 62(b) also authorizes the court to stay execution pending disposition of a motion under Rule 60 for relief from a judgment or order. A Rule 60 motion can be made more

than 28 days after judgment, and indeed it is common to rule that if a motion is made within 28 days it often should be framed under Rule 59, or perhaps Rule 52 or even Rule 50. True Rule 60 motions would continue to be available after expiration of a 28-day automatic stay, but there seems little harm in that. An amended rule can be drafted in terms that allow the court to order a stay whenever one of these motions is pending.

The draft Rule 62(b) presented for discussion did not address the question whether the automatic stay under Rule 62(a) should be extended to 28 days. It did provide that the court may stay execution until the time to appeal has expired without any appeal, or until an appeal has been filed and a determination has been made whether to approve a supersedeas bond under Rule 62(d).

A different sort of gap may be found in the provisions for a stay before an appeal is filed and for a stay by supersedeas bond under Rule 62(d) pending appeal. The stay by supersedeas takes effect when the court approves the bond. What happens between "disposition of" a motion listed in Rule 62(b) and the filing of an appeal and approval of the bond? Experienced appellate practitioners may seek a single bond that will hold for the entire period between expiration of the automatic Rule 62(a) stay and final disposition of the appeal. The draft Rule 62(b) presented for discussion addressed this question by providing that the Rule 62(b) stay may last until the court has determined whether to approve a supersedeas bond under Rule 62(d). That process could include initial approval of a bond framed to endure until conclusion of the appeal, but need not.

Discussion began with an accounting of the reasons that prompted adding Rule 62 to the Appellate Rules Committee's agenda. The bond and stay process is "totally mysterious," even to regular appellate practitioners. "Most of it is done off the books." "There are horror stories," and there is reason to fear that lawyers who do not regularly take appeals may need help. It is useful to seek a single bond for the entire process. But this approach comes at a cost. A Rule 62(b) stay calls for "appropriate terms for the opposing party's security." Often it is possible to provide security by means less expensive and cumbersome than a bond. A letter of credit is one example. Other undertakings might do as well. Rule 62(d), on the other hand, requires a supersedeas bond pending appeal. At least it seems to. One participant noted that he had got permission to post a letter of credit as security under Rule 62(d).

A distinct question was raised: Should Rule 62 include provisions addressing the amount of the security or bond? Many local district rules, and many state rules, do so. One common provision is to set the amount at the face of the judgment, or the face of the judgment plus interest. Some provisions set an automatic increase -- for example, 125% of the judgment. It was agreed that if such a provision is included, there should be

discretion to set a different amount. The traditional example is the inability of Texaco to post bond, as required by Texas law, for the full amount of the multi-billion-dollar judgment in the Pennzoil litigation, leaving it vulnerable to immediate execution. Even with this discretion, setting a presumptive amount in rule text could "stave off satellite litigation" and make the procedure easier for the inexperienced.

Further work was encouraged by observing that real advantages can be gained by providing greater detail and clarity in Rule 62 text. Practitioners would not need to spend as much time with the treatises and cases.

The gap between the 14-day automatic stay and the time to make post-judgment motions was questioned. Why not extend the automatic stay to 28 days? This seems a pragmatic question. Because of time-counting conventions, the 10-day stay provided before 2009 was automatically at least 14 days, and in some combinations of holidays could run a few days longer. There are obvious risks that opportunities for effective execution will diminish even during this period, whether assets subject to execution suffer natural diminution or are concealed. Expanding the automatic stay without security expands these risks. This question deserves further inquiry.

The form of security also deserves attention. The participants in the call noted that they were seldom required to post security after expiration of the automatic stay. One reason is that the costs of a bond are recoverable, a prospect that encourages responsible behavior by parties who hold a judgment for the time being -- a party who is confident that it will be able to execute its judgment if the judgment survives may prefer to avoid exposure to this cost in case the judgment does not survive. More generally, it will be desirable to consider the requirement that security pending appeal be in the form of a bond -- other forms of security may be more flexible, and more appropriate. This thought was repeated -- it is important to allow different forms of security. Rule 62(d) might well be revised to parallel present Rule 62(b), calling for "appropriate terms for the opposing party's security." This discussion led to a further suggestion: There is no apparent advantage in separating the provisions for stays pending conclusion of proceedings in the district court and pending appeal. The two provisions should be structured to flow naturally from district-court proceedings to appeal. This might be accomplished by rearranging Rule 62, or by combining (b) and (d) in a single subdivision. One practitioner supported this approach by noting that in his experience, 80% of judgments are headed for post-judgment motions and appeal. Merger should be attempted.

