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Via Electronic Submission

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Committee Members:

Thank you for this opportunity to comment on the proposed amendments to the Federal Rules of Appellate Procedure. My litigation practice includes the drafting of a considerable number of amicus curiae briefs in the federal appellate courts. These comments focus on proposed changes to Rules 29 and 32, with a particular focus on the effects of proposed changes on amicus curiae filings.

The Advisory Committee has recommended that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words. Although unmentioned by the Advisory Committee, an effect of the proposed change (per the operation of Rule 29(d)) would be to reduce the word limit on amicus briefs from 7,000 words to 6,250 words. For the reasons stated below, I oppose both word-limit reductions.

Party Briefs. A number of federal judges have submitted comments in support of the proposed change to Rule 32(a)(7)(B). A common theme of those comments is that many briefs are "much too long" and would be more effective if they were more concise. I fully agree with that sentiment, and for that reason, briefs I have submitted on behalf of parties rarely approach the 14,000-word limit. But there will often be occasions on which the complex subject matter of a case requires a 14,000-word brief, and in those instances a word-limit reduction will have one or both of the following results: (1) counsel will be prevented from fully developing important legal arguments; and/or (2) courts will be burdened by a significant increase in the number of motions requesting permission to file briefs in excess of the word limit.

Moreover, I rarely find that an attorney whose lengthy briefs are unpersuasive suddenly becomes more persuasive when he or she submits a shorter brief. Rather, my experience is that all the briefs submitted by some lawyers are poorly drafted and unpersuasive without regard to

length, while the appellate specialists whose work I most admire file lengthy briefs (when necessary) that are just as persuasive as their shorter briefs.

Some supporters of the proposed amendment have bemoaned a perceived increase in the number of pages in a typical brief; they note that briefs now often exceed 60 pages. But while page length has increased since 1998, the principal cause is unrelated to verbosity. Rather, page length has increased due largely to the 1998 amendment to Rule 32, which mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font. The increase in type size rendered briefs far more easily readable, but it also added six or seven pages to the typical brief.

Amicus Curiae Briefs. Rule 29(d) provides that "an amicus curiae brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Accordingly, a word-limit reduction for the brief of a party will have the effect of reducing the maximum words in an amicus brief from 7,000 words to 6,250 words. The Advisory Committee has supplied no explanation for that proposed reduction, which I oppose. While Rule 29(d) permits amicus filers to file a motion for leave to file a brief in excess of the normal word limit, I am unaware of any instance in which a federal appeals court granted such a motion.

I note initially that the Advisory Committee's rationale for limiting a party's brief—that a 12,500-word limit better approximates the pre-1998 50-page limit than does the current 14,000-word limit—is inapplicable to amicus briefs. Before 1998, the page limit on amicus briefs was 30 pages. So if one uses the Advisory Committee's estimate that the average pre-1998 page included 250 words, the Committee's rationale would support a 7,500-word limit (250 words/page x 30 pages) for amicus briefs, not the reduction to 6,250 words that the Committee is proposing.

More importantly, the most plausible argument raised by supporters of a word-limit reduction for a party's brief is inapplicable to amicus briefs. Many federal judges feel obliged to read a party's brief in its entirety, no matter how unpersuasive or poorly written. Some complain, however, that their time is wasted when they are forced to read overly long, unpersuasive briefs; and they thus support a measure that would tend to reduce the average length of party briefs. But I am unaware of federal judges who feel obliged to read all amicus briefs submitted in a case. Indeed, my understanding is that most judges do not read an amicus brief (or read nothing more than the summary of argument) unless the amicus filer has a track record of filing uniformly well-drafted briefs or a law clerk has recommended that the brief be read.

As a result, drafters of amicus briefs already have a large incentive to file concise briefs that include no more words than they deem absolutely necessary. If they hope to have their briefs read by the judge, they need to submit briefs that are no longer than is necessary to make the legal arguments they seek to convey. A 7,000-word amicus brief that is unpersuasive

because it is overly long will not result in a waste of judicial resources because it will not be read.

Accordingly, if the Committee on Rules goes ahead with the proposed amendment to Rule 32, I recommend that Rule 29 be amended to state explicitly that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words.

Amicus Curiae Briefs in Support of Rehearing Petitions. I largely support the proposed Rule 29(b), which would govern amicus filings "during consideration of whether to grant rehearing." I support creation of a nationwide rule governing such filings. Nationwide uniformity in filing rules would be a significant improvement over the current system, under which every circuit has its own set of rules, some of which are not written. Proposed Rule 29(b)(5) states that amicus briefs must be submitted no later than three days after the petition for rehearing is filed. I concur; that period is sufficient to allow the amicus filer to review the petition before filing but at the same time does not unduly interfere with the petition-review process. However, for the same reasons that I endorse continuation of the 7,000-word limit on amicus briefs in support of a party's principal brief, I suggest that proposed Rule 29(b)(4) be amended to increase the word limit on rehearing amicus briefs from 2,000 words to 2,500 words. A 2,500-word limit better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages.

Rule 26(c)'s "Three-Day Rule." The Advisory Committee proposes that the "three-day rule"—under which the time period for responding to a court filing is extended for three days when service of the paper is accomplished by certain methods—be amended so that it is no longer applicable to electronic service. I largely support the change; the three-day rule was designed with service by U.S. Mail in mind and makes little sense in the context of electronic service. However, my experience is that most lawyers, when they file and serve briefs, do so late in the day. Very often, the lawyer receiving electronic service will have gone home for the evening when the service email arrives. Accordingly, I recommend that the proposed amendment to Rule 26(c) be revised to make clear that if electronic service is sent to other counsel after 6 p.m. in that counsel's time zone, a paper served electronically will be deemed to have been delivered on the next business day (Monday through Friday, excluding holidays) following the date of service stated in the proof of service.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel