THE COUNCIL OF APPELLATE LAWYERS
AMERICAN BAR ASSOCIATION
JUDICIAL DIVISION
APPELLATE JUDGES CONFERENCE

Comments on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules February 13, 2015

Statement of Interest

The Council of Appellate Lawyers ("The Council") is part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide Bench-Bar organization devoted to appellate practice. We appreciate the opportunity to comment on the most recent proposed amendments to the Federal Rules of Appellate Procedure. The views express here are solely those of The Council and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

Our comments are focused on the proposed length limits in Appellate Rule 32 and the related proposed changes to Appellate Rules 5, 21, 27, 28.1, 35, and 40. We have no objection to the amendments proposed to other rules.

Comments on Length Limits

The Council respectfully opposes the proposed amendments to Rule 32 that would reduce a principal brief from 14,000 words to 12,500 and a reply brief from 7,000 to 6,250 words. The proposed change is not supported by any currently stated need. The Advisory Committee has not identified any problems with the present length of appellate briefs. Indeed, many state appellate courts permit the same or longer briefs, either with express type-volume limits that track the federal rules,[1] generous word or

[1] *See, e.g.,* California Court of Appeal, Cal. Rules of Court Rule 8.204(c) (14,000 words for computer-produced brief, 50 pages for typewritten brief); New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 600.10(d)(1) (First Department) (70 pages or 14,000 words for principal brief and 35 pages or 7,000 words for reply brief); 670.10.3(a)(3) (Second Department) (14,000 words for principal brief, 7,000 words for reply brief); Pa. R.A.P. Rule 2135 (14,000 words for principal brief and 7,000 words for reply brief).

page limits,[2] or even briefs with no restriction by page or word count.[3] Federal circuit courts, and the counsel who regularly handle federal appeals, have fifteen years of experience with the current federal type-volume rule. We are unaware of any problems in the length of appellate briefs being submitted today in federal circuit courts (or state courts applying those same standards).

While everyone can appreciate better focused and less repetitive briefs, the word count rule is not an effective enforcement mechanism to achieve those ends.[4] An inexperienced or unskilled brief writer will commit the same mistakes in 12,500 words as in 14,000. As one prominent appellate lawyer commented, "we'll just see slightly shorter bad briefs."[5] At the same time:

> [L]awyers and litigants in cases that really do warrant more extensive briefing will be frustrated, having spent extra time and money to explain why they need permission to file oversize. The benefit's not worth the burden on this one.[6]

Ironically, the proposed rule change will penalize knowledgeable lawyers who need adequate space to brief appeals that present complex facts or issues as well as appeals following lengthy trials and appeals involving multiple parties. (See submission of American Academy of Appellate Lawyers, dated November 11, 2014 at 2-6.)

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2 *See, e.g.,* California Supreme Court, Cal. Rules of Court Rule 8.520(c) (14,000 words for computer-produced principal brief and 8,400 words for reply brief, 50 pages for typewritten principal brief and 30 pages for reply brief; 2,800 words for supplemental brief presenting new matter if computer-produced and 10 pages if typewritten); New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 800.8(a) (Third Department) (70 pages for appellant's brief, 35 pages for respondent's brief, and 25 pages for reply); 100.4(f)(3) (Fourth Department) (70 pages for principal brief and 35 pages for reply brief); Tex. R. App. P. 9.4(i)(2)(B)-(C) (15,000 words for principal brief and 7,500 words for reply brief if computer-generated, 50 pages and 25 pages if not). *See, e.g.,* New York State Supreme Court Appellate Division, 22 N.Y.C.R.R. §§ 800.8(a) (Third Department) (70 pages for appellant's brief; 35 pages for respondent's brief and 25 pages for reply); 100.4(f)(3) (Fourth Department) (70 pages for principal brief and 35 pages for reply).

3 *See., e.g.,* New York Court of Appeals, 22 N.Y.C.R.R. § 500.1 (providing for 14-point type but no limit on brief length).