This discussion carried on with the observation that it is important to allow different forms of security.

It was agreed that there should be discretion as to the form of security both while proceedings continue in the district court and pending appeal. This led to a recommendation to attempt a merger of these provisions into a single subdivision.

Technical questions also were addressed. The discussion draft of Rule 62(b) separated proceedings in the trial court from proceedings on appeal by referring to the time when "a notice of appeal has been filed and become effective." This provision addresses the questions that might arise when the effect of a notice of appeal is suspended by post-judgment motions, questions that are addressed in Appellate Rule 4. The formula is borrowed from Civil Rule 58(e), where it was adopted in a deliberate plan to integrate with Appellate Rule 4. It was agreed that this is the proper phrase to express the thought.

A second question raised by the draft will be addressed in different terms if it proves possible to create a single subdivision for stays pending district-court proceedings and pending appeal. The draft extends the stay pending district-court proceedings to the point where the court has determined whether to approve a supersedeas bond. A fully integrated procedure will take care of this.

A third question was raised for the first time. Stays and bonds ordinarily are framed in terms of an "appeal." What does this mean after a court of appeals has concluded its proceedings but before expiration of the time to petition for certiorari or disposition of a petition? This question can be addressed in the terms of the bond. But it seems likely that not everyone will think to do so. Would it be useful to adopt a provision in the rules?

Other Rule 62 issues may deserve consideration if this project proceeds to fairly significant amendments. The role of state law under Rule 62(f) is one example.

The immediate tasks, then, are these: To consider extension of the automatic stay in Rule 62(a) to 28 days; to attempt to integrate the provisions for stays pending district-court proceedings and stays pending appeal into a single subdivision, or at least into a more natural flow without the interruption of Rule 62(c) addressing stays pending appeal of orders regarding injunctions; to adopt more flexible forms of security for stays pending appeal; and to consider adding a formula setting a presumptive amount for security.

Notes, Appellate-Civil Subcommittee February 4, 2015

The Appellate-Civil Subcommittee met by conference call on February 4, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee Chair; Hon. Peter Fay; Douglas Letter, Esq.; and Virginia Seitz, Esq. Reporters Catherine Struve and Edward Cooper also participated.

The meeting focused on a draft of a revised Rule 62 that was designed to frame the issues discussed in an earlier meeting. These issues have not addressed all of the questions that might be addressed in a complete overhaul of Rule 62. Instead, they are framed around the questions that initially inspired the Appellate Rules Committee to believe that there is work to be done, and the related questions that grew out of that beginning. These issues look toward a better integration of the automatic stay provisions of Rule 62(a); the provisions in Rule 62(b) for a stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60; and the supersedeas bond provisions of Rule 62(d). In addition, it may be valuable to add express provisions recognizing that security may take a form other than a bond, and that there is discretion in setting the amount of security.

The issue that sparked the initial interest in Rule 62 arose from the practice of experienced appellate lawyers that looks to provide a single bond (or other form of security) that will cover all stages of the case after expiration of the automatic stay provided by Rule 62(a). This security will cover post-judgment proceedings in the district court and any appeal that may be taken. It was thought useful to recognize this practice in rule text.

The "single bond" question led naturally to the apparent "gap" that exists between Rule 62(a) and 62(b). The automatic stay under Rule 62(a) expires 14 days after judgment is entered. Rule 62(b) recognizes that the court may order a stay pending disposition of motions made under Rules 50, 52, 59, and 60. These two provisions dovetailed nicely when the time to move under Rules 50, 52, and 59 was 10 days. (Ten days always meant at least 14 days under the time-counting conventions established by Rule 6). But the "Time Project" changed the time for Rule 50, 52, and 59 motions to 28 days. The change was prompted by the sense that many cases present such complicated issues that 14 days (or a few more, depending on intervening legal holidays) is not enough to prepare an effective motion. The period was set at 28 days -- unique in the Civil Rules -- to allow the parties a brief grace period to decide whether to file a notice of appeal within the 30 days allowed by Appellate Rule 4 for most civil appeals. Knowing whether the time to appeal has been suspended by a timely motion under any of these rules, or a Rule 60 motion filed within 28 days, can be important in deciding whether and when to file a notice of appeal.

The gap between expiration of the automatic stay under Rule 62(a) and the provision in Rule 62(b) for a stay pending disposition of a post-judgment motion led a district judge to suggest that the Civil Rules Committee should consider amending Rule 62(b). The Committee considered the question and concluded that the court has inherent power to stay its own judgment. It determined that revision of Rule 62(b) should be considered only if ongoing practice did not settle this question.

