MAYER·BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

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VIA ONLINE SUBMISSION

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, N.E., Suite 7-240
Washington DC 20544

Re: Comments on Proposed Revisions to the Rules of Appellate Procedure

Dear Mr. Rose:

This letter is submitted on behalf of the members of the Supreme Court and Appellate Practice of Mayer Brown LLP. Mayer Brown has the Nation's oldest and largest appellate practice. The members of our group include four former Deputy Solicitors General and three former Assistants to the Solicitor General, as well as numerous former Supreme Court and federal appellate clerks. Collectively, we have written thousands of federal appellate briefs. We also are the authors of the BNA treatise FEDERAL APPELLATE PRACTICE, and four Mayer Brown appellate partners are among the five co-authors of SUPREME COURT PRACTICE. We offer these comments based on our shared experiences representing our clients in appeals in all the federal courts of appeals.

To summarize our comments, we oppose both the proposal to reduce the word limits for briefs and the proposed deadline for amicus briefs in support of rehearing petitions.

1. Proposed Reduction To Word Limits For Briefs.

We respectfully urge the Committee to retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs. In our view, the proposed limit of 12,500 words for principal briefs and the correspondingly reduced limits for cross-appeal and reply briefs are too low and would negatively affect the quality of briefing in complex cases involving multiple issues.

According to its Note on the proposed rule change, "the Committee believes that the 1998 amendments," which replaced the 50-page limit for principal briefs with the current 14,000-word limit, "inadvertently increased the length limits for briefs." The Note further suggests that this inadvertent increase resulted from mistaken assumptions about the number of words contained in a typical 50-page brief. We understand there to be some debate about the

basis for the Committee's selection of 14,000 words as an appropriate word limit. Whatever the Committee's rationale for that number, however, it is unlikely that in adopting a 14,000-word limit the Committee actually increased the permissible length of briefs. Most briefs filed prior to the 1998 amendments used 12-point type. A 50-page brief in that type size could easily contain 14,000 words, even before considering the word-expansive effects of typeface, line spacing, and other formatting choices. Indeed, in adopting the new word limit the Committee observed that the "widespread use of personal computers" had "made the 50-page limit virtually meaningless." *See* Fed. R. App. P. 32(a)(7), Advisory Committee Note to 1998 Amendment. Thus, although 14,000-word briefs prepared after the 1998 amendment typically exceed 50 pages because of the increase in the minimum font size to 14 points, many if not most 50-page briefs filed before the rule change were in 12-point type and contained more than 14,000 words.

Equally important, of course, is whether the 14,000-word limit that has now governed for more than 16 years is reasonable or should be changed. We agree with the observation of several commenters that appellate briefs in simple cases can and should contain fewer than 14,000 words. A *maximum* word limit, however, should be sufficient to accommodate appeals involving a detailed factual record and multiple issues of moderate complexity. In our experience, it is often challenging in such cases to provide a sufficient factual recitation, argue the issues raised with appropriate references to the pertinent evidence and legal authorities, and include all required parts of the brief (such as the summary of argument) within the currently allotted 14,000 words. Given the various components that an appellant's opening brief (though not necessarily the appellee's answering brief) must contain, a 1,500-word reduction—more than 10%—would substantially cut into the space available for the Statement of Facts and the Argument. Consequently, it is inevitable that brief writers—especially those who do not specialize in appellate advocacy—would sacrifice readability and clarity in an effort to excise the necessary number of words. (Consider the ambiguities created by the ever-increasing tendency to drop the conjunction "that" following verbs.[1]) Reducing the maximum word limit would discourage punctilious citation to the record and inclusion of parentheticals describing cited cases and other sources—adding a burden for the judges and clerks that surely exceeds that of reading (or glossing over) such citations and parentheticals. At the same time, it would encourage overuse of acronyms, "cheating" on citation format, and other attempts at shortening without actually cutting substance.[2] Worst of all, in some cases parties would be forced to choose between making scattered cuts that render the brief less effective overall and omitting meritorious issues altogether.

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[1] For examples, see GARNER'S MODERN AMERICAN USAGE 808 (3d ed. 2009); MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE 298 (2d ed. 2013).

[2] Ironically, one of the commenters who favors reducing the word limit is also one of the strongest critics of overuse of acronyms. *See Nat'l Ass'n of Reg. Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012) (Silberman, J.).

We respectfully disagree with the suggestion that appellants—upon whom the practical effects of this proposed change would fall disproportionately—can address the proposed word-limit reduction by excising issues on which they are less likely to prevail. Certainly, it is wise to leave weak or superfluous arguments on the cutting-room floor. But selecting between meritorious alternatives is risky, because it is difficult to predict which issues an appellate panel will find persuasive. Members of our practice have repeatedly prevailed on appeal based on arguments that they deemed to be the least likely to succeed and that they would have jettisoned had they been required to file a shorter brief.