4 Some repetition is bound to occur in federal appellate briefs due to the requirements of statement of issues, case summary, summary of argument, and argument, and the frequent practice of including a request for argument as well as an "introduction" that previews or distills the argument.

5 Lisa Perrochet, Horvitz & Levy, Encino, California (comments on ABA Appellate Forum Linked-in page). Ms. Perrochet, as Chair of the Rules and Law Subcommittee of the Los Angeles County Bar Association's Appellate Courts Section, submitted a comment to this Committee on January 26, 2015, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0018.

6 L. Perrochet, ABA Appellate Forum Linked-in page.

The justifications offered in support of the rule change are not persuasive. The history underlying the adoption of the type-volume standard in Rule 32 in 1998 shows that the 14,000 word count limit was accurately derived from word-processed and professionally printed documents that carry 280 (or more) words per page—in contrast to monospaced, typewritten briefs that carry 250 words per page. Moreover, any proposed changes to Rule 32 should be based on current considerations rather than on some concept of a historical "correction." No such present need has been demonstrated.

A. The History of the 1998 Amendments to Rule 32 Shows That the 14,000 Word Count Limit Was Adopted Based on an Accurate Understanding of the Number of Words Per Page on A Word-processed or Professionally-printed Brief Using Proportionally Spaced Fonts.

The record shows that Rule 32's 14,000 word count limit was based on modern word-processing and printing capabilities that produce at least 280 words per page using proportionally spaced fonts. The relevant history is laid out in a memo entitled a "short history of the 1998 amendment to Rule 32" prepared by the Advisory Committee.[7] Among the key steps mentioned in that memo, the Advisory Committee received presentations from Microsoft and printing experts in 1994 that detailed the variability in word count per page, specifically noting that a typewritten 50-page brief with a monospaced font would have 12,500 words, whereas a 50-page brief produced on a computer, with a proportionally spaced font, "can greatly exceed 14,000 words."[8] In 1995, the Advisory Committee received information that a professionally printed 50-page brief, as filed in the Supreme Court of the United States, contained on average 280 words per page.[9] Judge Easterbrook, who served as liaison to the Appellate Rules Committee, has confirmed that Rule 32's type-volume limitation was an informed, reasoned decision that considered 280-words-per-page to be the proper standard in keeping with professionally printed briefs in the Supreme Court.[10]

The Advisory Committee's "short history" shows that the 12,500 word count yield for a 50-page brief was specifically tied to monospaced typewritten documents that were already outmoded in 1998. There thus was no "conversion error" in assigning 280 words per page for briefs with proportionally-spaced, word-processed text, or briefs printed professionally. The current proposal to reduce the word count limit from 14,000 to

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7 Catherine T. Struve, Memorandum, "a short history of the 1998 Amendment to Rule 32" (October 3. 2014), reproduced in the agenda materials for the Advisory Committee's October 20, 2014 meeting at 73-79 (Item No. 12-AP-E (length limits)).

8 *Id.* at 2.

9 *Id.* at 3.

10 Hon. Frank H. Easterbrook, Comment posted September 11, 2014, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0006.

12,500 words is on the wrong side of history and technology by three decades or more—the amount of time since briefs were routinely prepared on typewriters.[11]

B. Modern Appellate Practice Requires a Word Count Limit That Fits the Times.

No matter what historical surveys might show, they do not speak to current needs. Identifying a purported mathematical error that occurred fifteen years ago does not provide a sound basis to change current policy and practice. Indeed, given the passage of time and absence of problems in the intervening decade and a half, reliance interests would seem to predominate over more formalistic interests in correcting the supposed historical conversion error. A retrospective, academic correction cannot account for current briefing needs. Oral argument is becoming rarer and shorter in federal appellate courts, and the briefs are now often the only opportunity for lawyers to advocate on behalf of their clients. At the same time, as litigation grows more complex, many appeals also are becoming increasingly complicated, involving complex facts, extensive records, multiple parties with attendant multiplication of issues and sometimes multiple briefs, participation of *amici curiae* raising additional points that must be addressed, and difficult legal issues, including matters of first impression requiring surveys of the law and public policy considerations. Appeals from trials often strain word count limits given the lengthy record and the tendency of the losing side to raise a host of issues in the conduct of the trial. Requiring advocates to seek additional briefing space to deal with these complications—space that may not always be forthcoming from court personnel, individual judges or motions panels unfamiliar with the merits of the case—would add a needless layer of motion practice to many appeals with attendant time, expense, and uncertainty. Instead of a clear 14,000 word count rule that has been demonstrated to be workable in the vast majority of cases over the past fifteen years, the proposed amendment seeks to impose a materially reduced word

