***As published in the August 29, 2014 issue of the* Daily Journal**

Briefing between brevity and boredom

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The federal Advisory Committee on Appellate Rules doesn't seek the limelight. The committee studies the Federal Rules of Appellate Procedure and proposes amendments designed to modernize and streamline appellate practice in the federal circuit courts. Most of the committee's work flies well below the radar. But the committee made waves last week when it announced its latest batch of proposed changes to the rules.

What exactly has set tongues wagging? The committee has proposed (and solicited public comment upon) an amendment to Federal Rule of Appellate Procedure 32(a)(7) that would reduce the word limit in appellate briefs. Specifically, parties' opening and answering briefs would be limited to 12,500 words (the current limit is 14,000 words), and reply briefs would be limited to 6,250 words (the current limit is 7,000 words). The committee has

proposed corresponding reductions to the word limits in cross-appeal briefs, writ petitions, petitions for permission to appeal, and motions.

This proposal may alarm lawyers who believe that the quality of their advocacy is proportional to its quantity. But we take a different view. We believe that, in the long run, reducing word limits will improve the effectiveness of appellate briefs.

The committee's report does not justify the proposed change on the ground that appellate briefs would be more effective if they were shorter. Instead, the committee explains that it intended simply to introduce word limits for certain categories of filings previously governed by page limits. In the course of preparing the conversion, the committee reviewed its creation of word limits for appellate briefs in 1998. That review revealed a mistaken assumption made in 1998-at that time, the committee assumed that briefs contained roughly 280 words per page, though in fact the number was closer to 250 words per page. Today's committee seized on that "mistake" to justify a recalculation of the word limits in appellate briefs, and on that basis has proposed a limit of 12,500 words for principal briefs.

It's refreshing when government agencies admit mistakes. And the committee's historical account is certainly interesting. But as a justification for reducing word limits today, the committee's rationale falls a bit flat. The committee missed a ready-made opportunity to stress the importance of brevity as a tool of persuasion. The committee should simply have reminded the bar that shorter briefs are better briefs.

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Whatever the proper justification may be, the committee's proposal is likely to be enacted in the future, and the new rule carries two important consequences for attorneys handling federal appeals.

First, writing a shorter brief requires an attorney to be particularly vigilant in selecting the issues and arguments to pursue on appeal. Briefing weak or tangential arguments has always been poor strategy on appeal-but reduced word limits may make it all but impossible to do so.

Second, writing shorter briefs requires rigorous editing. Unfortunately, it seems that something in the nature of legal training leads many attorneys to "overwrite," or to complicate what they have to say. Drafting briefs on computers can exacerbate these tendencies by enabling lawyers easily to copy and paste from other documents and produce briefs of prodigious length.

There was a time when the California rules imposed no page limits on briefs produced by a commercial printer. (Typewritten briefs had a page restriction, but the sky was the limit for commercially printed briefs.) Some lawyers filed briefs of staggering proportions. Back then, a commercially printed brief received by one of the authors of this article ran to 250 pages, including more than 400 footnotes. Except in the rarest of cases, briefs of that length are

indefensible. They impede, rather than promote, an appellate court's review of the lower court's decision. It is no surprise that appellate courts are imposing ever stricter briefing limits in this era of burgeoning caseloads.

The federal courts first adopted page limits, then word limits, and now are proposing shorter word limits. The message from the bench is clear - say it once, say it briefly, then stop saying it. The only way to comply with that mandate is to subject a brief to repeated editing and cutting, first by the author, and then ideally by another attorney supplying a fresh perspective.

The committee's proposal should be taken as a nudge toward clarity, brevity and simplicity. In my opinion, attorneys should welcome the discipline required to respond to these word limitations. Editing a brief to meet a word limit, however painful, always produces a more persuasive brief. A word limit requires that you advance only the most important arguments, and that you simplify and clarify so as write as concisely as possible. That's why one of the "golden rules" of appellate brief writing is "EDIT, EDIT, EDIT." See, Myron H. Bright, "Appellate Briefwriting: Some "Golden Rules," 17 Creighton L. Rev. 1069, 1074 (1984).

Chief Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals aptly illustrated this rule in his tongue-in-cheek advice to lawyers about improving their chances of *losing* an appeal:

"First, you want to tell the judges right up front that you have a rotten case. The best way to do this is to write a fat brief. So if the rules give you 50 pages, ask for 75, 90, 125 - the more the better. Even if you don't get the extra pages, you will let the judges know you don't have an argument capable of being presented in a simple, direct, persuasive fashion. Keep in mind that simple arguments are winning arguments; convoluted arguments are sleeping pills on paper."

Alex Kozinski, "The Wrong Stuff," 1992 BYU L. Rev. 325, 326 (1992); see also Harry Pregerson & Suzanne D. Painter-Thorne, "The Seven Virtues of Appellate Brief Writing: An Update From the Bench," 38 Sw. U.L. Rev. 221, 227 (2008) ("[B]e concise. The argument should be short, uncomplicated, logical, and written in clear language that is easy to read. A brief loses its effectiveness the longer it gets.").

The proposal to shorten federal appellate briefs may appear to make it harder communicate your message on appeal. But the truth is that this change should help improve the quality of advocacy on appeal.

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