To illustrate, members of our group routinely handle appeals from large jury verdicts (often including punitive damages). The potential issues on appeal in these cases include challenges to the sufficiency of the evidence supporting the finding of liability for the underlying causes of action, a challenge to the sufficiency of the evidence supporting the finding of liability for punitive damages, challenges to evidentiary and instructional rulings, and arguments that the compensatory and punitive damages are excessive. When we are drafting the opening brief, there is no way for us to know which of these arguments might carry the day with a panel of three judges (especially because the identity of the panel members is unknown at the time of briefing except in the D.C. Circuit). Indeed, in some cases in which we have briefed each of these categories of issues, we prevailed on the sufficiency of the evidence for the underlying tort, winning the case outright; in others, we prevailed on the sufficiency of the evidence for punitive liability, thereby eliminating the punitive damages; in still others, we prevailed on evidentiary or instructional issues resulting in a new trial on part or all of the case and, in a subset of those, also prevailed on the sufficiency of evidence supporting the finding of punitive liability; and in still others, we lost on all of these antecedent issues, but prevailed on our argument that the damages were excessive. To require litigants to engage in ruthless culling so that they can satisfy a strict word limit therefore could exact a very high price by requiring elimination of a potentially winning argument.

A reduction of the word limit in complex cases would likely disadvantage not only parties but also the courts and the administration of justice. When deciding particular cases, the courts of appeals announce or explain general rules of law that will apply in future cases. It is therefore important that appellate courts have a full understanding of the practical and legal context in which a particular dispute arises. If forced to comply with reduced word limits, practitioners will be inclined to eliminate discussions of important contextual issues—for example, related statutory or regulatory provisions—that may not be directly at issue in the case at bar, but which should nevertheless be considered when resolving the parties' dispute. If the courts are deprived of such discussions, as they likely will be if the word limit is reduced, there is a significant risk that appellate decisions will have unanticipated (and undesirable) consequences.

Finally, the potential availability of a word-limit extension is no substitute for a reasonable default word limit. For at least the last 30 years, the presumption has been that requests for extensions are reserved for unusual cases. It is hard to imagine that presumption changing. Thus, although reducing the limit to 12,500 words is sure to increase the number and

frequency of extension requests—a new burden for Clerk's offices, judges, and their clerks—it is far from certain that such requests would be granted more generously than they currently are. And in cases of great complexity that are today seen as warranting extensions beyond current word limits, the extensions are likely to be materially stingier, even though the cases will be no less complex. Moreover, the predictable increase in extension requests would add uncertainty and inefficiency to the appellate process. Courts do not typically rule on such requests immediately, and appellants facing tight deadlines would likely be forced to begin preparing briefs before knowing how many words will be allowed. And in courts like the Ninth Circuit that allow parties to tender a proposed brief with the motion for an extension of the due date of the brief, the appeal could be delayed if the motion is denied and the party is forced to shorten the brief. Either way, the burden on counsel and the cost to the client would increase.

For these reasons, we think that a reduction of the word limits would create more problems than it would solve. We thus respectfully request that the Committee retain the current word limits for principal briefs, cross-appeal briefs, and reply briefs.

2. Proposed Deadline For Amicus Briefs In Support Of Petitions For Rehearing.

We also urge the Committee to modify its proposed revision to Rule 29, which would establish a specific deadline for an amicus brief in support of a petition for rehearing. With some notable exceptions, it is generally recognized among federal appellate judges that amicus briefs can be enormously helpful by, among other things, providing "expertise not possessed by any party," explaining "the impact a potential holding might have" beyond the parties to the case, or addressing "points deemed too far-reaching" by the parties. *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers) (internal quotation marks omitted). That is all the more true when it comes to the weighty determination whether to grant rehearing en banc.

Under the proposed rule, an amicus brief in support of a petition for rehearing would be due three days after the filing of the petition. If that deadline were adopted, a potential amicus would have only 17 days after entry of judgment to evaluate the panel's opinion, learn whether either party plans to seek rehearing, obtain the necessary internal and external approvals to submit an amicus brief, retain counsel, and prepare the brief. Such a short deadline would make it extremely difficult for most organizations to file amicus briefs at this important stage. We therefore suggest that the proposed rule be modified to require the amicus to file only a notice of intent to file a brief at the three-day deadline but permit an additional seven or ten days for the preparation and filing of the brief. Such a procedure would enable the court to move expeditiously in the majority of cases in which no amicus brief is being filed, while making it feasible for the amicus to prepare an adequate brief in those few cases of particular public importance where such briefs are most likely to be of value. If that proposal is not acceptable, then we suggest that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed.

Sincerely,

Timothy S. Bishop
Craig W. Canetti
Hannah Y.S. Chanoine
Scott A. Chesin
Donald M. Falk
Andrew L. Frey
Kenneth S. Geller
Lauren R. Goldman
Dan Himmelfarb
Erika Z. Jones
Stephen J. Kane
Richard B. Katskee
Michael E. Lackey, Jr.
Philip Allen Lacovara
Demetrios G. Metropoulos
John E. Muench
Miriam R. Nemetz
Brian Netter
Michele L. Odorizzi
Archis A. Parasharami
Eileen Penner
Andrew J. Pincus
Kevin S. Ranlett
Charles A. Rothfeld
Jeffrey W. Sarles
James C. Schroeder
Stephen M. Shapiro
Adam C. Sloane
John Sullivan
Carl J. Summers
Evan M. Tager
Andrew E. Tauber
Joshua Yount