MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2018-006. Type-Volume Limitations for Supreme Court Briefs
Date: November 26, 2018

Attached please find the following materials the Court relied upon when it used a 265 word per page benchmark to set the type-volume limitations for Supreme Court briefs: (1) the May 8, 2014 report of the federal Advisory Committee on Appellate Rules; (2) an excerpt from the background materials for that report; and (3) a full-page excerpt from a recently issued opinion by the New Hampshire Supreme Court.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **May 8, 2014**

I. Introduction

The Advisory Committee on Appellate Rules met on April 28 and 29 in Newark, New Jersey. The Committee approved for publication five sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; and (5) Rule 26(c)'s "three-day rule." The Committee discussed a number of other items and removed seven items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers other matters.

The Committee has scheduled its next meeting for October 20, 2014, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of five sets of proposed amendments as set forth in the following subsections.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks approval to publish proposed amendments that are designed to clarify and improve the inmate-filing rules. The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, are set out in the enclosure to this report.

The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

B. Tolling motions: Rule 4(a)(4)

The Committee seeks approval to publish the proposed amendment to Appellate Rule 4(a)(4) set out in the enclosure to this report. 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.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The Committee proposes to publish for comment an amendment to the Rule that 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). The proposed amendment would work the least change in current law. And, as Judge Diane Wood noted for the court in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The Committee seeks approval to publish for comment amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as set out in the enclosure to this report.

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than type-volume limits invites gamesmanship by attorneys. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

A change from page limits to type-volume limits requires a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. (See attached letter of D.C. Circuit Advisory Committee on Procedures, July 14, 1993.) The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. Although there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs, the proposed amendments approved by the committee shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits could choose, of course, to accept longer briefs.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The proposed amendments would add a new Rule 32(f) setting forth such a list.

D. Amicus filings in connection with rehearing: Rule 29

The Committee seeks approval to publish for comment proposed amendments to Rule 29, as set out in the enclosure to this report. The amendments would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no

federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. In addition, they would incorporate (for the rehearing stage) most of the features of current Rule 29, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

E. Amending the "three-day rule": Rule 26(c)

The Committee seeks approval to publish for comment the proposed amendment to Rule 26(c) that is set out in the enclosure to this report. The amendment would implement a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

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, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change would thus be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

III. Information Items

The Committee is studying proposals to amend the Rules to address appeals by class-action objectors. The Committee has heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. The Committee has benefited from informative research by Marie Leary of the FJC, who has studied class-action-objector appeals in three circuits. The Committee intends to consider the matter further, in consultation with the Civil Rules Committee's Rule 23 Subcommittee.

The Committee is considering whether to clarify the operation of Appellate Rule 41,

concerning issuance of the mandate. Two recent cases – *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise several issues concerning Rule 41. One issue is whether Rule 41 requires (or should require) a court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying the petition for writ of certiorari in a case. Another is whether a court of appeals may extend the time for the mandate to issue through mere inaction or must act by order. A third is whether Rule 41(d) should be amended to clarify whether a stay of the mandate continues through denial of a petition for rehearing by the Supreme Court.

The Committee is also considering whether the disclosure provisions in Appellate Rules 26.1 and 29 elicit all the information that a judge would wish to know in considering recusal or disqualification issues. Exploration of this topic likely would benefit from consultation with the Judicial Conference Committee on Codes of Conduct.

The Committee has received a suggestion to consider the appealability of orders concerning attorney-client privilege. This agenda item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. Recognizing that a project aimed at a global overhaul of interlocutory appeal jurisdiction would be unmanageable, the Committee intends to focus more narrowly on specific categories of appeals where a proponent urges an amendment to the rules.

