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Making Your Case: Strategies for Briefing in the Supreme Court of North Carolina

Written By Chris S. Edwards (csedwards@wardandsmith.com)
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Appellate practice can be challenging.

In complicated cases, it's made all the more challenging by the word limits often imposed by the pertinent rules of procedure. For example, in the North Carolina Court of Appeals, the North Carolina Rules of Appellate Procedure require that attorneys distill the errors made in a multi-day jury trial down to just 8,750 words. Meeting this requirement demands a lot of careful thought and attention. Developing a successful appellate strategy requires a give and take: Which issue gets the most space in the brief? What other issues lose space? All of these questions need to be answered.

Recently, I noticed several briefs filed in the Supreme Court of North Carolina that appeared to struggle with this issue. But doing so was unnecessary. Why? In North Carolina, our Appellate Rules do not impose word-length limitations on briefs filed in the Supreme Court. Our Rules are unusual in that regard. Federal Rule of Appellate Procedure 32(a)(7)(B) imposes a strict 13,000-word limit on all principal briefs, as well as a 6,500-word limit on reply briefs. Even in the Supreme Court of the United States, attorneys face similar word limitations. That's not so in North Carolina. This article explains the basis for this rule and provides some practical thoughts about how to best use this information in your briefing practices.

No Word Limits Apply: Understanding the Appellate Rules

Those frequently appearing in the North Carolina Court of Appeals might not realize that our Appellate Rules do not impose word limits on briefs filed in the Supreme Court. After all, Appellate Rule 28(j) clearly sets an 8,750-word limit for principal briefs and a 3,750-word limit for reply briefs. But that Rule by its own terms applies only to "briefs filed *in the Court of Appeals*," not in the Supreme Court.

The Appellate Rules specific to Supreme Court practice do not contain a similar word limitation for principal briefs. Appellate Rules 14(d) and 15(g) governs briefs filed in the Supreme Court. And both indicate only that each party must file a "new brief"—that is, a principal brief—in the Supreme Court within 30 days after the filing of the notice of appeal or after the Court certifies the case for review. Neither contains an explicit word limitation. Nor do they contain any reference to Rule 28(j), which sets the word limit in the Court of Appeals.

The same is true of reply briefs. Both Rule 14(d) and 15(g) permit the appellant to "file and serve a reply brief as provided in Rule 28(h)." Rule 28(h), in turn, provides no word limit for reply briefs filed in the Supreme

Court. To be clear, the Rule *does* reference Rule 28(j), but that rule, again, refers only to briefs filed "in the Court of Appeals." For that reason, it is proper to understand that Rule 28(j)'s 3,750-word limit does not apply. After all, your reply brief may require some additional words, since you will be responding to an appellee's brief of unlimited length.

With Great Power, Comes Great Responsibility

Having the *ability* to file a lengthy brief doesn't mean it's a good idea. A few years ago, the *New York Times* confirmed what many lawyers already knew, judges think many briefs are too long, saying that lawyers should file shorter briefs with fewer irrelevant facts and weak arguments. It would not be surprising if North Carolina Supreme Court Justices share that view.

Against that background, it's important to think about how you want to use the Rules—including the freedom from word limits—in your favor. Your biggest advantage is the ability to fully develop your strongest, most comprehensive arguments. Unrestrained by the 8,750-word limit used in the Court of Appeals, briefing before the Supreme Court affords the chance to provide detailed, fact-driven analysis; historical discussion; and thoughtful, well-developed examples, all things that the Court has shown interest in lately. In other words, if you have a winning argument, relief from word limits means you don't have to leave anything on the cutting room floor.

Of course, developing strong, winning arguments requires some tradeoffs. If briefing in the Court of Appeals demands thoughtful consideration about how to address many arguments, briefing in the Supreme Court requires careful thought about how to pare those many arguments down into just the strongest ones. I've heard a judge say that every case has one issue—some exceptionally complex cases even have two. While I might not be willing to go that far, it would be expected that, once a case reaches the Supreme Court, its key issues should have been clarified. There's no need—and, indeed, in some cases, no right—to simply re-hash all of the arguments that were made at the Court of Appeals. It is important to choose arguments wisely, to focus on those that are most important to the case, and to develop those arguments fully. Other, weaker arguments, even if technically permissible under Rules 14 and 15, should be pursued with caution.

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