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[11] The Minutes of the Spring 2014 Meeting of the Advisory Committee on Appellate Rules (April 28 and 29, 2014) state that:

> While deliberating over the formulae to use when converting existing pages limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments – namely that one page was equivalent to 280 words – appears to have been mistaken. Based on earlier research by Mr. [Doug] Letter on behalf of the D.C. Circuit's rules committee, a better estimate appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

Catherine T. Struve, Reporter, Item No. 12-AP-E (length limits) Spring Meeting Minutes April 28 and 29, 2014) at 5-6; *id.* at 7 ("Mr. Letter noted that his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake"). This brief discussion, which is the Advisory Committee's only 2014 analysis of the 1998 word count limit, does not square with the "short history" noted above. The Advisory Committee adopted the 14,000 word count limit in 1998 based on the documented difference between monospaced and proportionally spaced fonts and the different yields between typewritten briefs (12,500) and word-processed or professionally printed briefs (14,000). There was no mistake.

count without study or discernment of the expected negative consequences, or weighing those against the proposed benefits of reducing the word count.

The current 14,000 word count limit in Rule 32 fits the needs of experienced appellate practitioners and should be maintained. The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count. (We have collected comments in an attachment.)

To the extent that circuit judges are finding briefs lengthened by lack of focus or unnecessary repetition, courts might find it desirable to encourage additional training for appellate lawyers or the creation of briefing materials for the benefit of counsel stating specifically the preferred way to advocate before them. The Advisory Committee might also consider eliminating the requirement of a summary of argument or otherwise altering the structure of briefs to try to improve their quality and lessen the occurrence of repetition. Another step that would aid readability of appellate briefs would be to adopt modern typography principles as set forth in Matthew Butterick's *Typography for Lawyers* (2010). Briefs would be easier to read—and shorter—if the font size and leading (the space between lines) were reduced. Briefs would also be more reader-friendly if margins were increased. The Council suggests that these and other educational and formatting issues be explored.

Conclusion

In sum, the Council of Appellate Lawyers respectfully requests the Advisory Committee on Appellate Rules to reconsider its position on the length of federal appellate briefs and other documents and to retain the current word count limits under Rule 32 providing for 14,000 word principal briefs and 7,000 word reply briefs.

The Council of Appellate Lawyers

Bradley S. Pauley
Chair

Deena Jo Schneider
David H. Tennant
Co-chairs, Rules Committee

The Council of Appellate Lawyers

A. Comments opposing word count reduction

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1. I think this is a six page reduction. I find it difficult to believe that the reduction, if enacted, will reduce the burden on the judges. The good lawyers write well in 12,500 words, and the others cannot say anything in 14,000. Having said that, sometimes the statement of facts requires more words even from good lawyers. I suspect that the reduction in word count will be met by an increase in motions for over length brief. Whom does that help?

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2. Although I generally write briefs much shorter than 14,000/7,000 words – as brevity is not just the soul of wit but really appreciated by courts – the problem with lowering the word counts coupled with all the formalistic requirements imposed on the appellant is that there are often cases where you just don't have enough space to articulate arguments. In bankruptcy, which is my area of practice, courts are often less than knowledgeable and the advocate often needs to educate his or her audience. I oppose the reduction.

