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,

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