THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

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February 17, 2015

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 Federal Courts respectfully opposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure. In our view, the proposed reductions are more likely to harm appellate court efficiency and decision-making than they are to help.

We acknowledge that many appellate briefs are longer than they need to be. The problem is that determining an appropriate brief length depends on the case—it requires comparing the brief's length to the complexity of the legal and factual issues involved. While short briefs usually suffice for cases governed by clear legal authority and limited factual records, longer briefs may be necessary when cases turn on novel legal issues or divergent precedents, or when it is necessary to explain a complex factual record.

Judges do not benefit when lawyers present an overgeneralized and incomplete portrayal of legal precedent or of the factual record. Some briefs are short because they substitute generalities for specifically cited record facts, or because they fail to acknowledge that a case may be subject to two lines of authority which must be reconciled. Indeed, responsive briefs are sometimes longer precisely because an opponent's overly summary opening brief contains legal and factual errors, requiring correction, or omits necessary law and facts, requiring augmentation. In such cases, a longer brief may serve judicial accuracy and efficiency alike. Given appellate caseloads and the structure of our adversary system, counsel must bring the facts and governing law to the court's attention with appropriate citations, rather than relying on the court to review the entire factual record or conduct new legal research.

The proposed change to Rule 32 would decrease word limits by roughly 10.7%, reducing main briefs from 14,000 to 12,500 words, and reducing reply briefs from 7,000 to 6,250 words. Most

appellate briefs (including most briefs that are longer than they should be) are already under the 12,500 and 6,250 word limits, and would not be affected by the change. Instead, the reductions are likely to disproportionately affect cases that actually require long briefs—incentivizing counsel to cut back on factual nuance and citations, or to refrain from alerting courts to the complexity of governing precedent. That would result in less accurate judicial decision-making, while doing little to lessen judges' overall burden from overlong briefs.

These problems will not be fixed by relying on motions to file oversized briefs. First, requiring litigants to file, and courts to decide, such motions will create burdens out of proportion to any efficiency savings achieved by the word count reductions. As stated above, most briefs (whether appropriately sized or overlong) will be unaffected by the change; the briefs affected will be, disproportionately, those requiring extended treatment. Second, because appropriate brief size depends on each case's legal issues and factual record, a motions judge who has not immersed himself or herself in the case is unlikely to know whether or not extra words are necessary. Either judges will have to engage in substantial legal research and record review at the motions stage, or they will risk inappropriately refusing extensions to briefs that really deserve them. For similar reasons, we object to the proposed word limit changes to Rule 32, and also to the proposed changes to Rule 28.1 reducing word limits for briefs in cross-appeals.

We also believe that the word limit for petitions for rehearing or rehearing en banc, under Rules 35 and 40, should be set at 4,200 words, not 3,750. Requests for appellate rehearing are supposed to be limited to cases where the legal issues are exceptional, such as when an opinion has created major conflicts with circuit precedent, or when circuit precedent needs reconsideration in light of intervening Supreme Court rulings or a trend in other circuits. Requiring lawyers to explain such factors in 3,750 words will save judges virtually nothing in time or effort; yet the reduction in an already short pleading is likely to severely curtail lawyers' ability to explain why a panel opinion has led to the unusual step of seeking rehearing. Similar reasoning leads us to recommend setting Rule 29(b)(4)'s word limit for amicus briefs relating to petitions for rehearing at 2,240 words rather than 2,000, setting Rule 21's word count limits for papers relating to extraordinary writs at 8,400 words, rather than 7,500, and setting Rule 5(c)'s limit for petitions requesting discretionary appeal at 5,600 words, rather than 5,000 – all of which are based on the current conversion rate of 280 words per page.

We take no position on the other aspects of the proposed changes to the Federal Rules of Appellate Procedure, including the proposed word count limits for motions under Rule 27, and the proposal to require word count limits instead of page limits in submissions prepared on computers. The Committee supports the proposed amendment to Rule 32(f) setting forth a uniform list of items that can be excluded when computing a document's length.

We appreciate your consideration of our comments.

Disclaimer

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membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

Esther L. Klisura
Chair, 2014-2015
The State Bar of California
Committee on Federal Courts