The Committee removed seven items from its agenda. One of those items related to a proposal that Appellate Rules 3 and 6 be amended in light of the shift to electronic filing; although that proposal may eventually merit consideration as part of a broader package of e-filing-related amendments, the Committee decided to focus for the moment on matters prioritized by the CM/ECF Subcommittee, such as the three-day rule amendment noted in Part II.E of this memo. Two items related to the Appellate Rules' disclosure requirements, but raised particular issues that did not warrant continued study in connection with the Committee's ongoing consideration (noted above) of possible changes to those requirements. A fourth item concerned a suggestion by Justices Ginsburg, Scalia, and Breyer that the Rules Committees consider ways to expedite proceedings under the International Child Abduction Remedies Act. The Committee's consensus is that this issue is best addressed, in the first instance, by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee also removed from its agenda an item concerning audiorecordings of appellate arguments. Although Committee members point out the desirability of prompt online posting of such audiorecordings, this matter appears to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management. The Committee considered, and removed from its agenda, a proposal to peg the due date for amicus briefs to the due date, rather than the filing date, of the brief of the party supported by the amicus. The Committee

reasoned that putative amici have ready access to electronic dockets in cases of interest, and that the proposed change would pose a significant risk of interfering with the parties' briefing schedule, given the default rule that the appellee's deadline runs from the date of service (not the due date) of the appellant's brief. The Committee also rejected a proposal to permit party consent to extend the amicus's filing deadline, out of concern that such a change was not needed and could meet with opposition by judges who wish to avoid delay in case processing. Finally, the Committee removed from its agenda an item relating to a proposal by Judge Jon O. Newman to amend Criminal Rule 52 concerning the standard of appellate review for sentencing errors. The Committee noted that the Criminal Rules Committee has appointed a subcommittee to study this proposal, and felt that the proposal to amend a Criminal Rule is within the jurisdiction of that Committee.

ADVISORY COMMITTEE
ON
APPELLATE RULES

Newark, NJ
April 28-29, 2014

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April 28 and 29, 2014
Newark, NJ

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Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

6. Item No. 12-AP-E (length limits)

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court's switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers' time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules' length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court's rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court's Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk's Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk's Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee's next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the "petition" must not exceed fifteen pages and the "petition must *begin with*" the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)'s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court's rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk's Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

7. Item No. 12-AP-F (class action objector appeals)

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-E

The Committee is considering three major questions concerning length limits set by the Appellate Rules: Whether to express all length limits in type-volume terms (and, if so, what to do about filings prepared without a computer); whether to rationalize the treatment of items excluded when computing length; and whether to shorten the type-volume limit for briefs. Part I of this memo highlights relevant considerations; it notes that if existing page limits (in Rules 5, 21, 27, 35, and 40) are replaced with type-volume limits, the two major options for implementing such a change are:

- The "computer brief" approach: i.e., set a page limit that nets out to the same length as the type-volume limit but make the page limit available only for papers produced without a computer.

- The "safe harbor" approach: i.e., create a "safe harbor" page limit that is shorter than the type-volume limit.

Part I also notes two possible ways to rationalize the treatment of exclusions:

- The "form and substance" approach: i.e., create a separate list of exclusions, globally applicable, to which the other Rules would refer.

- The "substance-only" approach: i.e., the exclusions would be revised so that like items in each document are treated alike for purposes of computing length, but the exclusions would not be relocated to a separate globally-applicable provision.

Finally, Part I discusses whether the 1998 revisions resulted in an increase in the length limit on briefs and whether the current type-volume limits for briefs should be reduced.

The chair asked a subcommittee of Judge Chagares, Justice Eid, and Professor Katyal to work with him and the reporter to narrow the issues and formulate a proposal for consideration by the full committee. The sketch in Part II, which employs the "computer brief" approach to length limits and the "form and substance" approach to

exclusions, illustrates the subcommittee's suggested approach, with an open question about the best ratio to use for converting pages to words.

I. Key issues

Drawing upon the Committee's prior discussions and upon discussions with Committee members during the past year, this Part highlights key policy choices to be made.

A. Should existing page limits be converted into type-volume limits?

The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs; those limits are currently set forth in Rules 32(a)(7) and 28.1(e). But limits denoted in pages remain in Rules 5, 21, 27, 35, and 40.

Neal Katyal has pointed out that some lawyers manipulate length limits that are set in pages by altering fonts and line spacing. Replacing the current page limits with type-volume limits would reduce this opportunity for gamesmanship, because the type-volume limit is harder to manipulate than a page limit. Moreover, technological developments have made it much easier to count words. The Rules of the Supreme Court, for example, now rely exclusively on type-volume limits for all filings printed in booklet format.