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3. Having clerked at both the district court and federal court of appeals, I understand the bench's desire for brevity and the frustration many judges experience when they often encounter verbose motions and briefs. As an appellate litigator, I also appreciate that a reduction in word count of both principal and reply briefs might encourage more succinct and effective writing by attorneys. That said, I find myself in the same camp as those appellate litigators who seek to retain the flexibility to go to 14,000 words if necessary (and certainly some complex issues require it) without seeking the court's permission to file an oversized brief. The additional motion practice adds unnecessary time and expense to the briefing process.

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4. I oppose lowering the word limit because—in the high-dollar, multi-party, multi-issue commercial appeals that I work on—it is hard enough to adhere to the 14,000-word limit. Further reducing the word limit would seriously compromise the advocate's ability to properly present essential appellate issues. I understand the need to write succinctly and effectively, but complex appeals warrant full treatment, just as simpler ones do.

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5. Reducing word counts in briefs is a lousy idea. Just another example of the bad chasing out the good. There is no substantive explanation in the Committee's explanation of the reduction, other than the attempt to correlate the pre-1998 50-page limit to a word count limitation based on a calculation of how many words typically fit on a page under that old regime. Not a word about the experiences with the 14,000 word limit and why it is bad, just more anti-lawyer commentary that the old page regime "invite[d] gamesmanship by

lawyers." So because of the bad ones, do we want to limit brief length in cases in which a lawyer believes the length justified? Apparently so.

What have been the average word counts under the 14,000 word limit? How do greater or smaller word counts break down between the types of appeals, areas of law, nature of practitioner? Are there regional differences, i.e. are brief writers on the Coasts, more or less verbose than those in the middle of the country? I guess the Committee did not see the need to trouble itself with any empirical evidence.

And what problems do the extra 1,500 word create for the Judges and their Clerks? Not a word about that either. Any appellate practitioner is well aware of the axiom that in brief writing less is better. Here's what the Seventh Circuit's Practitioner's Briefing Handbook says:

> The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded. Except in unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious. http://www.ca7.uscourts.gov/rules/handbook.pdf, at p. 122.

But there is another side to this problem. Some cases justify length. Take a look at Moglin, Raising Issues on Appeal: Fewer Is Not Always Better (November 3, 2014) at http://www.americanbar.org/groups/litigation/committees/appellate/news-analysis/articles-2014/open/fall2014-1114-raising-issues-appeal-fewer-is-not-always-better.html, including the following point: As Judge E. Barrett Prettyman wrote more than 60 years ago, "although there may be one or two outstanding contentions, which to counsel seem conclusive, there may be several other sound contentions of comparatively lesser moment. It is good practice to put them in the brief."
"Some Observations Concerning Appellate Advocacy," 39 Va. L. Rev. 285, 294 (1953).

This means you need to have the room, the extra words. Adding additional motion practice to seek an expanded word count is no solution; it's just more hazing of lawyers.

Let's take a deep breath and expect that the vast majority of lawyers will do their best to make briefs concise and readable, and not let the few who can't or won't create additional artificial barriers to justice.

By the way, the "brevity is the soul of wit" allusion is misplaced. Polonius was a windbag, "a tedious old fool" who was wrong about everything.

Should briefs be witty and brief, or, lawyerly and assembled with care?

Thanks for the opportunity to vent a little, anonymously, as you promised.

6. I agree that, generally, "brevity is the soul of wit." As an appellate lawyer handling often complex cases before the U.S. Courts of Appeals, however, I am against the Rules Committee's proposed change limiting the ordinary maximum word limits in federal appellate briefs. While, in many cases, I use less than 14,000 words, sometimes – especially in complex commercial cases in which the facts alone take up a large part of the brief – the full word limit is simply necessary.

   I agree with those LinkedIn commenters who state they "want to retain the flexibility to go to 14,000 words without needing to seek permission to file an oversized brief." In many circuits, including the two I practice in the most (the 8th and the 10th), obtaining permission to file an overlength brief is (rightly) nearly impossible. To require going through that to reach merely 14,000 words would be overly burdensome and unfair. The present Rule 32 word limit is short enough.

   Thank you for the opportunity to voice my concerns.

