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# “Too Many Notes”?<sup>†</sup> An Empirical Study of Advocacy in Federal Appeals

Gregory C. Sisk and Michael Heise\*

The warp and woof of U.S. law are threaded by the appellate courts, generating precedents on constitutional provisions, statutory texts, and common-law doctrines. Although the product of the appellate courts is regularly the subject of empirical study, less attention has been given to the sources and methods of appellate advocacy. Given the paramount place of written briefs in the appellate process, we should examine seriously the frequent complaint by appellate judges that briefs are too long and that prolixity weakens persuasive power. In a study of civil appeals in the U.S. Court of Appeals for the Ninth Circuit, we discover that, for appellants, briefs of greater length are strongly correlated with success on appeal. For the party challenging an adverse decision below, persuasive completeness may be more important than condensed succinctness. The underlying cause of both greater appellant success and accompanying longer briefs may lie in the typically complex nature of the reversible civil appeal. In light of our findings, the current proposal to reduce the limits on number of words in federal appellate briefs may cut more sharply against appellants. Experienced appellate advocates submit that familiarity with appellate courts, the honed ability to craft the right arguments with the appropriate style in briefing, and expertise in navigating the appellate system provide superior legal representation to clients. Our study lends support to this claim. We found a positive correlation between success and experience for lawyers representing appellees, thus warranting further study of lawyer specialization.

## I. INTRODUCTION

The warp and woof of U.S. law are threaded by the appellate courts, generating precedents on constitutional provisions, statutory texts, and common-law doctrines. The channeling of the course of the law through the appellate courts is directed by appellate lawyers who advocate cases primarily through the vehicle of written briefs. While the product of appellate courts is regularly the subject of empirical study—exploring such

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<sup>†</sup>See Amadeus (Orion Pictures Corp. 1984). On the apocryphal “too many notes” exchange between Emperor Joseph and Mozart on the premiere of the composer’s new opera, see the conclusion of this article.

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influences as judicial background and ideology, the nature of the parties, and such legal factors such as standard of review and precedential regimes on substantive outcomes—less attention has been given to the sources and methods of appellate advocacy.<sup>1</sup>

Given the central role of appellate courts in the U.S. legal system and the paramount place of written briefs in the appellate process,<sup>2</sup> we should examine seriously the frequent complaint by appellate judges that appellate briefs are too long. Judges warn appellate litigators that they approach the maximum length allowed by the rules at the peril of undermining persuasive force. Former Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit warns lawyers that an over-long brief “telegraph[s] that you haven’t got much of a case.”<sup>3</sup> Former Chief Judge Patricia Wald of the District of Columbia Circuit advises “the shorter and punchier the brief the better.”<sup>4</sup> But, in some contrast, leading appellate lawyers Andrew Frey and Roy Englert suggest that “‘write short’ is not a panacea,” as “[r]elatively extended treatment may be necessary because the case involves an especially complex issue or because a number of issues must be presented.”<sup>5</sup>

Striking the balance on the appropriate length of appellate briefs for successful appellate advocacy and effective judicial decision making is of both general interest for better understanding the appellate process and of immediate consequence given a current proposal to reduce the permissible length of briefs in federal appeals. In late 2014, the Advisory Committee on Appellate Rules of the U.S. Judicial Conference circulated for public comment a proposal to reduce the number of words allowed for principal appellate briefs from 14,000 to 12,500.<sup>6</sup>

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<sup>1</sup>Some of the most interesting and important empirical work on the persons, methods, and forms of appellate advocacy—the “inputs”—in the federal courts of appeals is being conducted by a group of five political science scholars, Professors Susan Haire, Laura Moyer, Todd Collins, Stefanie Lindquist, and Roger Hartley. See, e.g., Laura P. Moyer, Todd A. Collins & Susan B. Haire, *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals*, 34 *Just. Sys. J.* 62 (2013); Susan B. Haire & Laura P. Moyer, *Advocacy Through Briefs in the U.S. Courts of Appeals*, 32 *So. Ill. U. L.J.* 593 (2008); Susan Brodie Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 *Law & Soc’y Rev.* 667, 684 (2006). We have benefitted greatly from their work and cite to it regularly in this article.

<sup>2</sup>See Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Processional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 *Cap. U.L. Rev.* 445, 456 (1982) (“Ninety-five percent of appellate cases are won or lost on the basis of written briefs.”); Moyer, Collins & Haire, *supra* note 1, at 63 (“[J]udges largely rely on attorneys’ written arguments as a basis for evaluating the dispute before them.”).

<sup>3</sup>Alex Kozinski, *The Wrong Stuff*, 1992 *B.Y.U. L. Rev.* 325, 326.

<sup>4</sup>Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 *J. App. Prac. & Process* 7, 10 (1999).

<sup>5</sup>Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, 20(2) *Litigation* 6, 8 (1994).

<sup>6</sup>Committee on Rules of Practice and Procedure, *Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* at 49 (Aug. 2014, available at <<http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>>) (proposed amendment to Fed. R. App. P. 32). On the proposed rule change, see generally Part III.A.4 of this article.

In addition, attorneys who specialize in litigating appeals contend that appellate work is different in nature than other litigation work.<sup>7</sup> Experienced appellate advocates submit that greater familiarity with appellate courts, the honed ability to craft the right arguments with the appropriate style in briefing, and expertise in navigating the appellate process bring considerable value-added to clients.<sup>8</sup> The veteran appellate specialist, therefore, should provide superior legal representation (and superior results), compared to the rookie or the practitioner who appears before an appellate tribunal once in a blue moon.

