BRIEF CHANGES: FROM TYPE TO TIME IN FEDERAL APPEALS COURTS

by MARC. J. POSTER

It is good practice to reread the court's rules before proceeding in any court. It is imperative for practitioners in federal appellate courts, since the rules change with ever-increasing frequency. Failure to follow the rules may result in unnecessary expenditures of time and money for the practitioner and could jeopardize the client's appeal. The following are some of the recent significant changes in the rules of appellate practice in the 9th U.S. Circuit Court of Appeals and the U.S. Supreme Court:

! The 9th Circuit has dramatically revised – and vastly complicated – its rules regarding the permissible length of briefs.

Length used to be determined simply by the number of pages. Indeed, Federal Rule of Appellate Procedure 28(g) still states that, unless otherwise provided by local rule, appellants' and appellees' principal briefs may not exceed 50 pages, and reply briefs 25 pages. The old 9th Circuit local rule limited principal briefs to 35 pages and reply briefs to 15 pages.

In recognition that most briefs are prepared by computer word processing systems, new 9th Circuit Rule 32 takes a completely novel approach. For appeals docketed Jan. 1, 1996, and after, the permissible length now depends in the first instance upon the typeface used in the brief: either "mono spaced" (all characters have the same width), or "proportionately spaced" (characters have different widths).

For proportionately spaced briefs, the number of pages does not matter. The typeface must be sized 14 points or more. **This is very large type, akin to that used in a children's reader.**

Each page may have no more than 280 words, including quotations and footnotes. A principal brief may not exceed 14,000 words, and a reply brief may not exceed 7,000 words. Fortunately, no one has to do a manual word count; the court will accept the word count generated by the computer word processing program. In addition, only the words in the body of the brief count; tables, corporate disclosure statements and statements of related cases do not. As a consequence of this new approach, a typical principal brief using 14-point proportionately spaced typeface may be 60 pages or more and may look a little odd with its large print, but it will still comply with the rules.

For mono-spaced briefs, the typeface may not exceed 10.5 characters per inch. This is roughly equivalent to the size of Courier 10 type found on most typewriters. Such mono-spaced briefs must either conform to the requirements for proportionately spaced briefs, or a principal brief may not exceed 40 pages and a reply brief may not exceed 20 pages.

All briefs, both proportionately spaced and mono spaced, must contain a "certificate of compliance" that states the brief's line spacing and either that the brief is proportionately spaced – noting its typeface, point size and word count – or that the brief is mono spaced – mentioning the number of characters per inch and its word count or

number of pages. The local rule does not specify if this "certificate" must be signed or who must sign it.

The court may grant permission to file a brief longer than that authorized by the rules. Long briefs, however, are not favored. Since the court has only a limited amount of time to devote to each case, practitioners should make every effort to keep their briefs within the length permitted by the rules.

! The 9th Circuit has adopted somewhat more practitioner-friendly procedures for obtaining extensions of time to file briefs. Under 9th Circuit Rule 31-2.2, there are two usually mutually exclusive methods for obtaining an extension of time: oral and written.

The appellate court clerk now has expanded authority to grant a telephonic request, on a showing of good cause, for a single extension of up to 14 days. The party requesting the extension must give advance notice of the request to the opposing party. Once an oral extension has been granted, absent "extraordinary and compelling" circumstances demonstrated in writing, the court will not grant a further extension of time. However, 14 days is often all the extra time an appellate practitioner needs to complete the brief and all the busy-work involved in assembling excerpts of record. The oral extension process greatly relieves the burden on the court to review and act on numerous written applications for relatively short extensions of time.

For extensions of time of more than 14 days, the new rule still requires a written motion. The motion must be filed at least seven days in advance of the present due date, and must specify when the brief is presently due, when the brief was first due, the length of the requested extension, the reason why an extension is necessary ("the press of other business" is not a sufficient reason), the moving party's representation that he or she has exercised diligence and that the brief will be filed within the requested extension of time and the position of any other party as to the request.

The 9th Circuit is generally understanding of practitioners' reasonable needs for additional time to file briefs. Even if the court does not grant the full extension requested, it usually authorizes some additional time for the brief to be filed.

! The U.S. Supreme Court has been accepting fewer and fewer cases for review. Recent revisions to Supreme Court Rule 10, considerations governing review on certiorari, suggest why.

The rule now states that certiorari will be granted "only for compelling reasons." The court will resolve conflicts between federal courts of appeal, between federal and state appellate courts on federal issues and even between its own decisions, only if the conflicts involve "important" questions. The revised rule also explicitly states what has always been the practice: Certiorari "is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law."

As the Supreme Court has made clear, practitioners should think long and hard about the chances for a grant of certiorari before petitioning that court for review.

! The Supreme Court also recently changed its own internal operating procedures to allow adequate time for those petitioning for certiorari to reply to any opposition to the petition. New Rule 15.5 provides, in essence, that the court clerk will wait 10 days after receipt of opposition to a petition for writ of certiorari before distributing the documents to the court for consideration. This gives the petitioner time, albeit not much

time, to prepare and file a reply and have the reply considered by the court along with the petition and opposition.

Under the old procedure, parties opposing petitions for certiorari sometimes took advantage of the short time frames in the certiorari process. By timing the filing of their opposition just before the regular distribution of matters to the court for consideration, they would leave petitioners with no effective opportunity to reply before the court formed an opinion about the merits of the petition. The opposition could misconstrue the facts or issues without fear of effective contradiction. The new rule will help prevent such abuses.

Moreover, in allowing sufficient time for filing a reply, the Supreme Court recognizes the potential importance and usefulness of the reply brief on an appeal. Parties often are able to focus more effectively on their best issues in a reply. Indeed, many appellate judges, at all levels, read the reply first, since it usually will summarize arguments and zero in on the most important aspects of the case. (Reply briefs are not universally admired, however. The 7th Circuit recently eliminated the right to file a reply brief on a cross-appeal, except with leave of the court.)

If parties believe their cases are sufficiently important to merit the attention of the Supreme Court under the principles stated in Rule 10, they should take full advantage of the opportunity now provided by Rule 15 to file a reply with assurance that the court will consider the reply before ruling on the petition for certiorari.

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Marc J. Poster is a partner at Greines, Martin, Stein & Richland LLP. This article appeared in the 4/03/96 edition of the Daily Journal.