Appellate Practice
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Length matters

Last month's column ended with an aphorism from Honest Abe about catching flies with honey. (But who wants to catch flies anyway?) This month we'll start with Lincoln's famous quip about length, which colloquially runs like this: How long should a man's legs be? Long enough to reach the ground.

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EXCEPTIONALLY APPEALLING

Last month's column ended with an aphorism from Honest Abe about catching flies with honey. (But who wants to catch flies anyway?) This month we'll start with Lincoln's famous quip about length, which colloquially runs like this: How long should a man's legs be? Long enough to reach the ground.

Reputedly, the full question was "How long should a man's legs be in proportion to his body?" To which the gangly lawyer answered, "I have not given the matter much

consideration, but on first blush I should judge they ought to be long enough to reach from his body to the ground." Lowry, Personal Reminiscences of Abraham Lincoln 21-22 (1910). The shorter version is, of course, pithier, which takes us to an important point about brief writing: shorter is better.

This is not news. Appellate judges have been beating that drum for ages. Given this universal sentiment, it suffices to point to Chief Justice John Roberts, who has often said "I have yet to put down a brief and say, 'I wish that had been longer.' ... Almost every brief I've read could be shorter." 13 The Scribes Journal of Legal Writing 35 (2010). In his view, even in the nation's highest court, a party's brief can be effective in a mere 35 pages.

Historically -- yet within living memory of many practicing California appellate lawyers -- there were no length limits on briefs. Common sense was to prevail. Somehow it did not. (Shocker!) This begat page limits (50 pages), which cybertechnology and foolhardy lawyers transformed into our current word limits. See In re MacIntyre, 181 B.R. 420, 421-22 (9th Cir. BAP 1995) (miniscule typesize to circumvent page limits draws sanctions); *Kano v. Nat'l Consumer Coop. Bank*, 22 F.3d 899 (9th Cir. 1994) (same); *People v. Mitchell Bros.' Santa Ana Theater*, 114 Cal. App. 3d 923, 929 n.5 (1981) (272-page opening brief not well received); *Couts v. O'Neill*, 51 Cal. App. 152, 158 (1921) (90-page opening brief and 282-page respondents "far from laconic 'brief'" provokes lamentation on how afflicting courts with voluminous briefs is "unjust and improper").

California's word limit for appellate briefs in civil cases is 14,000 words. Cal. R. Ct. 8.204(c)(1). The 9th Circuit also allows 14,000 words for principal briefs, but limits reply briefs to 7,000 words. 9th Cir. Rule 32. (This is more generous than Federal Rule of Appellate Procedure 32(a)(7)(B), which limits principal briefs to 13,000 words.) A few special rules apply in particular situations (e.g., cross-appeals) allowing for slightly longer briefs. *E.g.*, Cal. R. Ct. 8.204(c)(4) (double-sized briefs allowed for combined briefs in cross-appeals); 9th Cir. R. 28.1-1 (extra 2500 words for combined answering/cross-appeal brief), 32-2(b) (extra 1400 words for separately represented parties filing a joint brief). (Note also how the limit rises to 25,500 in criminal appeals in California. Cal. R. Ct. 8.360(a)(1).) Rehearing petitions are limited to 7,000 words. Cal. R. Ct. 8.204(c)(7).

Although the rules allow for motions to file fat briefs, such motions are highly disfavored and require a showing of diligence and substantial need. *E.g.*, 9th Cir. R. 32-2(a); Cal. R. Ct. 8.204(c)(5) (longer briefs require good cause). Absent special permission to exceed the length limitations, fat filings may be stricken, and obese briefs may draw sanctions. *E.g., CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1104 n.4 (9th Cir. 2007) (overlong Federal Rule of Appellate Procedure 28(j) letter stricken).

Oversized briefing isn't just a problem for appellate courts. In one infamous incident in district court, where the local rules allowed for 20-page briefs, the court had granted leave for a longer brief. When a 240-page brief was filed, however, the court felt compelled to comment on such an "outrageously long brief" that "was clearly an unacceptable imposition on the Court's good will." *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 355 (D. Me. 1991). The court explained that briefs are supposed to be helpful in focusing and resolving the issues; they are not supposed to "beat issues to death or obfuscate the real issues by giving prominence to tangential or totally irrelevant matters in hopes of tiring out the other party or wearing down the Court in the rigors of the decisional process." *Id.* Thus, "it is typically the *shorter* briefs that are the most helpful, perhaps because the discipline of compression forces the parties to explain clearly and succinctly what has happened, the precise legal issue, and just why they believe the law supports them." *In re M.S.V., Inc.*, 892 F.2d 5, 6, (1st Cir. 1989).

Therefore, good appellate lawyers not only strive never to seek permission to file overlong briefs, but, to the contrary, work as hard has possible to file briefs much shorter than the maximum allowed. The 14,000 word limit is not meant to be a target to aim for, but instead should be considered a dangerous electric fence from which one should keep a sound distance away. We will posit this notion as a general rule. But what about exceptions for exceptional cases?

Statistics on the average length of appellate briefs don't seem to exist, but it seems a reasonable estimate that most briefs probably fall within a range of 8,000 to 12,000 words. At this point, a lack of hard data requires a switch to the first person singular to share relevant anecdotes. Please excuse this breach of formality, but illustrations were otherwise elusive.

Engagements in 2019 gave rise to exceptional tales at both ends of the spectrum. In March 2019, I helped with the shortest brief I've ever filed: In a mere seven pages, our opening brief presented an introduction, three-part statement of facts, standard of review, and three-part argument (the one-line conclusion on an eighth page hardly counts). 2019 WL 1368740. The happy ending was a reversal. 2019 WL 7019548.

In stark contrast, only a dozen days after filing the Lilliputian brief, I helped with the longest brief I've ever filed: 421 numbered pages ("only" 376 substantive pages, ignoring the cover, tables, etc.). 2019 WL 1506432. What was this leviathan? An answer to two consolidated and extremely lengthy petitions for writs of review in the Supreme Court -- which have no page limits under the rules. Again, the outcome was favorable (to my side).

One lesson from these Spring 2019 stories is that a tiny-but-mighty brief can get the job done. If all that needs to be said ends up being less than ten pages, that does not

necessarily mean that something is wrong. To the contrary, it may mean that everything is right indeed -- brevity being the soul of wit (Hamlet, act II, scene 2).

It's no accident that this piece on the importance of short briefs appears in February, the shortest month. But since this column focuses on the exceptional, note that this year is a leap year. An extra day is one thing; an extra dozen or so pages is something else altogether. You do not want to be like the lawyer who, after filing an 85-page opening brief, was chided by the Supreme Court centuries ago with the sarcastic observation, "the learned counsel may not have had time to prepare a *short* brief." *King v. Gildersleeve*, 79 Cal. 504, 507 (1889) (emphasis original). Taking that time is worth it, of course: "Overly long briefs ... may actually hurt a party's case, making it 'far more likely that meritorious arguments will be lost amid the mass of detail.'" *Fleming v. Kane County*, 855 F.2d 496, 497 (7th Cir. 1988). And so we end this sermon with the wisdom of Ecclesiasticus 32:8, "Let thy speech be short, comprehending much in few words."