February 17, 2015

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 Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

We submit these comments on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. We appreciate this opportunity to address the proposal by the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). Our groups have extensive experience before the federal courts of appeals, and we draw on that experience to respectfully oppose the proposal to reduce the word limits for appellate briefs. We also suggest that eliminating the three additional days for electronic service provides an opportunity to consider whether the default deadline for filing a reply brief should be increased. Both of these suggestions reflect the increasing complexity of cases handled in the courts of appeals and would help avoid burdening courts with motions to extend the word limits or the time to file a reply brief.

RULE 32: WORD LIMITS

We oppose the proposal to reduce the word limits for opening and response briefs from 14,000 words to 12,500 words and to reduce the word limits for reply briefs from 7,000 words to

6,250 words. There is no compelling reason to change course after seventeen years under the current word limits, and there are good reasons to preserve the status quo.

As noted in other comments, the cases heard by the courts of appeals are complex and, if anything, only increasing in complexity. *E.g.*, American Academy of Appellate Lawyers, Cmt. § D(5) (Dec. 2, 2014); Joshua Lee, Cmt. (Sept. 16, 2014). Litigants on appeal must frequently address multiple causes of action, complex statutory schemes, ever-growing bodies of precedent, disputes among lower courts, threshold questions of jurisdiction and standing, interactions between state and federal law, and complicated technologies or business arrangements.

For many appeals, 1,500 words in an opening brief or 750 words on reply can mean the difference between including or excising a meritorious argument. It can also substantially affect the depth of treatment that each argument receives. Advocates understand that their objective is always to be helpful to the court as it works to understand their case and its salient points. While some advocates submit unnecessarily long briefs, there is already a penalty for going on longer than required: Such briefs tend to be less persuasive. At the same time, a shorter brief is not always possible or helpful to the court, lest the court not understand the context in which the case arises. We thus strive to submit shorter briefs whenever possible, but often find that the existing word limits constrain the substance of the arguments we can make. This is especially true in cases involving statutes with complicated common-law backgrounds or legislative histories, areas of law where the courts have issued conflicting rulings or decisions that require close distinctions, cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand.

The proposal to reduce the word limits contrasts with the Supreme Court's rule, which gives advocates 15,000 words for opening briefs on the merits. S. Ct. R. 33.1(g). Although the Supreme Court and the courts of appeals hear a different mix of cases, the number of words that the Supreme Court considers appropriate for addressing what is often a single question of law (and usually in a clean vehicle) should give the Committee pause about reducing the number of words litigants are given to develop multiple issues in an appeal from a case that may have involved numerous issues, many parties, or a complex trial record.

Moreover, it is not clear that the courts of appeals will benefit from reducing the word limits. Advocates forced to make cuts are likely to preserve substantive arguments at the expense of discussing some of the supporting authorities and record materials, such as details regarding the trial record and procedural history. This would require courts to spend more time tracking down cases and examining the record to analyze arguments that cross-reference those materials but that counsel do not have room to elaborate. The concern in such circumstances is not that litigants on appeal had to excise arguments completely, but that their briefs will fail to provide a complete understanding of what is at issue in the case and thus will be less helpful to the courts.

Lower word limits will also increase the number of motions seeking additional words. Office of General Counsel, EEOC, Cmt. at 1 (Feb. 5, 2015). Based on our experience, the current limits appear sufficient to accommodate the substantial majority of cases; requests for additional words appear relatively rare at present, and granted requests even more so. Tighter

limits would likely upset this balance, causing an uptick in the frequency of requests for more words and imposing an additional burden on the courts.

Additionally, many cases involve more than one party on each side. In some instances—including some of the most complex appeals from agency determinations—parties are presumptively required to file a joint brief. *See* D.C. Cir. R. 28(d) (providing that "[i]ntervenors on the same side must join a single brief to the extent practicable"). A single brief of 12,500 words may prove difficult in such cases, resulting in an ineffective joint submission, or multiple briefs where a single 14,000-word brief would have been "practicable." Even where joinder is not required, moreover, parties often work together to file joint briefs. Fed. R. App. P. 28(i); *see also, e.g.*, *Classen Immunotherapies, Inc. v. Shionogi, Inc., Merz Pharm., LLC, Merz Pharm., GmbH*, No. 2014-1364 (Fed. Cir. Aug. 8, 2014) (joint brief filed for all defendants). But the willingness to participate in a joint brief depends on the assurance that all issues will be fairly covered by that one submission. Again, then, the proposed reduction in word limits would reduce the attractiveness of such arrangements, with the unfortunate result that courts may receive *more* briefs in complex multi-party appeals than they currently do.

