



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON APPELLATE COURTS

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The Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

The State Bar of California's Committee on Appellate Courts (the "Committee") appreciates the opportunity to submit these comments on the proposed amendments to the Federal Rules of Appellate Procedure.

1. Rule 4(a)(4)

The Committee supports this proposed amendment. As explained in the report of the Advisory Committee on Appellate Rules, the "amendment addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as 'timely' under Rule 4(a)(4) if a court has mistakenly ordered an 'extension' of the deadline for filing the motion." The amendment "would adopt the majority view — i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not 'timely' under Rule 4(a)(4)." Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority.

2. Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and New Form 7

The Committee supports these proposed amendments. The Committee has some concerns, however, as to whether the proposed rule amendments would address potential problems that might arise with inadequate postage, where an inmate relied upon an institution for advising on the proper postage or some other issue arose that prevented the inmate from including proper postage. The Committee suggests that Rules 4(c)(1)(B) and 25(a)(2)(c)(ii) could be further amended, to deal with the issue of inadequate postage.

Rule 4(c)(1)(B), as further amended, would provide:

(B) the court of appeals exercises its discretion to excuse a failure to prepay postage or to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

Rule 25(a)(2)(c)(ii), as further amended, would provide:

(ii) the court of appeals exercises its discretion to excuse a failure to prepay postage or to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

3. Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6

The Committee opposes these proposed amendments to the extent they would reduce current word limitations or apply a conversion rate of 250 words per page to those rules that are currently based on a page limit, not a word limit. We believe the reduced limits will impair, rather than improve, appellate advocacy and judicial efficiency. We recommend the existing word limits remain, and that any conversion from page limits to word limits be based on the current conversion rate of 280 words per page.

We have reviewed the report prepared by the Advisory Committee on Appellate Rules and comments submitted by others on the proposed amendments. Separate and apart from the discussion concerning the original basis of a conversion rate of 280 words per page, and the rationale that has been articulated for the proposed amendments, we do not believe there is any current justification for reducing the limits on the length of briefs. We began our discussion with Rule 32, which currently has a 14,000 word limit for principal briefs. That is the same as the rule in the California Court of Appeal, where an opening or answering brief on the merits may not exceed 14,000 words. In our experience, that word limit works best and should not be reduced, whether based on a particular conversion rate or otherwise. Similar reasoning applies to other briefs and other proposed changes.

The proposed changes will reduce word limits for computer-generated appellate filings by more than 10 percent. While we agree attorneys should craft appellate briefs that are as succinct as possible, we believe reducing the current limits in the manner proposed by the Advisory Committee will impair the ability of practitioners to provide a sufficient development of the facts and issues in complex appeals. The proposed changes may also increase the workload of the circuit courts, either by inviting more motions to file briefs, petitions, and other documents that exceed the new word limits, or by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs because of the reduced word limits. For all of these reasons, we oppose the proposal to reduce the current length limits on computer-generated

appellate filings. The Committee supports the other proposed amendments to these rules and forms.

4. Rule 29

The Committee supports clarifying the procedures for filing amicus curiae briefs at the petition for rehearing stage for those circuits that do not have existing local rules on the subject, but opposes the short word-length limits and due dates proposed. In the experience of our Committee members, the Ninth Circuit's existing local rule, Rule 29-2, serves as a better model and has proven workable.

The Ninth Circuit Rule provides that amicus briefs shall be 4,200 words or less and shall be filed within 10 days after the filing of the petition or response the amicus wishes to support. By comparison, the proposed amendment requires that a brief must be 2,000 words or less and filed within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support. In our view, the proposed word length is insufficient for amici to explain both their interest in the subject matter of the case and their unique view of the issue(s) presented. Further, the proposed due dates are insufficient for amici to review the brief of the party being supported to avoid redundancy.

It is our understanding that the proposed amendments allow the Ninth Circuit to continue to follow its existing local rule, Rule 29-2, and, thus, practitioners in the Ninth Circuit would presumably not be affected by the change. However, we suggest that the proposed amendments should be based on the Ninth Circuit's rule, as it provides a well-tested and preferable model for other circuits.

5. Rule 26(c)

Under this proposal, Rule 26(c) would be amended to remove service by electronic means under Rule 25(c)(1)(D) from the three-day rule, which adds three days to a given period if that period is measured after service and service is accomplished by certain methods. The Committee understands that the proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006. However, as appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c).

Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days. The proposed amendment essentially treats electronic service the same as personal service, but they are not the same. Electronic service only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device. Electronic service is unlike personal service because electronic service can be made any time of day or night regardless of the recipient's whereabouts. Personal service, in contrast, is commonly

effected by delivery to the office of counsel of record, either to counsel or to an employee, which can only be done during business hours – and the doors may be closed at 5:00 p.m. This differs greatly from electronic service, which can be made any time of day or night regardless of the recipient's whereabouts. An "instantaneous" review of all incoming electronic transmittals should not be presumed, and to do so may facilitate gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically). For all of these reasons, the Committee believes some time should be added, even with electronic service.

Thank you for your consideration of our comments.

Disclaimer

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Very truly yours,

/s/

John Derrick
Chair, 2014-2015
The State Bar of California
Committee on Appellate Courts