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3rd Circuit 'Strongly' Disfavors Requests to Exceed Word Limits on Briefs

Howard J. Bashman | Contact | All Articles
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Howard Bashman

A single post on Twitter is limited to 140 characters. My column today consists of approximately 1,400 words. And, if you are preparing a brief to be filed in a federal appellate court, you also may need to be concerned with word counts, because the Federal Rules of Appellate Procedure use a word count limit, rather than a page limit, to determine whether an appellate brief is within the applicable size limit.

On Jan. 9, the entire membership of the 3rd U.S. Circuit Court of Appeals, consisting of all active and senior judges, issued a "Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure." That standing order contained the remarkable news that in about 25 percent of the cases on appeal, the 3rd Circuit receives motions to exceed the word limits applicable to appellate briefs. The standing order further reports that 71 percent of those motions seek to exceed the word limits by more than 20 percent.

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The purpose of the standing order was to announce that motions to exceed the generally applicable word limits are "strongly disfavored" and will be granted "only upon demonstration of extraordinary circumstances." The standing order proceeds to explain that circumstances favoring an increase in the word limit include appeals in which multiple parties are joining in a single brief or an appellee is responding to the briefs of multiple appellants. According to the order, another circumstance where the page limit may be increased involves "complex/consolidated proceedings in which the parties are seeking to file jointly." The court also provided a general catch-all category consisting of cases in which "the subject matter clearly requires expansion" of the word limit.

Perhaps in the hope of developing a coherent response to the issue, the 3rd Circuit's standing order states that "a three-judge Standing Motions Panel is hereby appointed to rule on all motions to exceed the page/word limitations for briefs." The order concludes by advising counsel to seek advance approval of requests to exceed the word limitations applicable to an appellate brief "whenever possible or run the risk of rewriting and refiling a compliant brief." When an advance request was not made, any motion seeking to exceed the word limit "shall include an explanation of why counsel could not have foreseen any difficulty in complying with the limitations in time to seek advance approval."

For those keeping score at home, the text of the body of the 3rd Circuit's standing order governing motions to exceed the word count applicable to briefs consisted of 242 words. Whether the text of the order was as concise as possible I will leave to others to opine, but the 3rd Circuit does deserve credit for managing to fit the entire contents

of the order onto one single-spaced page with at least a few lines to spare.

The 14,000-word limit that applies to a party's main brief in a typical appeal will ordinarily result in a brief that is around 60 pages long. In my experience, that word limit affords more than adequate space to address an appeal of ordinary complexity. One common way that an ordinary appeal may risk exceeding the applicable word limit arises when the first draft of the appellate brief is constructed through a process of simply cutting and pasting together those portions of the trial court briefs addressing the issues on appeal.

If three 20-page briefs were filed in the trial court, each addressing one of the three issues to be pursued on appeal, an appellate brief consisting of the contents of those trial court briefs can easily approach 60 pages of text and the 14,000-word limit. It is for this reason that I strongly disfavor any method of drafting an appellate brief that begins with cutting and pasting together the relevant pieces of the trial court briefing on the issues to be addressed on appeal. Rather, it is far preferable to write the appellate brief from scratch, after becoming fully familiar with the facts and arguments that were addressed in the briefs filed in the trial court.

As in the story of "Goldilocks and the Three Bears," where the lead character was constantly searching for the solution that was "just right," appellate advocates understandably may feel that they are sometimes trapped between two unsatisfactory extremes. On the one hand, if an appellate brief fails to contain the necessary factual and procedural background and arguments that are sufficiently persuasive and supported by appropriate authority, then the appellate court may fail to appreciate the wisdom of those arguments and thus fail to be persuaded by them. On the other hand, if an appellate brief contains unnecessary detail, too many arguments and too many string cites for even the most mundane legal principles, then the appellate judges may simply stop paying close attention to the brief, and the brief may lose its ability to persuade.

It is of course easy for me to say that appellate briefs should be short, to-the-point and concise. But the question remains: How can one achieve those goals in a case where the current draft of the brief exceeds the applicable word limit?

Here are two key pieces of advice. First, omit irrelevant background. If it is of no consequence when various motions or other documents were filed in the trial court, then the brief does not need to contain those dates. Second, and even more importantly, remember that an appeal that raises fewer issues has a greater likelihood of success than an appeal that raises an unnecessarily large number of issues. Surely the number of issues being raised on appeal has the greatest impact on how long the appellate brief will turn out to be.

In this age of technology, word counts of briefs are determined by the word processing software used to prepare the brief. A space between items of text will cause the software to count what comes before the space and what comes after as separate words. For example, "F.Supp." with no space after the first period counts as one word, whereas "F. Supp" with a space following the first period is counted as two words. Similarly, cites to the appendix on appeal as "App.64a" with no space between the "App." and the page number will count as a single word, whereas if a space is used, the software will count the same cite as two separate words. This all adds up to many additional "words" over the course of a 60-page brief.

The larger point, however, is that unnecessarily duplicative case citations, sometimes described as "string cites," not only often annoy appellate judges, but they can drive your word count through the roof. Similarly, ensuring that you are citing to strong and persuasive authority, rather than to every nonbinding trial court decision on an issue where binding precedent already exists from the court in which the appeal is pending, will help keep the word count lower.

But no doubt the best advice for keeping an appellate brief within the applicable word limit is one that the 3rd Circuit's standing order encourages advocates to follow: Do not wait until the last minute to prepare the appellate brief. With adequate time, an overly lengthy brief can be edited and refined so that what really needs to be said can fit into the applicable limits. When adequate time does not exist, however, then having to cut the brief down to size can be a recipe for disaster.

The 3rd Circuit has announced that it is serious about enforcing the word limits applicable to appellate briefs, which means that the attorneys who practice before that court must take those limits more seriously. Fortunately, shorter appellate briefs tend to be better appellate briefs, so one hopes that the 3rd Circuit's new standing order will serve to increase the quality of appellate advocacy rather than merely giving advocates one more reason to be frustrated at not being able to say all that they would like to communicate on appeal. •

Howard J. Bashman *operates his own appellate litigation boutique in Willow Grove, Pa., a suburb of Philadelphia. He can be reached via e-mail at* ***hjb@hjbashman.com*** *and via phone at 215-830-1458. You can access his appellate Web log at* ***http://howappealing.law.com.***