Moving beyond anecdote to empirical analysis, this study of civil appeals in the U.S. Court of Appeals for the Ninth Circuit investigates whether there is a systematic relationship between either the length of appellate briefs or the number of appellate cases handled by a lawyer and success on appeal.<sup>9</sup> Our study focuses on brief length, as measured by number of words, and on attorney appellate experience, as measured by number of federal appellate court appearances in the preceding 10 years.<sup>10</sup> Because many factors enter into the disposition of an appeal, this study develops a more fully specified model of variables. Included in our model are such proxy measures of importance or complexity as whether the decision was published and the appeal was argued,<sup>11</sup> variables for the main issue decided, the procedural posture of the case as it arose on appeal, and the nature of the parties.<sup>12</sup>

Brief length proved powerfully significant in our study and with substantial effect—for appellants.<sup>13</sup> However, the direction of correlation was the opposite of the conventional judicial wisdom. Longer briefs by appellants were associated with a greater probability in achieving reversal, while exceptionally short briefs were much more likely to be filed in losing appeals. For this set of civil appeals, persuasive completeness may be more important than condensed succinctness. The complexity of the civil appeal in which error below is most likely to be identified by an appellate panel may serve as the underlying cause of both a reversal and an extended discussion in the appellant's brief.<sup>14</sup>

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<sup>7</sup>See David Cardone, *The Art of Cathedral Building: Why Appellate Advocacy is Different*, Pa. Lawyer, Mar.–Apr. 2006, at 24.

<sup>8</sup>4 Successful Partnering Between Inside and Outside Counsel § 66:4 (2014) [hereinafter *Successful Partnering*] (“[A]ppellate specialists are often important to success on appeal.”)

<sup>9</sup>See Section II.

<sup>10</sup>See Section II.A.

<sup>11</sup>See Sections II.A, II.C.

<sup>12</sup>See Sections II.A, II.C.

<sup>13</sup>See Section III.A.

<sup>14</sup>See Section III.A.3.

These findings have direct implications for a current proposal to reduce the maximum length allowed for principal appellate briefs in the federal courts.<sup>15</sup> Based on the results of our study, such a reduction may cut more sharply against the appellant lawyer in a civil appeal who, having to overcome the general inclination of appellate courts to affirm trial courts, may need more space to present a winning argument.

In addition, the variable for appellee lawyer was statistically significant in our primary model and in the anticipated direction, that is, greater experience in appellate work correlated with success on appeal.<sup>16</sup> In light of prior work by others on lawyer experience in appellate work and the intriguing finding in this study, the question of lawyer experience and litigation success warrants continuing study.

## II. CIVIL APPEALS IN THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2010–2013

### *A. Development of Model, Identification of Variables, and Collection of Data*

For this study, we conducted an analysis of civil appellate decisions, both published and unpublished, made by judges hearing appeals in the U.S. Court of Appeals for the Ninth Circuit from the beginning of 2010 through the end of 2013.

#### 1. Source of Decisions

The Ninth Circuit reports dispositions of appeals on its website, with separate data sets for published opinions<sup>17</sup> and unpublished memoranda.<sup>18</sup> Each set of decisions may be analyzed by year (with complete sets running from 2010 forward) and by case type. For our study, we explored the “Civil” case type, a category that excludes not only criminal cases but also prisoner claims, bankruptcy cases, habeas corpus petitions, agency appeals (including immigration cases), and Tax Court cases. Thus, the “Civil” appeals under study here are those taken from District Court judgments that do not fall into one of the other specialized case types.

#### 2. Random Selection of Sample

For each of the four years of our study (2010, 2011, 2012, and 2013), we randomly selected 50 decisions for coding from each set of published and unpublished decisions. If a randomly selected decision fell outside the scope of our study because it involved a pro se appeal (so that lawyers were not filing briefs on both sides of the case) or, less frequently, because the Ninth Circuit did not address the merits (such as a dismissal for

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<sup>15</sup>See Section III.A.4.

<sup>16</sup>See Section III.B.

<sup>17</sup>See <<http://www.ca9.uscourts.gov/opinions>>.

<sup>18</sup>See <<http://www.ca9.uscourts.gov/memoranda>>.

lack of appellate jurisdiction or intervening mootness), then we randomly selected another case as a replacement.<sup>19</sup> For published opinions, few cases selected initially at random fell outside of the study, while for unpublished decisions, approximately one-third had to be replaced by another random draw.

### 3. Primary Mixed Model<sup>20</sup>

A combined model was created that included both published and unpublished decisions. This primary model—the Mixed Model—includes both published and unpublished decisions at the same proportion as they appear in the full population of decisions for the year. For our Mixed Model, then, we included all 50 of the unpublished decisions drawn at random from each of the four years of study and then randomly added published decisions from our previously selected random sample of 50 published decisions for that year until the correct proportion was reached.

For example, in 2013, for the “Civil” type of case in the Ninth Circuit, unpublished memoranda recorded the disposition of 77.1 percent of those appeals, with 22.9 percent resulting in published opinions. For 2013, then, all 50 of the randomly selected unpublished decisions were included in the Mixed Model, along with 15 randomly selected published decisions. In this way, the decisions included in the Mixed Model were weighted to reflect the distribution in the full population of Ninth Circuit dispositions between published and unpublished decisions.

### 4. Dependent Variable

As the outcome variable of interest, a reversal by the judge sitting on the Ninth Circuit of the District Court judgment was coded as 1, with affirmance being coded as 0. If a judge voted to reverse or vacate and remand on any issue presented, the decision was coded as a reversal, even if the judge voted to affirm on other issues presented in the appeal. In other words, our “reversal” coding is holistic in nature in terms of the judges’ overall reaction to the appellant’s appeal, counting as a reversal if the Court of Appeals has upset the District Court status quo in any meaningful way.<sup>21</sup> Given that the substantial majority of the appeals were affirmed in entirety, a reversal on any issue is at least a

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<sup>19</sup>To ensure inclusion of dispositive decisions only and to avoid duplication, we excluded at the outset all nondecisional orders and orders amending prior decisions, although we took later amendments to decisions into account in coding the outcome and main issue on appeal for cases included in our sample.

<sup>20</sup>An Excel spreadsheet showing the coding for the primary model is available at <<http://courseweb.stthomas.edu/gcsisk/brief.study/cover.html>>. The sampled Ninth Circuit decisions were coded by two law students working independently from each other. The teams of student coders were trained, provided a written coding book, and worked under the supervision of one of the authors. Each coding decision reflects the independent evaluations of at least two persons.

<sup>21</sup>See Theodore Eisenberg & Michael Heise, *Plaintophobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 *J. Empirical Leg. Stud.* 100, 115 n72 (2015) (coding reversal to include both full and partial reversals and noting that “any result short of a full affirmance represents an upsetting of the status quo [established by the trial court decision] and, at a practical level, upsets the party who won at trial”).

partial victory for the appellant.<sup>22</sup> Note that the coding is by each individual participating judge, who ordinarily sat on a panel of three judges, although two en banc panels of 11 judges were randomly selected for the Mixed Model as well.

## 5. Independent Variables<sup>23</sup>

Our independent variables for each model consisted of the following.<sup>24</sup>

*Brief Length:* Measured by number of words, the length of the opening briefs for appellants and appellees was recorded for sampled cases where parties were represented on both sides by lawyers. In most instances, we were able to rely on the lawyer's certification appearing near the end of the brief as to the number of words. When that certification was missing, we pasted the pertinent argument sections of the brief (excluding tables, certifications, and addenda) into a word-processing document to determine the number of words. Most Ninth Circuit briefs were available on Westlaw or Bloomberg Law, but we had to verify brief length with the Ninth Circuit clerk's office for a number of briefs that were under seal (e.g., briefs in Social Security disability appeals are not publicly available). In cases in which there was more than one appellant or appellee who filed separate briefs, the longest brief was coded.

*Attorney Experience:*<sup>25</sup> The experience of the lead attorney for each side, measured by number of prior appearances in federal appeals in the preceding 10 years, was recorded. The lead attorney was the one who argued the case orally (which was identified by designation in the opinion, by reviewing docket records, or by listening to the recording of the oral argument from the Ninth Circuit website).<sup>26</sup> If the appeal was not argued, the lead attorney was the one who signed the brief. Number of appearances in federal appeals was determined through the Westlaw "Litigation History" database for

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<sup>22</sup>To avoid double-counting of sampled cases, when cross-appeals were presented, we coded for only the first appellant's appeal, thus recording a reversal only if the appellant (rather than the appellee-cross-appellant) succeeded. To address the possibility that inclusion of cross-appeals might distort the model, by multiple briefs of different permissible length and possible inclusion of issues not addressed in the initial appellant's brief, we also conducted an alternative regression run excluding the 22 cross-appeals and found no material differences in the results, other than the variable for APPELLEE LAWYER EXPERIENCE moving to marginal significance ( $p = 0.06$ ).

<sup>23</sup>Because we included a broad array of civil appeals in our study, not limited by subject matter or identified as having ideological salience, and because our focus was on the lawyers through brief writing and experience, we did not include background variables on judges, such as party of appointing president. Judges were individually identified in our coding and, in the regression analysis, standard errors were clustered at the judge level.

<sup>24</sup>In addition, for the primary Mixed Model, we included a variable for whether or not the decision was published, which was significant ( $p < 0.05$ ) and in the anticipated direction of being associated with a greater likelihood of reversal when published.

<sup>25</sup>Our exploration of lawyer experience as measured by litigation history on Westlaw was inspired by Haire, Lindquist & Hartley Moyer, *supra* note 1, and Collins & Haire, *supra* note 1, although we developed our own definition of lead attorney and focused on federal appellate experience generally and not only for the Ninth Circuit.

<sup>26</sup>Audio files of oral arguments of Ninth Circuit appeals are available at <<http://www.ca9.uscourts.gov/media>>.

the attorney by counting the number of appearances in a U.S. Court of Appeals or the U.S. Supreme Court.

*Argued:* As a proxy for the importance or complexity of the appeal, we coded whether it had been orally argued or instead submitted on the briefs.

*Issue Type:*<sup>27</sup> Each appeal was coded for issue type as Constitutional, Federal Statute, Diversity, Civil Procedure, or Other. In cases involving multiple issues, the main issue decided by the Court of Appeals was coded.

*Procedural Stage:* The procedural posture at which the case was resolved by the District Court was coded for the main issue decided by the Court of Appeals: Trial Judgment, Summary Judgment, Dismissal at Pleading/Preliminary Stage, Postjudgment Ruling, or Administrative Review.

*Parties:* The nature of the party on each side (or the lead party if there were multiple parties) was coded as a Person, Business Entity, Association, State or Local Government, Federal Government, or Other.

In terms of raw frequencies, Table 1 describes the summary statistics for the primary Mixed Model.

### *B. Regression Analysis*

The dependent variable was the direction of the individual judge's vote in each Court of Appeals civil case, coded as 1 when the judge voted to reverse the District Court, at least in part, and as 0 when the judge voted to affirm the District Court. In the primary Mixed Model—which was randomly weighted to achieve the same proportion of published to unpublished decisions as in the full universe of Ninth Circuit decisions for the years under study—the overall reversal rate was 34.4 percent. This rate closely parallels the results reported by Professor Frank Cross in his comprehensive empirical study of federal appellate decisions, in which he found (for the 1990s) that 64.4 percent of appeals were affirmed.<sup>28</sup>

We adopted multiple regression models to analyze the influences of multiple variables. Because the dependent variable was dichotomous, we applied logistic regression.<sup>29</sup>

Recognizing that judicial observations (judge votes) in our models are not fully independent from one another—because the same judges participated multiple times in our sample of cases—we adjusted the standard errors by clustering. Mindful that “[c]lustering helps mitigate the underestimation of standard errors . . . and reduces the risk of

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<sup>27</sup>The issue type, procedural stage, and party type variables we used were adapted in substantial part from Professor Frank Cross's comprehensive empirical study of decision making in the federal appellate courts. Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* 28, 50–52, 134–38 (2007).

<sup>28</sup>*Id.* at 48.

<sup>29</sup>See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 *Ohio St. L.J.* 491, 553–54 (2004).



Table 1: Descriptive Summary (Mixed Model)

<i>Variable</i>	<i>Mean</i>	<i>SD</i>
Outcome (reversal)	0.34	0.48
Appellant brief length (words)	9,320	3,727
Winning appellant briefs ( <i>N</i> = 281)	10,355	3,313
Losing appellant briefs ( <i>N</i> = 535)	8,776	3,819
Appellee brief length (words)	10,007	3,664
Winning appellee briefs ( <i>N</i> = 535)	9,752	3,574
Losing appellee briefs ( <i>N</i> = 281)	10,491	3,789
Orally argued	0.79	0.41
Published opinion	0.27	0.44
Appellant lawyer experience	30.11	51.37
Winning appellant lyr. expr. ( <i>N</i> = 281)	31.51	53.20
Losing appellant lyr. expr. ( <i>N</i> = 535)	29.38	50.41
Appellee lawyer experience	26.97	42.61
Winning appellee lyr. expr. ( <i>N</i> = 532)	27.09	43.06
Losing appellee lyr. expr. ( <i>N</i> = 281)	26.75	41.81
	<i>Freq.</i>	<i>%</i>
<b>Issue Types</b>		
Constitutional	132	16.18
Fed. statute	389	47.67
Diversity	194	23.77
Civil procedure	68	8.33
Other	33	4.04
<b>Procedural Stage</b>		
Trial court judgment	89	10.91
Summary judgment	333	40.81
Dismiss. at pleading-prelim. stage	274	33.58
Postjudgment ruling	30	3.68
Administrative review	90	11.03
<b>Party Type</b>		
Appellants		
Individual	537	65.81
Business	201	24.63
Association	21	2.57
State-local gov't	36	4.41
Federal gov't	18	2.21
Other	3	0.37
Appellee		
Individual	93	11.40
Business	362	44.36
Association	12	1.47
State-local gov't	167	20.47
Federal gov't	179	21.94
Other	3	0.37

NOTES: Lawyer experience expressed in terms of raw number of appeals. Appellee lawyer experience results exclude the three attorneys who were listed as counsel in 16,870 cases during the 10-year period of this study.

Table 2: Logistic Regression Model of CA9 Reversals, 2009–2013—Mixed Model (Published and Unpublished Decisions)

Appellant brief length	0.00** (0.00)
Appellee brief length	0.00 (0.00)
Orally argued	1.19** (0.29)
Published opinion	0.55* (0.26)
Appellant lawyer experience	−0.00 (0.00)
Appellee lawyer experience	−0.00* (0.00)
<b>Issue Types</b>	
Constitutional	(ref.)
Fed. statute	0.31 (0.28)
Diversity	0.56 (0.37)
Civil procedure	1.60** (0.35)
Other	0.80 (0.44)
<b>Procedural Stage</b>	
Trial court judgment	(ref.)
Summary judgment	0.25 (0.27)
Dismiss. at pleading-prelim. stage	0.23 (0.30)
Postjudgment ruling	0.36 (0.56)
Administrative review	0.43 (0.37)
<b>Party Type</b>	
Appellants	
Individual	(ref.)
Business	−0.36 (0.23)
Association	−0.55 (0.54)
State-local gov't	−0.75 (0.45)
Federal gov't	1.13 (0.76)
Other	—
Appellee	
Individual	(ref.)
Business	−0.95** (0.27)
Association	0.10 (0.73)
State-local gov't	−0.09 (0.29)
Federal gov't	0.32 (0.38)
Other	—
Constant	−3.00** (0.60)
<i>N</i>	810

\* $p < 0.05$ ; \*\* $p < 0.01$ .

NOTES: Decision reversed on appeal = 1. Robust standard errors, clustered on judge, in parentheses. Unreported results from alternative specifications of all models that exclude the three attorneys listed as counsel in 16,870 cases during the 10-year period of this study do not materially differ from the reported results.

rejecting a true null,<sup>30</sup> following the path of other researchers in judicial decision making, and appreciating that a larger number of clusters enhances accurate inference, we have adopted clustering at the judge level in the first of our primary models here.

<sup>30</sup>Matthew Sag, Tonja Jacobi & Maxim Sytch, Ideology and Exceptionalism in Intellectual Property: An Empirical Study, 97 Cal. L. Rev. 801, 837 n168 (2009).

### C. Summary of Findings

#### 1. Brief Length

As discussed in greater detail below,<sup>31</sup> APPELLANT BRIEF LENGTH proved highly significant and in a positive direction (i.e., correlated with a higher probability of reversal) in our primary Mixed Model ( $p < 0.01$ ). APPELLEE BRIEF LENGTH did not approach statistical significance in this model ( $p = 0.652$ ).

#### 2. Lawyer Experience

As also discussed in greater detail below,<sup>32</sup> APPELLEE LAWYER EXPERIENCE was significant ( $p < 0.05$ ) and in the expected direction (i.e., more experience for an appellee's lawyer was negatively correlated with a reversal) in the primary Mixed Model.

#### 3. Control Variables

In addition, we included a number of control variables for a more fully specified model, as earlier outlined in the summary statistics table (Table 1). Certain findings of note are described below.

*a. Oral argument.* Of particular interest, ORAL ARGUMENT was highly significant as an independent variable ( $p < 0.01$ ) with a large positive coefficient. For this particular set of civil cases, the oral argument rate was high. In 2002, the Ninth Circuit heard oral argument in 38.7 percent of appeals.<sup>33</sup> Ten years later, oral argument was heard in under 20 percent of appeals in this circuit.<sup>34</sup> In our primary Mixed Model that combines both published and unpublished decisions, nearly 79 percent of the civil appeals had been argued for the years in question. Given that the "Civil" category of appeals under study here excludes not only criminal cases but also prisoner cases, habeas corpus, and immigration reviews, as well as any case involving a pro se appellant, the higher argument rate is less remarkable.

Although highly correlated with reversal, oral argument being obtained was hardly a guarantee of success for an appellant. Although nearly 79 percent of the appeals in our study were argued, the reversal rate was 34.4 percent. Still, while being granted oral argument does not lead ineluctably to victory for an appellant, being denied oral argument may be devastating. The chance of success for an appellant (based on raw numbers) fell from 34.4 to 16.4 percent when the case was not argued.

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<sup>31</sup>See Section III.A.

<sup>32</sup>See Section I II.B.

<sup>33</sup>Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 15 (2d ed. 2003).

<sup>34</sup>Table S-1, U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2012, U.S. Courts. Available at <<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S01Sep12.pdf>>.

Importantly, the panel's decision not to hear oral argument in an appeal does not "cause" a loss for the appellant; rather, it sends an early signal that such a loss is likely impending. In an appellate guide prepared by Ninth Circuit attorney representatives, the appellate advocate is assured that submission of the case without oral argument "should not be taken as any kind of negative comment on the case or the advocacy."<sup>35</sup> The empirical data suggests otherwise for civil appeals in which both parties are represented by counsel, at least in terms of offering an early hint on outcome.

The appellant's lawyer should recognize the vital importance of presenting the appeal in the written brief in a sufficiently compelling manner as to convince the panel of judges to hear argument in the case.<sup>36</sup> And an appellant's lawyer who succeeds in being placed on the argument calendar should never fail to appear. An appeal that otherwise might be destined for defeat may be turned around by the additional persuasive opportunity afforded to the appellant's attorney who is allowed to present argument to the panel.<sup>37</sup>

*b. Issue type, procedural stage, and party type variables.* We included ISSUE TYPE, PROCEDURAL STAGE, and PARTY TYPE control variables to ensure that any relationship discovered between other independent variables and the dependent variable was not an "artifact" of some correlation between that variable and a general category of case, process, or party.<sup>38</sup> We briefly note a couple of these variables that proved significant.

*Civil Procedure Issue Type Variable.*<sup>39</sup> In the primary Mixed Model, the only ISSUE TYPE to achieve significance was CIVIL PROCEDURE ( $p < 0.01$ ). An appeal pivoting on a procedural question was much more likely to result in reversal of the District Court. Compared with the overall reversal rate of 36 percent in this model, appeals focused on procedural questions were reversed at a 47 percent rate. Given that procedural

<sup>35</sup>The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit 70 (2014).

<sup>36</sup>See Solomon L. Wisenberg, Federal Criminal Appeals: 10 Things You Should Know, FindLaw ¶ 5 (Jan. 8, 2015), available at <<http://corporate.findlaw.com/litigation-disputes/federal-criminal-appeals-10-things-you-should-know.html>> ("I have, in my career, won appeals without oral argument, but that is not the norm.")

<sup>37</sup>See Robert J. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 Iowa L. Rev. 1, 17 (1986) (discussing potential of oral arguments to change a judge's view on the merits of a case).

<sup>38</sup>See Donald R. Songer & Susan J. Tabrizi, The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts, 61 J. Pol. 507, 517 (1999) (explaining that, in a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases, "[t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases").

<sup>39</sup>While the other issue type categories turn on the source of the law giving rise to the claim considered by the court on the merits and are self-explanatory, the "Civil Procedure" category included appeals addressing primarily procedural matters that did not go directly to the merits, such as class action certification, jurisdictional errors, pleading mistakes, service of process objections, or sanctions.

questions rising to the Court of Appeals typically involve legal questions reviewable de novo, and speculating that parties choose to highlight procedural rather than substantive legal questions on appeal only when there is a particularly strong argument for procedural error below, this correlation is not surprising.

*Business Party:* In the primary Mixed Model, only one party type emerged as significant—BUSINESS APPELLEES ( $p < 0.01$ )—and in the anticipated direction of being negatively correlated with a reversal. In other words, a business entity that had succeeded below was more likely to hold on to that trial court victory on appeal. Looking to raw numbers in the Mixed Model, a business appellee being in the case lowered the rate of reversal from 34.4 percent to just under 27 percent.

### III. BRIEF LENGTH AND LAWYER EXPERIENCE AS CORRELATED WITH APPELLATE SUCCESS

#### A. Correlation of Greater Brief Length with Appellate Success for Appellants

##### 1. Advice of Judges and Lawyers on Brief Length

“Brevity” for brief writing is the clarion call sounding from the federal appellate bench.<sup>40</sup> In listing common criticisms of briefs by judges, Judge Ruggero Aldisert places in prominent first place: “Too long. Too long. Too long.”<sup>41</sup> In a recent question-and-answer session at a law school, Chief Justice John Roberts responded to a question on persuasive brief writing by saying: “I know that every judge in this room will agree with me: Be brief! Be concise.”<sup>42</sup>

Prolixity—the opposite of brevity—is described by judges as injurious to the case. By waxing long, the author of the brief may lose the attention of a busy judicial audience. Moreover, by failing to focus in like a laser on the key issue and making short-shrift of it, the lawyer is said to signal a lack of confidence in the strength of the appeal. In blunt terms, former Chief Judge Alex Kozinski reports that “when judges see a lot of words they immediately think: LOSER, LOSER.”<sup>43</sup>

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<sup>40</sup>Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008) (“The power of brevity is not to be underestimated.”); Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 9.8, at 139 (2d ed. 2003) (saying that judges “send this very loud message to the appellate bar: *You write too much. Prepare better and write less*” (emphasis in original)).

<sup>41</sup>Aldisert, *supra* note 40, § 2.4, at 25; see also Interview by Bryan A. Garner with Antonin Scalia, Associate Justice, U.S. Supreme Court, Washington, DC (2006–2007), available at <<https://www.lawprose.org/interviews/supreme-court.php>> (“prolixity is probably the worse offense that most unskilled briefs writers are guilty of”).

<sup>42</sup>Inadmissible, Roberts: “Be Brief!” Nat’l L.J., Sept. 29, 2014, at 24.

<sup>43</sup>Kozinski, *supra* note 3, at 327.

Somewhat in contrast, although no one argues for verbosity as a positive good, practicing lawyers argue that brevity cannot be a talisman for good brief writing.<sup>44</sup> Appellate specialists Andrew Frey and Roy Englert do encourage lawyers to “write lean prose that makes the necessary points and avoids excessive repetition,” while explaining that “[r]elatively extended treatment may be necessary because the case involves an especially complex issue or because a number of issues must be presented.”<sup>45</sup> James Martin, then president of the American Academy of Appellate Lawyers, explains that “counsel in complex cases” must have sufficient brief space “to provide an appellate court with an appropriately thorough and useful discussion and analysis of the issues on appeal.”<sup>46</sup>

Appellate expert Martin Siegel acknowledges the “valid temptation to keep briefs as lean as humanly possible,” but explains that a lawyer sometimes must decide whether to add another issue—“one that will lengthen the brief and thereby annoy its readers but that just might win the case.”<sup>47</sup> As Siegel emphasizes, the lawyer’s “first job is to win, even if that inevitably leads to a little more reading by judges or results in a loss of style points.”<sup>48</sup>

## 2. Findings on Brief Length and Appellate Success

In our study of civil appeals decided between 2010 and 2013 by the U.S. Court of Appeals for the Ninth Circuit, APPELLANT BRIEF LENGTH measured by words proved highly significant at the 99 percent probability level ( $p < 0.01$ ) in our primary Mixed Model that included both published and unpublished decisions. Moreover, APPELLANT BRIEF LENGTH had a positive coefficient as an independent variable, meaning that greater brief length was correlated with a heightened probability of a reversal of the District Court judgment (or, to state it in opposite terms, shorter brief length was correlated with a greater chance of affirmance). Importantly, as part of the regression analysis, we controlled for such factors as whether the appeal was argued, the type of case, procedural stage, and lawyer experience, so the brief length finding stands independent of these variations in case and litigation personnel characteristics.

In sum, as the length of an appellant’s brief increased by number of words, the rate of reversal increased as well. Greater brief length ran parallel to appellate success.

Figure 1 illustrates this escalating correlation using raw frequencies (unadjusted by multivariate regression), by comparing brief length in 1,000-word increments and reversal rate percentage.

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<sup>44</sup>See Frey & Englert, *supra* note 5, at 8 (“‘Write short’ is not a panacea.”).

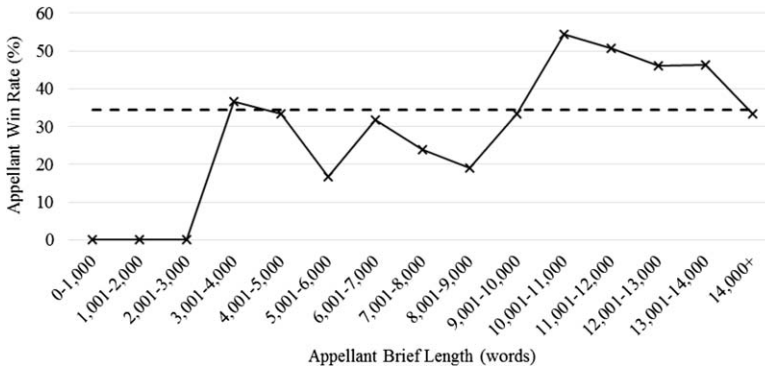
<sup>45</sup>*Id.*

<sup>46</sup>American Academy of Appellate Lawyers’ Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Letter by James C. Martin, President, Nov. 24, 2014 [hereinafter American Academy of Appellate Lawyers], available at <<http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0013>>.

<sup>47</sup>Martin J. Siegel, How to Winnow Arguments on Appeal, 40(2) *Litigation* 30, 31, 32.

<sup>48</sup>*Id.* at 34.

Figure 1: Appellant brief length by 1,000-word increments compared to reversal rate, by percentage.



NOTE: The dashed line indicates the appellant’s overall win rate (securing a reversal) at 34.4 percent.