If Rule 62 is to be considered for other reasons, it seems wise to reconsider the fit between Rules 62(a) and 62(b).

Reconsideration does not lead to an obvious answer. There are good reasons to keep a tight rein on the automatic stay. It is possible to dissipate or conceal assets promptly after an adverse judgment, and the greater the time available the greater the prospect that the judgment debtor can choose means that resist undoing. On the other hand, the value of the post-judgment motions may be defeated if the judgment creditor is allowed to execute on the judgment. Just as a judgment debtor may avoid payment, so a judgment creditor may be able to avoid repayment. (If a rule is drafted that recognizes the court's authority to terminate the automatic stay, it may be desirable to include a provision that recognizes authority to require security by the judgment creditor as a condition of allowing immediate execution.)

One possible resolution is to extend the automatic stay to 30 days, but to recognize the court's authority to terminate the automatic stay. Termination of the automatic stay could easily be integrated with a provision that allows the court to order a stay on appropriate terms for security: the risk presented by the automatic stay, and the risk presented by the absence of a stay, could be counterbalanced. Security need not be ordered, whether in the form of a bond or some other form (a certificate of deposit, other security, the manifest ability of the judgment debtor to make good on the judgment). But security could be ordered on terms that are calculated to eliminate any risk to the judgment creditor or, if immediate execution is allowed, the judgment debtor.

Express authority to order a stay at any time, on appropriate terms for security, would address the desire to have a single bond that endures for the life of the case, at least through appeal.

It also may be desirable to include in the rule text express recognition of authority to dissolve a stay or modify the terms for security. Circumstances change, and may be particularly likely to change if security is ordered before decision of any post-judgment motions.

Present Rule 62(d) provides what seems to be a right to a stay upon posting a supersedeas bond. The illustrative draft carries subdivision (d) forward, although relocated within the rule. The only change is to recognize that security may take a form other

than a bond. One important question that needs to be addressed is whether Rule 62(d) now establishes at least a very strong presumption for -- and perhaps something approaching a right to -- a stay on posting a bond approved by the court. At least some courts have recognized that the requirement of a bond may be excused. Research needs to be done to determine whether a stay may be denied even though a satisfactory bond (or other satisfactory security) has been tendered.

The central features of the draft rule, then, emphasize the value of establishing court authority to control stays of execution. The automatic stay may be terminated. A stay may be ordered at any time, beginning with entry of the judgment. It may be subject to appropriate terms for security, establishing discretion whether to demand any security and as to the form of any security and the amount. The stay may be ordered for any period, up through issuance of the appellate mandate. (This feature can be integrated through the Appellate Rules on issuing the mandate to cover the period for petitioning for certiorari, possibly before but ordinarily after judgment in the court of appeals.)

Discussion began by focusing on the "gap" between expiration of the automatic stay after 14 days and the 28-day period for filing post-judgment motions under Rules 50, 52, and 59.

The most elemental question is why there should be an automatic stay at all. Why not put the burden on the judgment debtor to justify a stay? And perhaps to provide security? The need for some automatic stay may flow from the need to recognize the entry of judgment, to prepare a motion, and to arrange security. Some judgment debtors may be able to anticipate the need and act almost instantly on receiving e-notice of judgment. But others may not. Immediate execution by an aggressive judgment creditor is a possibility. The rule has long provided for an automatic stay, and there has not been any evident sense that this has been a mistake.

The more direct question about the "gap" was addressed by suggesting there is a need to protect the opportunities for correction of the judgment by a post-judgment motion. As the rule stands now, there is a risk that an inexperienced lawyer may not recognize the need to ask for an extension of the automatic stay -- or a stay issued on the court's inherent authority, and on such terms as the court may impose in exercising its authority -- and expose the judgment debtor to the serious risks of immediate execution. Recovery of the amounts seized in execution may not provide much protection for a judgment debtor who cannot function without those assets. The judgment creditor can oppose the stay; authority to grant a stay is not an automatic entitlement. If there are strong reasons to deny a stay, the stay will be denied.

The draft submitted for discussion was intended to address this question by one or the other of two alternatives. One was to extend the automatic stay to 30 days. That would leave the burden

on the judgment creditor to seek to dissolve the stay. The other was to retain the automatic stay at 14 days, but allow the judgment debtor to move at any time, including the moment judgment is entered or perhaps even before judgment is entered, to win a stay on "appropriate terms for security."

One important question, then, is which party should have the burden with respect to security after -- or perhaps during -- an automatic stay.

