United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Laurence H. Silberman
United States Senior Circuit Judge

January 13, 2015

Mr. Jonathan C. Rose, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

I have been sitting on the D.C. Circuit for almost thirty years. For the first half of my tenure, our briefs were limited to 12,500 words, subject to a motion to extend. Then in 1998, the word limit was expanded to parallel the limits in Supreme Court briefs. I think that was a mistake; the briefs now tend to be much too long. All the judges on the D.C. Circuit agree with me – and so do judges I have spoken to on other circuits. Indeed, the top-grade appellate specialists I have spoken to in Washington also agree. (One actually suggested the present length is an advantage for a skilled appellate specialist because he or she, by writing a shortened brief, as against a less skilled opponent, will benefit.)

Although I do not mean to denigrate the importance of the Committee's mixed membership of lawyers and judges, on this issue I would think the view of the consumers of briefs, rather than the producers, would be more influential. We judges, of course, are in an advantageous position to determine whether a longer or somewhat shorter brief is more persuasive. The judges on our circuit actually read the briefs; many of us do not even ask for bench memos.

The problem is that many lawyers tend to write briefs to match the page limits, whether or not that is actually justified. An over-long brief, either because of excessive discussions of facts and background material which obscure the legal issues, or because of the addition of quite marginal arguments, is not effective – its even tiresome and can cause a judge to insufficiently appreciate the core legal arguments.

Although there are few judges I admire more than Frank Easterbrook, I disagree with his analogy to the Supreme Court's practice. When the Supreme Court grants *cert*, the issues are quite important and normally difficult, but more important, they are limited to the *cert* grant. The court does not have to face an array of marginal issues and most Supreme Courts advocates do not spend pages on factual presentations more appropriate to a jury argument or agency proceeding. We should keep in mind that Frank has a unique technique; he has said if he is not persuaded by the opening brief, he stops reading.

I regard the ancillary issues discussed in the submission of the American Academy of Appellate Lawyers – whether the Committee has adequately explained its reasons for proposing shorter briefs – to be quite beside the point. The only real question is: are the briefs now too long to be persuasive. The answer I submit is "yes."

Sincerely,

Laurence H. Silberman

cc: Hon. Steven M. Colloton
U.S. Court of Appeals for the Eighth Circuit