

Outline of Proposed Testimony  
AAAL President Charles A. Bird  
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1. Introduction.

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

2. Bench versus Bar serves neither.

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

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

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

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

3.1 Lawyers who can't write.

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

3.2.1 This is a moving target as technology develops.

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

- 3.3 Lawyers whose clients don't understand appellate courts. Lawyers' first concern is clients: getting, keeping, not being sued by. GCs and favored trial lawyers can interfere even with specialist performance.
4. Overall things to do.
  - 4.1 Certify federal appellate specialists; consider competency standards for admission to circuit-level practice.
  - 4.2 Develop circuit bar associations that focus on better advocacy in their appellate courts; teach how to frame and select issues, including critical evaluations of the standard of review, prejudicial error, and appellate remedy.
  - 4.3 Have more oral arguments in counseled cases; every oral argument is a potential teaching experience.
  - 4.4 Write more disclosing memorandum dispositions. The court's issue selection is also a teaching experience.
5. Study fluctuating length limits for appellate briefs.
  - 5.1 For pro se parties, develop a short-form brief (See Ninth Circuit appellant's informal brief).
  - 5.2 For counseled cases, study allowing circuits that actively manage appeals to shorten the 14,000 word limit based on the length of the record and the complexity of the case. FRAP should still provide base word limits for particular kinds of appeals in circuits opting into the active case management process. The actual word limit, to be not less than the FRAP base, would be set by a motions attorney when the briefing schedule is set, after consulting with counsel. This step would be easy to add to early settlement evaluation in circuits that have such programs. The parties would retain the right to seek leave from the court to file longer briefs. Take care with reply briefs, since shotgun appellee's briefs and alternative grounds to affirm can cause major difficulties.