Further (and perhaps countervailing) considerations include the following: Multiple rules would require amendment; there currently are more rules of appellate procedure that apply a page limit than there are rules that apply a type-volume limit. Some pro se litigants continue to file non-computer briefs; because some briefs will be handwritten or typed on a typewriter, it is necessary to determine how to handle the length limits for such briefs. When courts order or permit supplemental filings, they often express the length limits for those filings in pages; would a shift to type-volume limits in the rules create a need to set the length limits for supplemental filings in type-volume terms and, if so, would the computation of such limits add an extra layer of complexity? Finally, the type-volume limit will entail the inclusion of an additional item – a certificate of compliance.

B. If amendments are adopted, should those amendments track the approach in current Rules 32(a)(7) and 28.1(e)? If so, should the necessary changes be in the direction of shorter or longer briefs?

The approach reflected in Rule 32(a)(7) suggests the adoption of a particular type-volume limit, cf. Rule 32(a)(7)(B), and the adoption of a safe harbor denominated in pages, cf. Rule 32(a)(7)(A). For the safe harbor to serve its function as a safe harbor (rather than a loophole), there needs to be a difference between the effective length under the type-volume limit and the effective length under the page limit. In the 1998 amendments that put Rule 32(a)(7) in place, the Committee chose to shorten the effective

length under the page limit (to 30 pages for a principal brief) and to select a type-volume limit that purported to approximate the pre-1998 page limit of 50 pages.

If the Committee adopts the type-volume-limit-plus-safe-harbor approach for the length limits in Rules 5, 21, 27, 35, and 40, it will face a choice: Should it choose a safe-harbor limit that is shorter than the present page limit, and a type-volume limit that approximates the current page limit? Or should it set the safe-harbor limit at the current page limit, and choose a type-volume limit that nets out to something longer than the current page limit? Going longer (with the type-volume length) might raise concerns among judges who object to the added length; going shorter (with the safe-harbor page limits) might raise concerns about access to justice for the (largely poor and pro se) filers who would be using the safe-harbor limit rather than the type-volume limit.

C. Should the amendments instead set differently-expressed limits for computer briefs and non-computer briefs?

An alternative approach would retain the current page limits (alongside new type-volume limits), but make those page limits available only to those who prepare their briefs without the use of a computer.[1] Lawyers with access to computers are unlikely to hand-write their briefs or have them typed on a typewriter merely to circumvent type-volume limits.

D. What conversion formula should the Committee employ in transmuting page limits into type-volume limits? Should the length limits for briefs be reduced?

Under either the safe-harbor or the computer-brief approach, it will be necessary to convert pages into an equivalent number of lines and words.

The project that resulted in the 1998 amendments assumed that a brief would typically have 26 lines of text per page; that assumption seems reasonable.[2]

The 1998 project appears to have assumed that a brief would typically have 280 words per page; however, that estimate seems high. At the Committee's spring 2013 meeting, participants questioned the choice – made in the 1998 amendments – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. It was suggested that this choice increased the length of appellate briefs without sound justification.

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[1] Participants have noted that some pro se litigants file handwritten papers with no margins, covered in tiny handwriting. Such filings are problematic. But there appears to be no obvious way to address this problem; and the problem would arise with any system that retains the option of page limits (including the safe-harbor approach described in I.B).

[2] A page of text with 1-inch margins, double-spaced, in Courier New 12, has 24 lines. Given Appellate Rule 32(a)(4)'s instruction that "[t]he text must be double-spaced, but quotations more than two lines long may be indented and single-spaced," an overall guess of 26 lines per page sounds plausible.

Doug Letter noted that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. In 1993, the D.C. Circuit's advisory committee on procedures studied representative briefs that did not include an excessive number of single-spaced footnotes or block quotes. Based on that review, the committee recommended that the court adopt a maximum word rule based on an average of 250 words per page. The D.C. Circuit accepted that recommendation and employed the 12,500 word limit for appellate briefs with no reported negative consequences until the 1998 amendments to the federal rules superseded the local rule.[3]

In summer 2013, without the benefit of the D.C. Circuit advisory committee report, Michael Gans researched the issue further. His findings also suggest that the shift from a 50-page limit to a 14,000-word limit increased the length limit for briefs. He found that, on average, briefs filed under the pre-1998 rules had 259 words per page. That average, moreover, is based on a survey that included pages with more than 26 lines of text per page through the use of block quotes and single-spaced footnotes.[4] If one uses 259 words per page as a benchmark, then the word-limit equivalent, for a 50-page brief, would be 12,950 words. Following the D.C. Circuit's pre-1998 rule, and using the round number of 250 words per page, principal briefs would be limited to 12,500 words and reply briefs would be limited to 6,250 words.

An additional question would then arise: What changes should be made in the length limits for briefs in connection with a cross-appeal? Presumably Rule 28.1(e)(2)(A)'s 14,000-word limit for the appellant's principal brief should be reduced to 12,500 to parallel the treatment of length limits under Rule 32(a)(7). And it seems reasonable to accord the same treatment to the length limit for the appellant's response and reply brief (which likewise is currently set by Rule 28.1(e)(2)(A) at 14,000 words). A similar mathematical exercise (16,500 / 280 * 250) would yield a length limit of 14,732 words for the appellee's principal and response brief; presumably, it would be desirable to round this figure up or down and amend Rule 28.1(e)(2)(B) accordingly. Finally, it does not seem that any adjustment would be necessary for Rule 28.1(e)(2)(C), which sets the limit for the appellee's reply brief at half the length specified by Rule 28.1(e)(2)(A).

E. If the Committee proceeds with length-limit amendments, should it also clarify and rationalize the statements of items excluded when computing length limits?

In applying any length limit, litigants will want to know what to count and what to exclude. Some length limits address this question, while others do not:

Rule	Length limit	Exclusions specified?
5(c)	20 pages (petition for permission to appeal; answer; cross-petition)	Rule 5(c): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by

[3] I enclose Doug Letter's July 14, 1993 letter on behalf of the D.C. Circuit advisory committee.
[4] I enclose Michael Gans' September 3, 2013 letter summarizing his research.

Rule	Length limit	Exclusions specified?
		Rule 5(b)(1)(E)."
21(d)	30 pages (mandamus petition; response)	Rule 21(d): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C)."
27(d)(2)	20 pages (motion; response)	Rule 27(d)(2): "exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)."
27(d)(2)	10 pages (reply)	No.
28(j)	350 words (letter regarding supplemental authorities; response)	Rule 28(j): "[t]he body of the letter."
28.1(e)(1)	30 pages (appellant's principal brief) 35 pages (appellee's principal and response brief) 30 pages (appellant's response and reply brief) 15 pages (appellee's reply brief)	No.
28.1(e)(2)	14,000 words or 1,300 lines (appellant's principal brief; appellant's response & reply brief) 16,500 words or 1,500 lines (appellee's principal and response brief) 7,000 words or 650 lines (appellee's reply brief)	No.
29(d)	"no more than one-half the maximum length authorized by these rules for a party's principal brief" (amicus briefs)	Yes for type-volume limits, via incorporation of Rule 32(a)(7)(B)(iii).
32(a)(7)(A)	30 pages (principal brief) 15 pages (reply brief)	No.
32(a)(7)(B)	14,000 words or 1,300 lines (principal brief) 7,000 words or 650 lines (reply brief	Rule 32(a)(7)(B)(iii): "Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the

Rule	Length limit	Exclusions specified?
		limitation."
35(b)(2)	15 pages (petition for en banc hearing or rehearing)	Rule 35(b)(2): "excluding material not counted under Rule 32."
40(b)	15 pages (petition for panel rehearing)	No.

Assuming the Committee agrees that it is worthwhile to review and rationalize the treatment of exclusions, there are two main questions – what to change, and how to change it.

1. What to change

As to the substantive question – how to ensure that exclusions are treated uniformly across different types of filings – I suggest that the Committee consider the following changes:

- **Treat exclusions the same for Rules 28.1(e)(2) and 32(a)(7)(B)**

Rule 28.1's length limits for briefing in connection with cross-appeals differ in one respect from Rule 32(a)(7)'s length limits for briefing in connection with other appeals. Whereas Rule 32(a)(7)(B)(iii) specifies items that are excluded for purposes of calculating the type-volume limitation, Rule 28.1(e)(2) includes no such provision. The 2005 Committee Note to Rule 28.1(e) does not explain the omission.

The Committee's discussion in spring 2013 supported the view that lawyers, in computing the type-volume limit for briefs in cross-appeals, may simply be assuming that it is permissible to exclude the items that Rule 32(a)(7)(B)(iii) lists as excludable. But if other length-related amendments are to be made, it is worthwhile to consider amending the Rules so that exclusions function similarly for purposes of Rules 28.1(e)(2) and 32(a)(7)(B)(iii).

- **Clarify whether the Rule 35(b)(1) statement counts toward length limits for petitions for hearing or rehearing en banc**

During the Committee's spring 2013 meeting, Greg Garre noted a question that has arisen concerning the operation of the length limit for petitions for hearing or rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)?

The Rule text suggests an affirmative answer: Rule 35(b)(2) states that the "petition … must not exceed 15 pages" and Rule 35(b)(1) states that the "petition must begin with" (not "be preceded by") the statement. And the fact that Rule 35(b)(2)

specifies that "material not counted under Rule 32" should be excluded from the page count might be taken to suggest that *other* items should be *included*. Including the Rule 35(b)(1) statement is also consistent with the notion that the substance of a party's argument should count toward the length limit, while excluded material is non-substantive.

Only two local circuit rules speak to this issue, and they take opposite approaches. The Eleventh Circuit excludes the local circuit equivalent of the Rule 35(b)(1) statement from the 15-page length limit; by contrast, the Federal Circuit *includes* its local circuit equivalent of that statement.[5] Although the Eleventh Circuit's approach might be taken as a departure from the better reading of Appellate Rule 35(b), such a departure is explicitly authorized: Appellate Rule 35(b)(2)'s length limit applies "[e]xcept by the court's permission."

- **Address exclusions for Rules 28.1(e)(1), 32(a)(7)(A), and 40(b)**

If it proceeds with the other length-related amendments discussed above, I suggest that the Committee consider specifying exclusions in Rules 28.1(e)(1) and 32(a)(7)(A) (safe-harbor page limits on briefs)[6] and Rule 40(b) (page limit for petitions for panel rehearing).

2. How to make the change

Assuming that the Committee wishes to make the changes noted above, there are two basic possibilities for doing so. One could list the excluded items in each rule that sets a length limit. Or one could instead create one list of exclusions and add cross-references to that list in each rule that sets a length limit. I show the latter approach in Part II.

II. Illustrating the "computer brief" approach to length limits and the "form and substance" approach to exclusions

This part offers a sketch that adopts the "computer brief" approach to length limits and that adds a new Rule 32(f) setting out a global list of items excluded from length computations. The certificate-of-compliance provision currently in Rule 32(a)(7)(C) would be relocated to a new Rule 32(g) and would apply to filings under all type-volume limits, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments would be made to Form 6.

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[5] *See* Eleventh Circuit IOP accompanying Rule 35; Eleventh Circuit Rule 35-5(c); and Federal Circuit Rule 35(c)(2).

[6] It may be that litigants simply assume that they can exclude when counting pages (under Rule 32(a)(7)(A)) the same items that they can exclude when counting words or lines (under Rule 32(a)(7)(B)). But clarity seems desirable in a provision that is most likely to be employed by pro se litigants.

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding items listed in Rule 32(f) and the accompanying documents required by Rule 5(b)(1)(E):

(1) a handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed

(A) 5,000 words; or

(B) 520 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * *

(d) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Except by the court's permission, and excluding items listed in Rule 32(f) and the accompanying documents required by Rule 21(a)(2)(C):

(1) a handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed

(A) 7,500 words; or

(B) 780 lines of text printed in a monospaced face.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * *

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

(2) **Page Limits**. Except by the court's permission, and excluding ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement~~ items listed in Rule 32(f) and accompanying documents authorized by Rule 27(a)(2)(B)~~, unless the court permits or directs otherwise~~.:

(A) A handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) A motion or response to a motion produced using a computer must comply with Rule 32(g) and not exceed

(i) 5,000 words; or

(ii) 520 lines of text printed in a monospaced face;

(C) A handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) A reply produced using a computer must comply with Rule 32(g) and not exceed

(i) 2,500 words; or

(ii) 260 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28.1. Cross-Appeals

* * *

(e) Length. Excluding items listed in Rule 32(f), the following limits apply:

(1) **Page Limitation**. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation**.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it complies with Rule 32(g) and:

(i) ~~it~~ contains no more than ~~14,000~~ 12,500 words;[7] or

[7] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it complies with Rule 32(g) and:

(i) ~~it~~ contains no more than 14,700 words;[8] or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~**(3) Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 adoption of Rule 32(a)(7)(B) superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the use of the estimate of 280 words per page inadvertently increased the length limits for briefs. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

Rule 28.1(e) is amended to refer to new Rule 32(f) (which sets out a global list of items excluded from length computations) and to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * *

(7) Length. Excluding items listed in Rule 32(f), the following limits apply:

[8] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if it complies with Rule 32(g) and:

- ~~it~~ contains no more than 12,500 words;[9] or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.~~

~~**(C) Certificate of compliance.**~~

~~(i) A brief submitted under Rules 28.1(c)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

~~• the number of words in the brief; or~~

~~• the number of lines of monospaced type in the brief.~~

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(c)(3) and 32(a)(7)(C)(i).~~

* * *

[9] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(f) Items excluded from length. In computing any length limit set by these Rules, headings, footnotes, and quotations count toward the limit but the following items do not count:

- Corporate disclosure statement
- Amicus authorship-and-funding disclosure statement
- Table of contents
- Table of citations
- Statement with respect to oral argument
- Addendum containing statutes, rules, or regulations
- Certificates of counsel
- Signature block
- Proof of service

(g) Certificate of compliance. (1) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B), and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2), must include a certificate by the attorney, or an unrepresented party, that the [brief or paper] [document] complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the [brief or paper] [document]. The certificate must state either:

- the number of words in the [brief or paper] [document]; or
- the number of lines of monospaced type in the [brief or paper] [document].

(2) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(g)(1).

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

* * *

(2) Except by the court's permission, ~~a petition for an en banc hearing or rehearing must not exceed 15 pages;~~ and excluding items listed in Rule 32(f) [and the statement required by Rule 35(b)(1)] ~~material not counted under Rule 32~~:

(A) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(g) and not exceed

(i) 3,750 words; or

(ii) 390 lines of text printed in a monospaced face.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes [the statement required by Rule 35(b)(1) and] any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * *

(b) **Form of Petition; Length**. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise~~ Except by the court's permission, and excluding items listed in Rule 32(f):~~;~~

(1) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages; and

(2) a petition for panel rehearing produced using a computer must comply with Rule 32(g) and not exceed

(A) 3,750 words; or

(B) 390 lines of text printed in a monospaced face.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This ~~brief~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [*insert Rule citation, e.g., 32(a)(7)(B)*] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation if any*]]:

[ ] this ~~brief~~ document contains [*state the number of*] words~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~, *or*

[ ] this ~~brief~~ document uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~ document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[ ] this ~~brief~~ document has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

[ ] this ~~brief~~ document has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

III. Conclusion

The Committee's discussions, thus far, have produced three areas for possible action. Extending the type-volume limits to filings other than briefs will require choices concerning the treatment of documents prepared without the aid of a computer. In addition, the Committee may wish to review and standardize the extent to which the Rules specify items that can be excluded when applying the length limits. And the Committee may wish to reconsider the number of words specified in the type-volume limits for briefs.

Encls.

TAB 3B

U.S. Department of Justice

DNLetter:lcb

Telephone:
(202) 514-3602

Washington, D.C. 20530

JUL 14 1993

Honorable Abner J. Mikva
Chief Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Honorable Ruth Bader Ginsburg
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Dear Chief Judge Mikva and Judge Ginsburg:

When I sent you the final version of the Advisory Committee's recommended local rule changes, I indicated that we would be conducting a survey to determine the proper number of words to allow in briefs under the new proposed Rule 28. (As you recall, the Committee recommended that the length requirement for briefs be shifted from a page maximum to a word maximum.) Jack Goodman of the Advisory Committee, and I have now conducted that survey, although we have had difficulty gathering data from law firms.

For the reasons described below, we recommend that the Court adopt a maximum word rule based on an average of 250 words per page, which would translate to a limit of 12,500 words for a party's main brief, 6,250 for a reply brief, and 8,750 for an intervenor or amicus curiae brief. (For shorter documents, such as petitions for rehearing and motions, the Committee had recommended that the Court retain the current page limits rather than switching to a word count, although these documents could now be prepared in proportional fonts of acceptable size.)