A related question asked about the burden on the court of addressing these questions. The greater the court's responsibility, the greater the prospect that disputes about stays and security will eat into scarce judicial resources. The first response was that these problems do not seem to arise in practice. Once judgment is entered, "the parties talk and work it out." Motions to extend the automatic stay do not arise. (This may indicate one value in the automatic stay -- it provides shelter for these discussions.)

Discussion turned to the question whether it is useful to carry forward the present provision for obtaining a stay by posting a supersedeas bond. Perhaps the supersedeas should be superseded by a procedure that makes the court responsible for all stays, at least after an automatic stay expires. Discussion recalled the question whether present Rule 62(d) establishes something like a "right" to a stay on posting bond approved by the court. Approval by the court seems to allow delegation of approval authority to the court clerk. Some courts have local rules that expressly authorize the clerk to approve a supersedeas bond, at least if the bond satisfies criteria set out in the rule. But why allow this opportunity for a second bite at the apple? If the court has denied a stay sought on motion under the open-ended provision of draft Rule 62(b)(1), why should that not end the matter?

One value of carrying forward the present supersedeas provision may be that it allows a party to forgo any motion. Judgment is entered. An appeal is taken, perhaps without any post-judgment motions. An appeal bond is posted. End of story. Or, at least, end of story if the present rule establishes something that at least approaches a right to a stay on posting bond.

Another way of asking the question was whether there is a need to provide for a discretionary stay ordered by the court if the automatic stay is extended to 30 days. To be sure, there is a need if a timely post-judgment motion is filed; the court ordinarily will need more time to dispose of the motion, or perhaps several motions.

One possibility to avoid a "second bite" would be to draft terms that allow a party to secure a stay by posting a supersedeas bond only if that party has not sought a court-ordered stay. It was noted that this approach would generate strategic behavior by discouraging an application for a court-ordered stay, which may be

important in the period before any appeal is filed, so as to preserve the automatic stay that seems available under the supersedeas procedure.

Discussion turned to the question whether Rule 62 should provide more detailed terms governing the form of security. The national rules once had such provisions. They were abandoned. Brief discussion suggested that it would be a mistake to attempt to address such issues, which often call for a pragmatic exercise of discretion, in national rule text. Local rules can address some parts of these issues, but the time has not come for national-rule provisions.

A different structure was suggested. Rule 62(a) could have three paragraphs. (1) would address the automatic stay. (2) would address stays pending disposition of post-judgment motions, perhaps restoring explicit reference to Rules 50, 52, 59, and 60. It might, or might not, address more general authority to order a stay that persists from expiration (or termination) of the automatic stay through appeal. (3) would address stays pending appeal. This structure might reduce the potential overlap between subdivisions (a) and (b) in the illustrative draft. It would provide for a stay for the benefit of a party who needs this protection pending preparation and disposition of post-judgment motions.

It was suggested that whatever structure is adopted, it will be important to recognize the opportunity to secure a stay that persists from the end of the automatic stay through appeal, with a single security (unless the terms of security are modified by the court to address changing circumstances, such as actual decision of the post-judgment motions).

It was noted that the Subcommittee has not yet considered other possible questions raised by Rule 62. They will continue on the Subcommittee agenda.

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Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Stay of Judgment to Pay Money. Execution on a judgment to pay money is stayed as follows[1]:

(1) Automatic Stay. Unless the court orders otherwise, execution shall be stayed for a period of 30 days[2] after judgment is entered.

(2) Stay Pending Disposition of a Post-Judgment Motion. Upon the filing a supersedeas bond or other appropriate security[3] in the amount of 125% of the judgment[4], execution shall be stayed[5] pending disposition of any of the following motions:

(A) under Rule 50, for judgment as a matter of law;

(B) under Rule 52(b), to amend the findings or for additional findings;

(C) under Rule 59, for a new trial or to alter or amend a judgment; or

(D) under Rule 60, for relief from a judgment or order.

(3) Stay Pending Appeal. If an appeal is taken—

(A) Upon the filing a supersedeas bond or other appropriate security in the amount of 125% of the judgment, execution shall be stayed pending disposition of the appeal.

(B) If a supersedeas bond or other security filed in connection with Rule 62(a)(2) remains in place, no additional security is required to maintain the stay pending disposition of any appeal.[6]

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[1] I have tried to simplify the structure, along the lines suggested on one of our recent calls, such that (a)(1) applies to the automatic stay, (a)(2) applies to post-judgment stays, and (a)(3) applies the stays pending appeal.

[2] This provides time to seek security for either a post-judgment motion (28 days) or an appeal (30 days).

[3] I think that it is important to specify that non-bond securities may be accepted both at the post-judgment phase and the appeal phase.

[4] It is my impression that specifying an amount that is adequate as a matter of law will reduce potential satellite litigation about the bonding process.

