always Appealing: The Future Is Nigh and Includes a Word Count and Larger Fonts

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The future for appellate court practitioners in Washington begins September 1, 2021 when documents filed in our state appellate courts move from a page limit to a word count limit.1 Washington's Supreme Court entered its order adopting the new word count limits and formatting requirements on December 2, 2020. In shifting to word count, the Supreme Court amended several rules of appellate procedure2 and adopted a new rule, RAP 18.17, as the single comprehensive rule covering all formatting and length limitations for documents filed in our state's appellate courts.

When the new rules take effect, our appellate courts will join other courts that have already moved to word count, including the King County Superior Court,3 other state appellate courts,4 and the United States Courts of Appeals.5 Word count is not the only change — larger font sizes are our future as well.

This column is intended to provide some insight into how these changes came about:

At the direction of the Washington Supreme Court, a word count workgroup was formed to explore switching from page limits to word count limits for court filings. The Workgroup started with a small group of appellate judges and clerks, and was later expanded to include appellate practitioners. In proposing the shift to word count, the Workgroup stated, "using word counts

rather than pages provides a level playing field, where the length of a document (and thus, how much legal argument can be made) is not determined by formatting decisions such as fonts, spacing, and use of footnotes."6

The Workgroup's goal was to propose a word count that was analogous to the length of briefs under the existing rules for page limits.7 I was a volunteer for the Workgroup and joined with Judge Brad Maxa of Division II of the Court of Appeals and attorney Melissa White to comprise the subcommittee tasked with proposing the precise word limit.

In coming up with our recommendation, we surveyed several 50-page briefs filed in the appellate courts, using the ubiquitous 12-point fonts of Times New Roman, Arial, and Georgia. We counted the words for the entire brief, as well as for the first 10, 15, 20, and 25 pages. Based on our survey, we determined that a 12,000-word brief is comparable to a 50-page brief using 12-point Times New Roman. In our survey, there was only one 50-page brief that significantly exceeded 12,000 words, but it was deemed an outlier and representative of the numerous "cheats" deployed to keep within the page limits. For example, six pages of the "outlier" brief included single-spaced assignments of error and statement of issues, in violation of RAP 10.4(a)(2), and included 13 footnotes, some quite long, in 11-point Times New Roman.8

The word count adopted in the new rule is consistent with the recommendation from the Workgroup. Documents that were previously limited to 50 pages are now limited to 12,000 words, 25-page documents are now limited to 6,000 words, 20-page documents are now limited to 5,000 words, 15-page documents are limited to 4,000 words, and 10-page documents are limited to 2,500 words.9 A word limit of 12,000 words for principal briefs is within the range adopted in other appellate jurisdictions.10

As under the existing rule, a party that wants to file an overlength document must seek permission from the appellate court. Although the new rule does not require a party to show "compelling reasons" for filing an overlength brief, as had the existing rule (RAP 10.4(b)), counsel for the party would do well to keep their briefs within the limit of the rules. As Division One noted in a (notable) unpublished decision, "an overlength brief typically imposes an unnecessary burden on the court and opposing counsel and is frequently less effective than a well organized, succinct brief. Both counsel here would have been well advised to spend the time necessary to submit less rambling and more coherent briefs, and we trust that they will do so in the future."11

Under the new rule, each document filed in the appellate courts after September 1, 2021, must now include a Certificate of Compliance above the signature line certifying the number of words contained in the document.12 Not every word counts under the new rule: "words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of

compliance, the certificate of service, signature blocks, and pictorial images" are excluded from the word count.13 The parts of the document excluded from the word count are similar to those excluded in other word count rules adopted in other jurisdictions.14

For purposes of certifying the word count, the signor may rely on the word count calculation of the word processing software used to prepare the brief.15 As footnotes are included in the word count, those drafters using Microsoft Word should make sure they check the box to "include text boxes, end notes, and footnotes" when using its software to calculate the word count.

Although the shift to word count will likely impact all attorneys, the rule recognizes that not every individual who files in the appellate courts will have access to word processing software. For instance, pro se litigants, including those who are incarcerated, may prepare documents by hand or with a typewriter. Accordingly, the rule accommodates those situations by leaving in place the existing page limits for those documents that are hand-written or prepared by typewriter.16

I, for one, am looking forward to the implementation of the new rule. Here's hoping the advent of the new rule means fewer briefs with widowed headings, briefs larded with footnotes in small fonts, and single-spaced assignments of error and related issues.

As mentioned above, word count is not the only change in our future. The new rule has also adopted a larger font size. To improve "readability," the new rule increases the font size from a minimum 12-point font to a minimum 14-point font "equivalent to Times New Roman or sans serif font equivalent to Arial," and requires that footnotes be in the same size font as the body of the brief.17 A review of rules in other jurisdictions shows that 14-point is the most widely required minimum size font.18 Nevertheless, documents prepared by typewriter may still use 12-point font.