Mr. Goodman and I analyzed data first from the Department of Justice Civil Division archive of appellate briefs. We took ten briefs that were approximately 50 pages in length, and which did not contain what could reasonably be considered an excessive

number of single spaced footnotes or block quotes. We then also obtained from that archive ten reply briefs of approximately 25 pages in length, also avoiding briefs with too many footnotes or block quotes. By computer, we determined the total number of words in these briefs. In doing so, we began counting with the first page of the brief, and excluded the cover, the tables, and any addenda. Thus, we determined the number of words that would be contained in an acceptable 50 or 25 page brief that begins on the first page with a case caption and ends with a signature block. This computer counting included names and numbers in citations.

We found that the briefs of approximately 50 pages had an average total word count of 12,275 words, but some of the briefs were only 49 pages long. The average per page word count for this group was 247. For the reply briefs of approximately 25 pages, the average total word count was 6,244, with an average per page word count of 251.

We then obtained data from eight appellate briefs filed by the Federal Communications Commission and the law firm of Wilmer, Cutler & Pickering. The combined total average words per page from these briefs was 250 (although the briefs from the FCC averaged higher than that amount and the briefs from Wilmer, Cutler averaged lower than that amount).

Based on these data, a brief with a maximum average of 250 words per page appears to be close to what the Court would expect to be the limit for "normal" briefs under the current rules. Consequently, Mr. Goodman and I think that if the Court adopted the word limits proposed above, those limits will on average be close to what the Court would currently find as the maximum allowed (although reply briefs would be longer than currently allowed since the Court has accepted our recommendation that, if a page length limit were used, reply briefs could be 25 pages -- as FRAP allows -- rather than the current 20).

We note that this proposal means that there will be some variations in brief page numbers, and briefs within the maximum word limit will sometimes exceed 50 pages. As described in our earlier recommendation, however, we expect that adoption of this proposed rule will lead to extensive use of proportional fonts, and many briefs will actually be shorter in pages than currently received briefs, but more easily legible.

Mr. Goodman and I will continue to attempt to obtain data from several law firms to make sure that the data we have

developed are not unusual in some unknown way. I have attached to this letter a copy of the gross data that we developed. Please contact me if any further explanation is needed.

Sincerely,

Douglas Letter

Douglas Letter
Chairman
Advisory Committee on Procedures

cc: Ron Garvin
Clerk, U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W., Room 5423
Washington, D.C. 20001-2866

Mark Langer
Chief Staff Counsel
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

OVERALL WORDS PER PAGE: 249 WORDS PER 54 LINES W/DOUBLE SPACE

LIST OF BRIEFS WITH 49 TO 50 PAGES

	WORD COUNT
ANESTHESIOLOGISTS AFFILIATED (49 PAGES)	b11,371/pp232
ARMSTRONG (50 PAGES)	b11,793/pp236
TREASURY V. FLRA (50 PAGES)	b12,070/pp241
PARKER V. RYAN (50 PAGES)	b12,777/pp256
WABASH VALLEY POWER ASSOCIATION, INC. (49 PAGES) .	b12,438/pp254
KHADER MUSA HAMIDE (50 PAGES)	b11,402/pp228
MT. DIABLO HOSPITAL MEDICAL CENTER (50 PAGES) . .	b13,292/pp266
PENTHOUSE INTERNATIONAL, LTD. (49 PAGES)	b13,246/pp270
PETER ROSETTI (50 PAGES)	b12,345/pp247
AMALGAMATED TRANSIT UNION (50 PAGES)	b12,019/pp240
TOTAL AVERAGE WORDS PER BRIEF/PAGE	b12,275/pp247

LIST OF REPLY BRIEFS WITH 24 TO 25 PAGES

CARTERET REPLY (25 PAGES)	r5,977/pp239
DAVIDSON V. SULLIVAN (24 PAGES)	r5,864/pp244
HAITIAN REFUGEE CENTER, INC. (25 PAGES)	r6,787/pp271
JONES V. SULLIVAN (25 PAGES)	r6,141/pp246
MARTINEZ V. LANNOM (25 PAGES).	r6,856/pp274
TASHIMA (25 PAGES)	r6,297/pp252
ANNI WATERFLOW (25 PAGES).	r6,417/pp257
WINSTAR (25 PAGES)	r5,667/pp227
JOHNSON V. HHS (25 PAGES).	r6,382/pp255
FARMER (25 PAGES).	r6,053/pp242
TOTAL AVERAGE WORDS PER 25 REPLY/PAGE	r6,244/pp251

