M E M O R A N D U M

TO: Advisory Committee on Federal Appellate Rules

FROM: Howard J. Bashman

RE: Proposed Word Limit Reduction for Federal Appellate Briefs

DATE: February 17, 2015

The observation "if it ain't broke, don't fix it" properly appears to inform this Committee's approach to amending the Federal Rules of Appellate Procedure. As the Committee's draft minutes from its April 2014 meeting reflect, "Mr. Letter suggested [that] traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so."

I am submitting this public comment because in my view "a very good reason" does not exist for reducing the FRAP principal brief word count limit from 14,000 words to 12,500 words, nor should any of the corresponding briefing word limits be reduced by that ratio.

As members of the Committee are aware, in addition to my own appellate practice, I devote a substantial amount of my time to drawing public attention to the very best examples of appellate advocacy. In my own writings, both on my widely read appellate blog and in my monthly columns published in *The Legal Intelligencer*, I have repeatedly urged attorneys who brief and argue appeals to strive for concision and to pursue the fewest and strongest issues possible.

As reflected in my own work as an appellate attorney, I am fervently of the view that shorter appellate briefs are ordinarily far more effective than longer briefs and that focusing on stronger issues to the exclusion of weaker ones ordinarily will achieve greater success for the client when I am representing the party taking the appeal. Moreover, when I represent the

appellee, I have not hesitated to observe that an appellant has raised far too many issues, thereby calling into question the strength of each and every of the appellant's claims of error.

To be sure, any page limit or word limit is arbitrary in some respect. Moreover, no size limit is proper for every case. But a size limit is not a size requirement. One need not write a brief that approaches the existing word limit to demonstrate the seriousness of an appeal. Indeed, the opposite may be true. When an appellant raises too many issues or drudges on too long about a claim of error, an appeal may become easier to decide. After all, useless parts of an appellate brief need be read at most only once. And what appellate court has failed to write in an opinion, "We have reviewed all of the appellant's remaining claims of error and find them to be without merit"?

Regrettably, the Advisory Committee's explanation offered for the proposed word limit reduction appears to be erroneous. As Judge Easterbrook asserts in his public comment opposing the reduction, the current 14,000–word limit was not adopted in error. The previous 50–page limit permitted the filing of professionally typeset printed briefs, resembling the printed booklets that advocates in "paid" cases are still required to file in the U.S. Supreme Court. The very first Third Circuit appeal on which I worked in private practice involved a commercial tort case between two corporations in which my law firm's client won a $54 million judgment. Given the high stakes, my client — the appellee — ended up filing a professionally typeset printed booklet style brief for appellee whose 49 pages contained far more than what a 50–page brief prepared on 8 1/2 by 11 inch paper would have allowed. In retrospect, it could reasonably be argued that the earlier regime in which 50–page briefs were permitted regardless of the manner of preparation created an unfair disparity in favor of those litigants who could afford to secure more briefing space by incurring the costs of a professionally typeset printed brief.

Regardless of whether the decision to adopt a 14,000–word limit on principal appellate briefs was originally based on a miscalculation, it would have been preferable for the Advisory Committee's comment to instead have focused from the outset on what should have been the chief concern: are federal appellate briefs now too long, and is the best way to address any such problem an 11–percent across–the–board reduction in maximum brief size?

As demonstrated in recent posts at my "How Appealing" blog, even the most highly regarded appellate advocates in particularly complex cases regularly find it necessary to file briefs that approach the current word limits. One week ago, on February 10, 2015, the Second Circuit decided a class action appeal captioned *Sykes* v. *Harris*, No. 13–2742 (2d Cir.), and the Federal Circuit decided a patent law appeal captioned *Helferich Patent Licensing, LLC* v. *The New York Times Co.*, No. 14–1196 (Fed. Cir.). In *Sykes*, the opening brief that Paul D. Clement filed on behalf of his clients contained 13,758 words according to its certificate of compliance. And the opening brief that Miguel A. Estrada filed on behalf of his clients contained 13,975 words according to its certificate of compliance. In *Helferich*, the Brief for Appellant that Aaron M. Panner filed contained 13,515 words, the Brief for Appellees that Daryl Joseffer filed (and in which Edward R. Reines representing other appellees joined) contained 13,973 words, and the Reply Brief for Appellant contained 6,884 words. All of these briefs were considerably in excess of the new word limits now under consideration for the Federal Rules of Appellate Procedure.