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7. Most of my appellate practice is in state court where the word-length limits are shorter, so I feel I am able to get the job done in fewer than 14,000 words. In my briefs in federal court, I don't recall ever going to the length limit, and the briefs that I have read that approach the limit generally seem bloated to me. Granted, there are appeals that need the length, but my garden-variety appellate work rarely if ever includes those. So I do not see the word length reduction as an impediment -- and it may make for crisper, tighter briefs.

   That said, I would prefer that the length limit remain unchanged. I say this because it's comforting to know that I have the space should I need it for a brief. My experience has been that requests for length extensions are not welcomed by federal appellate courts (nor by my state courts). If the length limit is reduced, I would hope the federal appellate courts would take a more liberal approach to considering length extension requests thereafter.

   Thanks for asking.

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8. This one is easy for me – I want the 14,000 words. No reason to use it if I don't need to, but sometimes in a complex case those extra words are important. I want to retain the flexibility.

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9. I would oppose this change. While brevity may be a virtue, the change does not recognize the difference between a simple single issue appeal and some of the complex multi-issue appeals confronted regularly in Federal Courts of Appeal. Experienced appellate attorneys know not to use the full word limit in the former, but need the

flexibility to use it all in the later complex cases. Counsel should not be placed in the position of asking for permission to file an oversized brief, which can make the lawyer look bad and can often be denied even in deserving cases.

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10. I also concur in the opposition to the rule change. A few notes:

I don't know whether you wish to point this out, but I think the 250/280-word discrepancy may have its roots in the lack of consensus over what it means to be double-spaced. (Pardon the following explanation, but my father and grandfather were printers, and I learned to typeset from a job case in junior high and using an AM Varityper in college.) Double spacing usually means twice the leading of single spacing (leading is the distance between the baselines of successive lines of type, and is derived from the strips of lead once used). In one traditional convention, the ratio of leading to font size is 1:1; in other words, if the type size is 14 point, the leading is 14 point. If you follow that convention, double spacing gives you leading (or line spacing) of 28 points for 14-point fonts. Microsoft Word follows a different convention: As I recall, the ratio for Single is 1.15:1, and I assume (without checking) that the leading in Word for Double follows that ratio, consuming 15% more space. Over time, I have used both a 28-point setting and the Double setting; I generally prefer 28 points because Double gets very little on a page.

I tested my most recent Ninth Circuit brief, the body of which had 11,816 words. With the setting at Double, the text (with footnotes) took up exactly 47 pages; with the setting at 28 points, it took up approximately 42.5 pages. When I did the math, the average was 251 for Double, and 278 for 28 points. In fact, if you multiply 250 by 1.15, you get 287. I don't think 280 was an accident; I believe the testers were doubling 14 points to get the line spacing.

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11. There are mixed views on the proposed rule amendment within our appellate firm. The most vocal advocate for defending the proposal to decrease the word limit is probably [X], who believes that parties can and should be more efficient in their briefing.

But there are those in our firm who strongly oppose it the proposed rule amendment and thus would be in favor of CAL's position. The strongest voice in that regard is [Y]. She strongly opposed and submitted her views to the rule drafters here in Texas when the Texas Supreme Court was promulgating the rule to take us from page limits to word limits and proposed word limits along the lines in the current version of the FRAPs. She and others convinced the court that 14,000 words for a principal brief was too stingy; the current Texas rule on word limits permit 15,000 words for principal briefs.

From the Fifth Circuit perspective, that court has a crushing its criminal docket. But I feel pretty confident in saying that only a small fraction of the criminal cases would be impacted by a change in the word count. Thus, the proposed amendment is largely unnecessary when it comes to the criminal and habeas docket. The same could likely be said for the employment and immigration cases.

But many of the civil cases that come to the Fifth Circuit are complex—civil diversity cases, antitrust, environmental, bankruptcy, constitutional litigation. For those cases, my experience has been that we frequently need more than the proposed 12,500 word limit will permit. We sometimes need more than the 14,000 word limit, but we are forced to spend an inordinate amount of the client's money cutting our briefs down to size. And our circuit pretty routinely denies motions to exceed the word limits and did so recently in a complex antitrust case. Worse yet, we are sometimes forced to cut issues that had already been thoroughly vetted and had survived the issue-triage process, or we have to cut the briefing down so severely on some issues that the end product is a decrease in comprehensibility.