In the face of these reasons to stay the course, there is no compelling justification for changing direction after seventeen years of practice. The Committee points to what it believes was an "inadvertent[] increase[]" in the length limits as the reason for its proposed reduction. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 48 (Aug. 2014). The newly proposed conversion ratio, however, is based on a tiny sample of only fifteen opening briefs and thirteen reply briefs filed before 1993

in a single court of appeals. *Id*. at 18, 20-24. Even within that small sample, eleven briefs—more than a third—would have exceeded the proposed new limits. *Id*. at 23-24. In addition, Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio and reported that, in a pre-1998 study of fifty briefs that he conducted for purposes of amending the Seventh Circuit Rules, the average word count was only "a little under 14,000." Easterbrook, Cmt. (Sept. 11, 2014). The premise that briefs have gotten longer as the result of a 1998 mistake therefore cannot justify the proposed change.

Nor would a change be warranted even if there had been a mistake. Litigants and courts have been operating under the current word limits for seventeen years. Although some briefs filed during that time undoubtedly should have been shorter, there is no evidence that the current limits have proved unworkable for the average case or that there is any other pressing reason to change them. The burden should be on those who would change the status quo, and there has been no showing that a nationwide reduction in the word limits is warranted.[1]

RULE 26(C): THE "THREE-DAY RULE"

Rule 26(c) currently gives a party receiving a brief by electronic service three extra days to respond. The Committee proposes to eliminate this extra time. We agree that a paper served electronically should be treated as delivered on the date of service. However, the proposed change would reduce the time for filing a reply brief from what is typically seventeen days to

[1] If the Committee decides to reduce the word limits in Rule 32 notwithstanding these concerns, it should, at a minimum, add a statement making clear that nothing in the rule prevents the courts of appeals from granting increased page limits, especially in cases where the parties agree that the case is a complex one and warrants more words.

fourteen days. We suggest that rather than reduce the de facto seventeen-day deadline for reply briefs that has existed under Rule 26(c), the Committee should adopt an offsetting amendment that would set a seventeen-day deadline for filing a reply brief or, better yet, increase the deadline to twenty-one days.

The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread. This extra time can be critical for advocates juggling competing deadlines or representing incarcerated (and thus hard to reach) clients and is particularly important as litigation grows more complex. A longer deadline also allows more time for client review and feedback and benefits the courts by reducing the number of extension requests.

By comparison to the current proposal, the Supreme Court sets a thirty-day deadline for merits reply briefs. S. Ct. Rule 25.3. Even when that deadline is cut short because it would fall too close to oral argument, *see id.*, it is longer than the current de facto deadline in the courts of appeals and will typically be more than double the proposed new deadline.

Although there is no need to link the extra time to electronic service, we suggest that the Committee adopt an offsetting amendment that would set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting. This time could, of course, be shortened when there is a case-specific need to expedite an appeal. But an across-the-board contraction of the de facto deadline for filing reply briefs should not be adopted without considering whether a longer default period for reply briefs is warranted.

Respectfully yours,

Seth P. Waxman
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

Pratik A. Shah
AKIN GUMP STRAUSS HAUER & FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, NW
Washington, DC 20036

Lisa S. Blatt
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004

Paul M. Smith
Matthew S. Hellman
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001

Christopher Landau
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005

Jeffrey A. Lamken
MOLO LAMKEN LLP
600 New Hampshire Avenue, NW
Washington, DC 20037

Deanne E. Maynard
Joseph R. Palmore
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006

Walter Dellinger
Jonathan Hacker
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Peter D. Keisler
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW
Suite 500 West
Washington, DC 20037