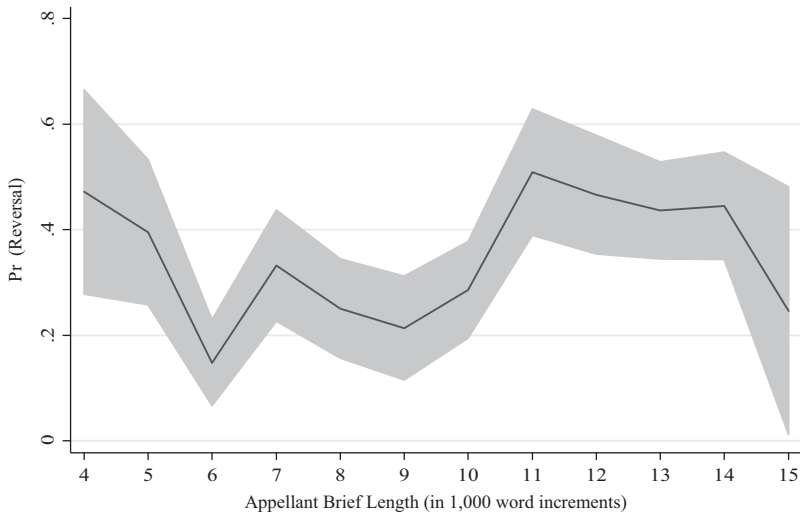
As shown in Figure 1, appellant briefs that were under 3,000 words were filed in appeals that uniformly failed. Appellant briefs between 10,001 and 14,000 were filed in appeals that succeeded at rates well above the average of 34.4 percent, rising to nearly 55 percent for those between 10,001 and 11,000 words and holding at around 45 percent for those between 12,001 and 14,000 words. In Figure 1, the most pronounced association (in opposite directions) between brief length and reversal rate is at the lower and higher ends of the spectrum of brief length by word.

Using the same comparison of brief length in 1,000-word increments to reversal rate, Figure 2 presents the marginal effect of brief length as a predictor of reversal rate when controlling for all other independent variables in the regression model.<sup>49</sup>

The power of appellant brief length as a predictor of reversal rate is confirmed by how closely the average predicted effect under regression as illustrated in Figure 2 mirrors the raw frequency comparison chart in Figure 1. The most significant difference is that the regression-produced graph omits the shorter briefs (those with fewer than 3,001 words), which uniformly led to a loss for appellants and thus lacked necessary variation. Importantly, as Figure 2 shows, even controlling for such factors as the experience of the lawyer, the issue type of the appeal, the procedural stage at which the judgment below was rendered, and the nature of the party, greater appellant brief length was

<sup>49</sup>See Patrick Royston, *marginscontplot: Plotting the Marginal Effects of Continuous Predictors*, 13 *Stata J.* 510 (2013); Richard Williams, *Understanding & Interpreting the Effects of Continuous Variables: The MCP Command*, available at <<http://www3.nd.edu/~rwilliam/stats3/Margins03.pdf>> (Feb. 21, 2015); see also Michael Heise, *Plotting Marginal Effects*, [www.elsblog.org](http://www.elsblog.org) (last visited: Jan. 25, 2015), available at <[http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2015/01/plotting-marginal-effects.html](http://www.elsblog.org/the_empirical_legal_studi/2015/01/plotting-marginal-effects.html)> (describing the “user-created Stata command, *mcp*, that can transform marginal effects’ results into intuitive graph”).

Figure 2: Average predictive probability of a reversal as a function of appellant brief length.



NOTES: All cases (39) where appellant brief length was fewer than 3,001 words were excluded from the analyses as all such cases resulted in a loss on appeal (affirmance). Shaded area displays confidence intervals. Unreported alternative specification using covariate means generated substantively similar results. The tick marks on the horizontal (or “x”) axis note appellant brief word length groupings of 1,000 words. Thus, for example, the tick mark labeled “4” includes appellant briefs that include between 3,001 and 4,000 words (inclusive).

powerfully associated with a greater likelihood of appellate success. Thus, for example, the limited success of appeals in which shorter appellant briefs were filed is not plausibly attributable to other directly measured factors, such as the limited experience of the appellant’s lawyer.

APPELLEE BRIEF LENGTH did not approach statistical significance in our primary model ( $p = 0.652$ ). Interestingly, the variable was significant ( $p < 0.01$ ) in an alternate regression run of published decisions considered separately. Greater brief length for appellees was negatively correlated with reversal by published opinion. Given that publication of an opinion is an indicator of importance,<sup>50</sup> appellees in these substantial appeals may face the same need for more space to make winning arguments that appellants face in civil appeals generally.<sup>51</sup> Again, however, in the larger universe of published

<sup>50</sup>See Ninth Circuit Rule 36-2 (listing among other “criteria for publication” that the disposition “[e]stablishes, alters, modifies or clarifies a rule of federal law”; “[c]riticizes existing law”; or “[i]nvolves a legal or factual issue of unique interest or substantial public importance”).

<sup>51</sup>See Section III.A.3.



and unpublished decisions, the length of the brief filed by the lawyer for the appellee was not significantly correlated with the outcome of the appeal.

### 3. Possible Interpretations of the Findings

Contrary to the conventional wisdom emanating in powerful terms from the bench, and frankly to our initial surprise as researchers, the most powerful correlation in our study between briefs filed and disposition of the appeal is that longer briefs by appellants were significantly more likely to be linked with reversal. Examined empirically and systematically, brevity did not appear to be the key to appellate success across the breadth of civil appeals. Rather, for appellants, more extended exposition in briefs was correlated with winning the appeal, while briefs on the shortest end of the scale were presented in appeals that failed at a significantly greater rate.

As illustrated by Figure 1, for appellants in the set of civil appeals under study here, briefs that were conspicuously short fell uniformly on the losing side. But the story does not end there. Charting appellant success rates by 1,000-word increments confirms that those briefs on the longer end of the scale had been filed in appeals that achieved a higher than average reversal rate. In sum, for clients and their lawyers prosecuting civil appeals from District Court judgments, there is a robust and generally escalating correlation between greater brief length and greater success, especially at the high and low ends of the brief-length spectrum.

Nonetheless, we think it absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal. We do not think that the takeaway from this study could be that prolixity is the ticket to appellate victory. It is foolish to believe that a strong brief could be strengthened even further by padding it with excess verbiage to elevate the number of words right up the maximum allowed. Clear and economical writing surely is likely most effective. Repetition diminishes persuasive power. Wordiness dissipates focus. Digressions distract. String citations interrupt. Embellishment annoys.