[5] This provision makes the stay automatic and mandatory upon the filing of the specified bond or other security. Under the proposed subsection (4), the court has discretion to stay execution in other circumstances.

[6] This provision is aimed at ensuring that judgment debtors can procure a single security for the post-judgment and appeal phases.

(4) Court Discretion. Under Rule 62(a)(2) and (a)(3), the court may, for good cause shown, stay execution without the filing of a bond or other appropriate security, or upon the filing of a bond or other appropriate security in an amount less than 125% of the judgment.[7]

(b) Modification or Dissolution of Stay. The court may, for good cause shown, dissolve or modify the terms of any stay under this rule.

(c) Stay of Injunction, Receivership, and Patent Accounting Orders.[8]

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory of final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

[REMAINDER OF RULE 62]

[7] It seems to me that just as we want to preserve the court's ability to dissolve or modify a stay even when a bond/security is in place, we want to preserve the court's discretion to stay execution even in the absence of a "full price" (*i.e.*, 125%) bond or other security.

[8] I really didn't touch this part.

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TAB 8A

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 14-AP-C (pro se briefs)

Date: March 31, 2015

A pro se plaintiff asks for a new appellate rule after having what she believes to be an unsatisfactory experience when she was appointed counsel under the Ninth Circuit's pro bono program. Her description of the experience is as follows:

> The 9th Circuit Court of Appeals, in San Francisco, put my copyright infringement case into its Pro Bono Program by court order. When the judges heard my appeal, they counted the pro bono supplemental briefs (clearly marked and designated as supplemental) as replacement briefs instead. The pro bono attorneys only argued a few minor points not covered in my appeal brief. The court ignored my appeal brief even though it contained the main issues of the appeal. All further motions arguing that the main issues of appeal be heard were denied without giving any reason for the denial until the court finally refused to accept any more motions. So, the court did not meet its legal obligation to fully hear my properly-filed, timely appeal. The end result was Constitutional deprivations, i.e., the denial of due process (the rights to fair proceedings and the right to be heard in a meaningful way) and, consequently, equal protection -- very costly deprivations after investing almost a decade in the court system.
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> A new rule could prevent court errors of this magnitude. A new rule should require that as long as a litigant presents a motion showing that any main issue on appeal is not resolved according to law as applied to proven facts of the case, the appeals court cannot refuse the motion. Said rule should assure that the court provides written, law-based reasoning for denying such motion. If not, the motion can be resubmitted until the court reaches a soundly-reasoned legal decision. This makes it harder for judges to produce incorrect decisions in the first place—and to not avoid fairly resolving issues as the end result of each appeal.

The docket of the case indicates that under the order directing appointment of pro bono counsel, the pro se's pending motions were denied without prejudice to renewal through

counsel. Once appointed, counsel filed a "Supplemental Opening Brief." The pro se's complaint is that the 9th Circuit failed to treat this brief as supplemental--i.e., instead of considering briefs/motions filed pro se prior to appointment of counsel along with those filed by counsel, the 9th Circuit only considered the briefs filed by counsel.

The rule that the pro se proposes to address the alleged wrong is not a viable rule. A rule that says "a court of appeals must accept a motion when a main issue is not resolved according to law as applied to the facts" is so broad, and would have to be subject to so many exceptions, that it would likely do more harm than good. A more narrow possibility would be to address what to do when a court receives a supplemental brief from counsel after a pro se litigant files her own brief. There is nothing that I could find in the Appellate Rules about such a situation. The only thing I could find even close to on point is Rule 28(c), which requires court permission for any brief after the reply. In this case, such permission was granted but the original brief was not considered.

At bottom, the complaint of the pro se appellant here seems to be a disagreement over strategy with appointed counsel. I spoke with Judge Hurwitz of the Ninth Circuit and he says this occurs with some frequency under the Circuit's pro bono plan. Another way to look at it is that counsel simply mischaracterized the brief given the court order. It was not "supplemental" given the fact that the pro se's briefs were rejected because counsel was appointed. Neither of these scenarios warrants appellate rulemaking.

On the merits, it would appear that the court should surely have the discretion to reject the pro se's brief and consider counsel's brief to be the brief on the merits. Once counsel is appointed, strategic decisions, particularly in civil cases, are for counsel to make.

If the Committee decides, however, that a rule might be useful to assist courts and parties in determining how to treat briefs filed by pro bono counsel after a pro se has already filed a brief --- or more specifically that a pro se's opening brief will be accepted or rejected if counsel is appointed --- then a full memorandum on the subject will be prepared for the next meeting.