BRIEFS

SOURCE	NO. OF PAGES	NO. OF WORDS	WORDS PER PAGE
FCC	49	11660	237.9591837
FCC	48	13836	288.25
FCC	50	13585	271.7
FCC	47	12408	264
FCC	47	12563	267.2978723
WC&P	14	3037	216.9285714
WC&P	21	4806	228.8571429
WC&P	19	4230	222.6315789
AVGE.	34	7945	230.2953813

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United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
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September 3, 2013

The Honorable Steven M. Colloton
United States Circuit Judge
Des Moines, Iowa

Re: Advisory Committee on Federal Appellate Rules

Dear Judge Colloton:

During this past spring's Advisory Committee meeting, some questions arose concerning the length of briefs and Federal Rule of Appellate Procedure 32(a)(7)(B)(i). You asked me to take a look at the length of briefs under the former version of FRAP 32, FRAP 28(g), which set the length of briefs at 50 pages.

As part of this inquiry, I contacted Mark Langer, the clerk of the D.C. Circuit, regarding his court's adoption of word limits for briefs. Mr. Langer confirmed the information provided in Doug Letter's June 6, 2013 e-mail to Professor Struve, which recounts Mr. Letter's recollections of the DC Circuit Rule Advisory Committee's discussions on the topic. As you will recall, Mr. Letter and some other members of the DC bar conducted informal surveys of their own briefs and determined that 50-page briefs were about 12,500 words in length. Based on this informal survey, the DC Circuit set a 12,500 word limit for principal briefs as an alternative to the 50-page limit. Mr. Langer did not have any backup materials, reports, or statistical analysis to share with the Advisory Committee.

In addition to discussing this with Mr. Langer, I conducted my own study of principal briefs. I retrieved 20 boxes of closed 1995-1998 files from the Federal Archives; these were the last four years in which FRAP 28(g) and its 50-page limit were in effect. These boxes contained 210 attorney-filed briefs. I had my summer intern, Ms. Robyn Parkinson, a first-year student at Westminster College in Fulton, Missouri, perform a full word count for each brief, counting the words in the sections that counted against the page limit under Rule 28(g). (The following sections counted against the page limits: Jurisdictional Statement, Statement

of Issues, Statement of the Case, Statement of Facts, Summary of Argument, Argument, and Conclusion.)

As might be expected, the range of words on a page varied greatly, from as few as 1 to as many as 472. Averaging all of the word counts from all of the briefs, however, yielded an average word count per page of 259 words (and a median of 261 words). Multiplying that average by 50 pages yields a total of 12,950 words. It would appear, therefore, that the informal survey conducted by Mr. Letter and the other members of the DC Circuit Rules Advisory Committee may have slightly underestimated the length of 50-page briefs under the Rule 28(g) by between 3 and 4%.

I also undertook one other study. I used CM/ECF to run a report on the word length of principal briefs filed in the 2008 calendar year. There were 1,175 attorney-filed briefs which reported word length in 2008 (some attorney-filed briefs are filed under the page or line limits and do not report words). Of those 1,175 briefs, 32 (3%) were filed under an order permitting an overlength brief. My count showed 180 briefs (15%) were between 12,500 and 14,000 words, while the remaining 963 briefs were less than 12,500 words in length. In other words, 82% of the principal briefs filed in 2008 under FRAP 32(a)(7)(B)(i) would have been an acceptable length under FRAP Rule 28(g), assuming 50 pages equals 12,500 words. If we use 12,950 words as the equivalent of 50 pages, the number of 2008 briefs which would have been an acceptable length under the old rule rises to 85%, and the number between 12,950 and 14,000 words falls to around 12%.

I hope this information is useful. Please let me know if you wish me to undertake any other studies or analysis.

Sincerely,
Michael E. Gans
Clerk of Court

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "When statutory language is ambiguous, however, we will consider legislative history and examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

> The pretermitted heir statute, RSA 551:10, states: Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

RSA 551:10 (emphases added). The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her