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Judges Push Brevity in Briefs, and Get a Torrent of Arguments

By ELIZABETH OLSON OCT. 3, 2016

The Constitution of the United States clocks in at 4,543 words. Yet a number of lawyers contend that 14,000 words are barely enough to lay out their legal arguments.

That's the maximum word count for briefs filed in federal appellate courts. For years, judges have complained that too many briefs are repetitive and full of outmoded legal jargon, and that they take up too much of their time.

A recent proposal to bring the limit down by 1,500 words unleashed an outcry among lawyers.

"There are cases where the facts are complicated, and where areas of the law are complicated," said Nancy Winkelman, a partner and appellate lawyer at Schnader Harrison Segal & Lewis in Philadelphia, and president of the American Academy of Appellate Lawyers.

The academy, which includes Chief Justice John G. Roberts Jr., who is known as a premier appeals brief craftsman, argued against a reduction before an advisory committee considering the change to the federal rule.

And lawyers in criminal, environmental and securities law insisted that briefs' lengths should not be shortened because legal issues and statutes are more complex than ever.

As a result, the new word limit — which takes effect on Dec. 1 — will be 13,500 words, a reduction of only 500 words. And appellate judges will have the freedom to opt out of the limits.

The new limit may not provide much relief for judges deluged with verbose briefs.

While workloads vary, according to federal court data, the average federal appeals court judge, for example, might need to read filings for around 1,200 cases annually.

The opening brief, an opposition brief and a reply would total about 35,000 words, which means each judge would be reading about 42 million words connected to his or her annual caseload.

That amount of reading — especially bad reading — can thin the patience of even the most diligent judge.

Briefs "are too long to be persuasive," said Laurence H. Silberman, a judge on the United States Court of Appeals for the District of Columbia Circuit.

Other appellate judges agree, including Judge Mary Beck Briscoe of the United States Court of Appeals for the 10th Circuit, who said that many briefs are "needlessly lengthy."

Lawyers could do better, Judge Briscoe said, "by excising tangential facts, secondary or tertiary arguments" on issues "on which a party is unlikely to prevail."

That would "do the court and their clients a service by focusing the court's attention on the core facts and dispositive legal issues," she noted.

In arguing against a reduction of words, the American Academy of Appellate Lawyers urged singling out "bad briefs" rather than only lengthy ones. It advised courts to "post on their court websites short videos outlining how to write a decent brief."

Before there was a word limit, there was a page limit to appellate briefs: 50 pages. Soon more words were being crammed into those 50 pages through smaller-than-normal typefaces and other techniques.

“Lawyers could play with the font sizes and file a 50-page brief that had much more squeezed in,” said Bryan A. Garner, a leading expert on legal writing, who helped develop the 14,000-word limit.

After judges complained that they needed to use magnifying glasses because of thin margins, squeezed spacing or small type, the word limit was imposed in 1998.

Robert N. Markle, a federal appellate lawyer, has argued — in his own personal view, not the government’s — that the limit should be reduced to 10,000 words. In a typical case, he said, “nothing justifies even approaching, much less reaching or exceeding 14,000 words.”

Still, he acknowledged that the cut of 500 words “was at least a start.”

Correction: October 4, 2016

An earlier version of a picture caption misstated the title of Anthony M. Kennedy. He is an associate justice of the Supreme Court, not the chief justice.

A version of this article appears in print on October 4, 2016, on page B1 of the New York edition with the headline: Brevity in Briefs? Lawyers Register Their Objections.
