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.