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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 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,

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