With the larger font size, it appears that "everything old is new again." Before 1988, the maximum length of opening and response briefs was 70 pages.19 With the increased font size, 50-page briefs in Georgia, Arial, and Times New Roman will now be roughly 70, 69, and 67 pages, respectively. While this might not seem to bode well for trees, the reality is that in an increasingly electronic world, it will be a rare instance when documents filed in the appellate courts will ever need to be printed, as it is now mandatory for any case participant admitted to practice law in Washington to use e-filing to file their documents in all three Divisions of the Court of Appeals, which also allows parties to "e-serve" the opposing party.20 Also, as of August 1, 2020, the Appellate Electronic Court record is designated as the official court record of the Court of Appeals and no hard copy paper case files with created or maintained.21

1 https://www.courts.wa.gov/court_rules/adopted/pdf/25700-A-1323%20AMENDED.PDF The rules were originally scheduled to take effect on February 1, 2021, but the appellate court clerks (understandably) asked for more time to allow for training staff on the new rules, to update procedures, to create templates, and allow for public outreach since the change would affect nearly every filing and every filer in the appellate courts.

2 The following rules were amended: RAP 4.2, RAP 4.3, RAP 10.4, RAP 10.7, RAP 10.8, RAP 10.10, RAP 12.4, RAP 13.4, RAP 13.5, RAP 13.7, RAP 16.7, RAP 16.10, RAP 16.16, RAP 16.17, RAP 16.21, RAP 16.22, RAP 17.4, RAP 18.13, and RAP 18.14.

3 KCLR 7(b)(5)(vi).

4 By early 2018, the state appellate courts of California, Delaware, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Missouri, Montana, Nevada, New York, North Dakota, Pennsylvania, Texas, Vermont, and Virginia, had already adopted word count rules. Renee Townsley, the Clerk/Administrator at Division III of the Court of Appeals compiled the research from other appellate jurisdictions regarding their word count rules for the Supreme Court's Word Count Workgroup.

5 FRAP 32(a)(7)(B).

6 https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=3723. Note, too, that the United States Court of Appeals for the Seventh Circuit lamented these types of "typographical techniques" in Westinghouse Elec. Corp. v. N.L.R.B., 809 F.2d 419, 425 (7th Cir. 1987), where it sanctioned counsel because they "filed a brief with approximately 1½ spacing, with type smaller than 11 points, and with margins smaller than those allowed. The effect was to stuff a 70-page brief into 50 pages. One has the sense that the lawyers wrote what they wanted and told the word processing department to jigger the formatting controls until the brief had been reduced to 50 pages."

7 Under the current rules, opening and response briefs are limited to 50 pages, and reply briefs to 25 pages. RAP 10.4(b). Page-related limits also apply to motions and petitions for review. See RAP 13.4(f); RAP 17.4(g). Prior to 1988, the maximum length of opening and response briefs was 70 pages. 3 Washington Practice: Rules Practice RAP 10.4 (8th Ed.).

8 This brief was actually already overlength, as it exceeded 50 pages, but we only counted the first 50 pages. Our survey included both "true" 50-page briefs, which included a signature block on the 50th page, as well as longer briefs, but we only counted the first 50 pages.

9 RAP 18.17(c).

10 Between 8,400 and 15,000 words based on the research compiled by Renee Townsley, the Clerk/Administrator at Division III of the Court of Appeals of word count rules from other appellate jurisdictions for the Supreme Court's Word Count Workgroup.See e.g.FRAP 32(a)(7)(B) (13,000 words); Del. Sup. Ct. R. 14(d)(i)(14,000 words); Ga. Ct. App. R. 24(f)(1)(8,400 words in civil cases; 14,000 words in criminal cases); Ill. Sup. Ct. R. 341(b)(1)(15,000 words); Ind. R. App. P. 44(E)(14,000 words); ME RAP 7A(f)(1)(10,000 words); Mont. R. App. P. 11(4)(a)(10,000 words); Tex. R. App. P. 9.4(i)(2)(B)(15,000 words); Va. Sup. Ct. R. 5:26(b)(8,750 words).

11 Marriage of Lake, 146 Wash. App. 1066 (Cause no. 60658-1-I) (Sep. 29, 2008).

12 RAP 18.17(b).

13 RAP 18.17(b).

14 See e.g.FRAP 32(g); Del. Sup. Ct. R. 14(d)(i); Ga. Ct. App. R. 24(f)(3); Ill. Sup. Ct. R. 341(b); Ind. R. App. P. 44(C); ME RAP 7A(f)(3); Mont. R. App. P. 11(4)(d); Tex. R. App. P 9.4(i)(1); Va. Sup. Ct. R. 5:26(b).

15 RAP 18.17(b).

16 RAP 18.17(c).

17 RAP 18.17(a)(2). The existing rule allows footnotes of at least 10-point font. RAP 10.4(a)(2).

18 See https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=3723.According to the subcommittee tasked with recommending new formatting requirements, of the forty-three jurisdictions they reviewed, fifteen require 12 point font, six require 13 point font, and twenty-two require 14 point font.

19 3 Washington Practice: Rules Practice RAP 10.4 (8th Ed.).

20 GR 30(b)(4); https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2020_002&div=III.

21 https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2020_002&div=III.