On balance, I think the proposed change is unnecessary to curb unedited and ineffective prose that goes on too long, and the proposed change is potentially harmful in complex cases that require more generous briefing limits.

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12. Many thanks to the drafters, and well done! I concur in the proposed opposition.

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13. One other thought on the comment--one area where 14,000 words even is not enough is bankruptcy appeals. There was some appeal that I helped out with in the third circuit in a bankruptcy case where you had several different creditor groups arguing differing issues and if I recall correctly we got one brief to respond to a lot of that stuff (the court may have had some separate appeals on other issues arising out of the confirmation but a lot was crammed into one round of briefing). There may be some other examples you could come up with to say something like the rule change is forgetting about these special cases -- and while you don't need 14000 in every appeal there are some that you almost certainly do (maybe patent cases are another example where there are always a lot of issues/highly technical that you need to explain). I am sure you don't need 14000 words in the routine immigration appeal (or criminal case), but those are not the only cases in the federal appellate courts.

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14. I also concur.

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15. I concur in the opposition to the proposed amendment.

B. Comments supporting word count reduction

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1. Not only do I favor the proposed amendments, I don't think they go far enough. For a principal brief, a 10,000-word limit is plenty, as is a 5,000-word limit for a reply brief. If there's a single complaint shared by appellate judges at all levels of the judiciary and at all levels of experience, it's that far too many briefs are much, much too long. Not only are such briefs generally not helpful, they're an imposition on the court and on opposing counsel. If I must be one of the few who stand athwart history, yelling "Stop," I take comfort in the fact that, with Roger Townsend, I'm in good company. I do not agree with the proposed comment that David submitted. To me, the issue is not whether someone was right or wrong in estimating how many words fit on a page. Who cares? The problem that ought to be addressed is the proliferation of verbose, repetitive briefs that are cursed by both the judges and law clerks, who must read them, and opposing counsel who must slog through them in an effort to distill and streamline an effective response. The job of a good appellate advocate is to make the complex easy to understand, to say in 20 words what it took a less-talented advocate 100 to say. Judges don't see advocates as treatise-writers. They want to know what this particular case is about and what they need to know to resolve the issue or two (not twenty) that one side says amounts to reversible error. Boredom, and irritability, set in well before page 40. To hide behind the excuse that cases are more complicated these days does not address why more effective advocates seem able to work within the rules while at the same time producing superior products. Should there arise a truly unusual case that might require even the bests writer to exceed the word limit, a court will be far less likely to summarily deny the request if the writer has the reputation with the court for writing concise, effective briefs in general.

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2. Responding to the solicitation for comments re the proposed reduction in page limits for principal briefs and reply briefs, I have been an appellate lawyer or appellate judge for about ¾ of my 50 year legal career. I share that to give context for my opinions. I found as a judge the appellate briefs seemed to be as long as the rules permitted (in some cases, without regard to complexity of the subject matter or procedural problems. My court (from which I have been retired 11 years next month) endured for its first 20 years without page limitations but by the early 1980s it enacted a 35 page brief limit for principal briefs, which continues today though it translates to 8750 words now. That 8750 word limit is fine for all but the occasional extraordinarily complex, fact intensive which demands more discussion. The most complex cases can merit an expanded page/word limitation on motion addressed to the discretion of the Chief Judge. That discretion is not lightly exercised but it is the safety vale that assures that the Court gets all the briefing that it needs.

   In my judicial experience, most briefs, even now, are written right up to the page/word limitation in the applicable appellate Rules. If the rules limit briefs to X number of words, the majority of the briefs will be filled at X pages or x minus 1 page or x number of words or x number minus 50 words.

A collateral benefit to page/word limitations is that the limit requires diligent editing in preparation which produces a better and more readable brief.

##END##