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Briefs are all about the words, not pages

By Lisa Perrochet



Lisa Perrochet is a certified appellate practitioner, and a partner at Horvitz & Levy LLP. She submitted a comment on behalf of the Los Angeles County Bar Appellate Courts Section, but represents no one's views but her own with this commentary. The proposed rule amendments, and a link to the posted comments discussed above, can be found at www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

It's all about the words, not pages. You may have heard that the Judicial Conference Advisory Committee on the federal appellate rules has proposed amendments to swap old-fashioned page limits for modern word count limits. That's great! Page limits entice lawyers to squeeze margins and cram text into all the corners. Readability plummets. Judges get grumpy. From the online comments responding to the proposal, it seems no one disagrees that moving to word counts is a good thing.

But the happy consensus falls apart when it comes to the question of how many words is the "right" number for the default upper limit on appellate briefs. For a long time, 14,000 has been the cap, subject to seeking permission to file longer briefs in particularly complex cases. The Advisory Committee proposes a 12,500-word cap, offering the justification that the existing limit was based on what amounts to a clerical error in converting the old 50-page limit to a roughly equivalent word count.

A few who have commented on the Advisory Committee's site have debunked the idea that there was any error. And everyone seems to agree that, whatever the original method for fixing the cap at 14,000 words, the question at this point should be whether a lesser limit would be roomy enough for most appeals nowadays. The comments contain a chorus from people on both sides of the proposal observing that tighter writing is more effective. Lots of

briefs could, with a bit more effort (and more expense to the client) read better if they were shorter.

Where the rubber meets the road is on the question whether there is a problem with the current 14,000 word cap and, if so, whether a move to 12,500 words will meaningfully address the problem.

The 10th U.S. Circuit Court of Appeals judges say, “Many of the briefs submitted to our court are needlessly lengthy.” It’s not clear whether that means most of the briefs are too long, and whether the offenders are largely within the 12,500-14,000 range. I would have thought there are 10,000-word briefs that could have said as much in 7,500 words. One practitioner’s comment sympathized with judges’ frustration, but not with the rule proposal: “Under the current limit, the courts are burdened with too many aimless, bloated 14,000-word briefs. Under the proposed limit, they will get aimless, bloated 12,500-word briefs instead. The problem is real, but the solution proposed will miss the mark.”

The 10th Circuit judges point out that, “[b]y excising tangential facts, secondary or tertiary arguments, or issues on which a party is unlikely to prevail, attorneys do both the court and their clients a service by focusing the court’s attention on the core facts and dispositive legal issues.” Too true. But once you’ve had a few hundred appeals go to decision, you realize that what’s tertiary to one judge can easily be dispositive to another. Judges, with the luxury of hindsight, know well how they would have wielded the red pen to get to the core of the court’s concerns. But should they expect the same from the brief’s author, who may have little appellate experience, and who wants to offer a thorough explanation for the ways in which the court could legitimately rule for the client?

The D.C. Circuit judges also support the proposed rule change. Their comment says, in full, “The Judges of the U.S. Court of Appeals for the D.C. Circuit support the proposal to amend FRAP 32 to reduce the length limitations for briefs.” For any reader left wondering just where the D.C. Circuit judges are coming from, this comment shows that shorter isn’t always better.

Some appellate practitioners, individually and through groups like the American Academy of Appellate Lawyers and the ABA Council of Appellate Lawyers, have opposed the proposal, writing of the need for lawyers to retain flexibility in advocating for their clients, the increasing complexity of many types of cases, and the burden to litigants and courts of preparing and processing motions for leave to file oversize briefs in such cases.

But it’s not so simple as a bench-versus-bar discussion. Judge Frank Easterbrook, who participated in the rule-making process that led to the 14,000-word limit, opposes the proposal, noting, “Most briefs filed in the Seventh Circuit are shorter; allowing lawyers who think that they need 14,000 words to use them, without filing a motion, is sensible.” On the other hand, one appellate practitioner said, “In the typical case, nothing justifies even approaching, much less reaching or exceeding, 14,000 words. Indeed, I would support reducing the limit to 10,000 words, but 12,500 is a good start.”

With that feedback, what’s the Advisory Committee to do? Do they have reason to believe that judges will reach a smarter, fairer ruling if 2,500 words are cut from 13,999-

word briefs? Is there a better way to guide the brief writers in helping the courts? And how long does it take a judge to read an extra 2,500 words anyway? About three times as long as it took you to read this note.

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