One other example is also worth mentioning. Last year, I briefed and argued on behalf of the plaintiff an appeal from a district court's granting of a Federal Rule of Civil Procedure 12(b)(6) dismissal on statute of limitations grounds. Because the district court's dismissal rested solely on that basis, my client's opening brief focused entirely on demonstrating error in that ruling. That opening brief contained only 7,560 words.

Six different, separately represented defendants filed briefs for appellees in that 3rd Circuit case. Those defendants argued not only that the district court's statute of limitations-based dismissal should be affirmed, but they also appropriately argued that the district court should have dismissed the case on numerous alternative grounds that the parties had briefed in the district court but the district court never reached.

By my calculation, the briefs for appellees devoted a combined 20,000 words to arguing additional alternate grounds for dismissal. In my client's reply brief, I needed a total of 6,871 words to respond to the greatest extent possible to each and every alternate ground for dismissal that the defendants had raised. Had my reply brief been limited to 6,250 words in that case, I seriously doubt that I could have adequately begun to address and oppose the various supposed alternate grounds for affirmance.

The Third Circuit reversed the statute of limitations dismissal and remanded to allow the district court in the first instance to consider any additional grounds for dismissal. Yet the Third Circuit surely had the power itself to reach those other grounds in the first instance, and if I had been deprived of the ability to adequately address those grounds in my client's reply brief, who knows how the Third Circuit would have resolved the appeal.

Appeals frequently present complex factual and legal issues. Appeals can involve the laws of foreign nations or law from jurisdictions outside the geographical boundaries of the circuit in which the case is pending. Good appellate advocates recognize that most federal appellate judges are generalists who may lack extensive expertise in the particular factual and legal issues that an appeal may present. There is perhaps no better feeling for judge or advocate alike than an oral argument at which the judges understand what the advocates have argued in the briefs. In cases of sufficient complexity, the ability to achieve that understanding will be lost if the proposed word limit reduction takes effect.

Lastly, I fear the unintended consequences that may arise if the word limit reduction proposal is adopted. For example, briefs that fail to adequately develop issues (albeit not to the point of waiver) will necessitate that judges themselves bear more of the research burden that the parties currently shoulder. Secondly, in cases with parties on the same side of an appeal, a brief size limit of only 12,500 words is likely to cause more separately represented parties to file separate briefs instead of joining in a single submission. In such instances, shorter briefs may translate into even more reading for judges. Next, as counter–intuitive as it may seem, judges know that briefs that unnecessarily raise too many issues can make a case easier to decide, by reducing the effectiveness of all the claims of error. And appellate briefs larded with excess verbiage can likewise undermine a party's likelihood of success on appeal.

Putting everything that I and the numerous other opponents of the word limit reduction proposal have said to one side, on the other side of this issue is the fact that many appellate judges apparently are of the view that briefs are often unnecessarily long. I accept that complaint as true. But the question remains whether determining the word limit for appellate briefs — which is not a length that any advocate is required to reach — should be based on the worst the profession has to offer or the very best. My concern, simply stated, is that the word limit reduction proposal will disproportionately impact in a negative way the quality of the appellate briefing in the most important and complex cases, cases that are ordinarily handled by the most talented appellate advocates.

In nearly every case that a federal court of appeals decides, the court's ruling will represent not only the first appellate review that a case will receive on the merits, but it will also be the last. Depriving many litigants of the opportunity to say what needs to be said in their only appeal as of right — an opportunity the current word limit surely facilitates — must require a justification more compelling than the "oops, we made a mistake" rationale being offered or the desire of federal judges for at most

an eleven–percent lighter reading burden in whatever percentage of cases the rule change actually would impact.

For these reasons, and for the many other cogent and persuasive reasons that my colleagues in the appellate bar have submitted for opposing the word limit reduction, I respectfully urge the committee to withdraw the proposed word limit reduction amendment from further active consideration.