AMERICAN ACADEMY OF APPELLATE LAWYERS

July 28, 2016

VIA ELECTRONIC MAIL

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United States Court of Appeals
for the Ninth Circuit

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Susan V. Gelmis, Chief Deputy Clerk
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Dear Ms. Dwyer and Ms. Gelmis:

The American Academy of Appellate Lawyers (the Academy) supports the proposed 9th Circuit Local Rule concerning the word count for briefs.

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.

On November 24, 2014, the Academy submitted a detailed response to the Committee on Rules, Practice and Procedure of the Judicial Conference to the United States concerning proposed changes to the Federal Rules of Appellate Procedure.[1] The Academy supported 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 to a word limit.

The 1998 amendments to the Federal Rules of Appellate Procedure established the 14,000 word limit for principal briefs. The proposed amendments considered by the Judicial Conference in 2014 reduced the limit for principal briefs to 12,500 words and, ultimately, this was revised to a limit of 13,000.

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[1] A copy of this response is attached for your ready reference.

The basis for the proposed reduction to 12,500 words was that the 1998 Advisory Committee was confused or mistaken with respect to the limitation on prior briefs. After careful research, the Academy was unable to identify any basis to support the view that the 1998 Advisory Committee was confused or mistaken. In addition, the Academy was unaware of any complaints from any Federal judge in the 9th Circuit (or elsewhere in the United States) that longer briefs had been filed as a result of the 1998 amendment.

In its original comment, the Academy noted that Circuit Judge Frank Easterbrook, a member of the 1998 Advisory Committee, posted a public comment stating the primary data supporting the 14,000-word limit was a detailed word count of briefs filed in the Supreme Court. The Academy believes that reducing the word limit would adversely affect developing issues in complex appeals. The inevitable result of reducing the limit would be more motions to file briefs exceeding the limits or inappropriately constricted presentation of the issues in complex appeals.

In short, the Academy supports the proposed 9th Circuit Local Rule concerning the word count for briefs.

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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

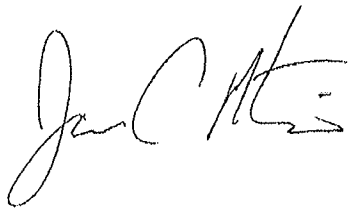
setting word limits, the new 29(b) would require the proposed brief, along with the motion for filing, to be filed no later than three days after the rehearing petition is filed.

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
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November 24, 2014