Rather, we suggest that the findings in this study point to something more nuanced, but still very important, which is that the right length of a brief should turn on the substance of the individual case and the nature of the winning argument. While brevity has its place and tighter writing remains an essential part of the set of skills for a persuasive writer, the greater priority for the civil appellate brief-writer is persuasive completeness.

On the one hand, Chief Judge Wald's pointed warning that "[t]he more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes"<sup>52</sup> should not be ignored. On the other hand, Chief Judge Wald immediately qualifies her call for "the shorter and punchier" brief by insisting that "everything that counts has to be in" the brief, which she

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<sup>52</sup>Wald, *supra* note 4, at 9.

acknowledges “may seem inconsistent.”<sup>53</sup> The tension here is between the judge’s understandable preference for terse writing against the conceded need for completeness in the lawyer’s communication to the court.

The most straightforward explanation for this study’s findings may be that, at least within the relatively limited space of up to 14,000 words, the thorough explication often is the more powerful explication. Judges understandably wish for a shorter document given the demands on their time and are less than delighted by the prospect of trudging through a longer dissertation. Nonetheless, the merits of the appeal may call for a more expansive and ultimately more persuasive treatment by the lawyer for a party challenging an adverse decision below.

Martin Siegel makes the salient point very well, in a manner consistent with our empirical findings:

At bottom, the problem is that lawyers’ and judges’ interests don’t perfectly align. Judges naturally want the shortest brief and the quickest route to a correct decision, while lawyers are paid to maximize the odds of victory with necessarily limited information about that route’s location.<sup>54</sup>

Along these same lines, Andrew Frey and Roy Englert observe that “[j]udges may always grumble about the length of briefs, but, if you stay within the rules and write briefs that tell them what they need to know in economical prose, they usually will come around.”<sup>55</sup> Indeed, our findings suggest judges are more likely to “come around” to appreciate the meticulous brief that shows the path to a resolution in the appellant’s favor.

Stressing again that brief length standing alone surely is not the *cause* of appellate success, the correlation we have uncovered in our study instead may reflect the nature of the reversible judgment. In other words, the source for both enhanced appellate success and expansive briefs by appellants may lie in the complexity of the underlying case and lower court disposition that sets the stage for reversal on appeal.

In the particular context of civil appeals in federal court, a successful argument for reversal may be more likely to arise in a case of greater complexity. If so, then the greater difficulty of the legal issues and the intricacies of the factual scenario presented in such a case may simultaneously offer a greater chance for appellate victory and demand a more extended discussion in the appellant’s brief. As James Martin of the American Academy of Appellate Lawyers suggests, “[i]f the average civil-case brief is longer today [2014] than in 1988, the reason could be that appeals in civil cases are more complex.”<sup>56</sup>

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<sup>53</sup>Id. at 10; see also id. at 12 (admitting that her “advice on short, punchy briefs clearly raises a dilemma” for attorneys who are handling “the mammoth regulatory cases” with voluminous records and considerable complexity).

<sup>54</sup>Siegel, *supra* note 47, at 34.

<sup>55</sup>Frey & Englert, *supra* note 5, at 8.

<sup>56</sup>American Academy of Appellate Lawyers, *supra* note 46, at 9.

#### 4. Implications for Proposals to Reduce Brief Length Maximum for Federal Appeals

When the Federal Rules of Appellate Procedure were first adopted in 1967, principal briefs by appellants and appellees in the federal Courts of Appeals were limited to 50 pages of standard typographic printing, which was the equivalent of 70 pages of typewritten text.<sup>57</sup> In 1979, the rule was revised to eliminate any distinction between printed and typewritten briefs, setting a single limit for principal briefs of 50 pages.<sup>58</sup>

In 1998, with the advent of the personal computer and the end of typewritten legal documents, the maximum length of briefs was restated in terms of number of words.<sup>59</sup> Under Rule 32(g) of the Federal Rules of Appellate Procedure, a principal brief may “contain[] no more than 14,000 words.”<sup>60</sup> A brief that is no more than 30 double-spaced pages in length need not include a certificate of compliance with the word limit.<sup>61</sup>

In 2014, nearly 20 years later, the Advisory Committee on Appellate Rules has circulated for public comment a proposal to reduce the number of words allowed to 12,500.<sup>62</sup> The committee explained the proposed reduction as based on a mistake in 1998 when the number of pages was “transmuted” into words.<sup>63</sup> In the committee’s understanding, the 1998 adoption of 14,000 words as the maximum length for the brief “appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines).”<sup>64</sup> Based on a study of pre-1998 briefs finding that 250 words per page “is closer to the mark,” the Advisory Committee proposal would lower the permitted words for principal briefs to 12,500 (i.e., 250 times 50).<sup>65</sup>

In public commentary in response to the proposed change, Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, who was a member of the rules committee in 1998, recalled that the 14,000-word limit was adopted as an appropriate measure, not because of a miscalculation of words per page in Court of Appeals

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<sup>57</sup>Fed. R. App. P. 28, Advisory Committee’s Note (1967).

<sup>58</sup>Advisory Committee Note to 1979 Amendments to Federal Rules of Appellate Procedure, Fed. R. App. P. 28(g).

<sup>59</sup>Advisory Committee Note to 1998 Amendments to Federal Rules of Appellate Procedure, Fed. R. App. P. 32.

<sup>60</sup>Fed. R. App. P. 32(a)(7)(B)(i).

<sup>61</sup>*Id.*, 32(a)(7)(A).

<sup>62</sup>Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure at 49 (Aug. 2014, available at <<http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>> (proposed amendment to Fed. R. App. P. 32)).

<sup>63</sup>*Id.* at 18.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 18, 54.

briefs.<sup>66</sup> Instead, he explained, the word limit adopted in 1998 was based on a count of words in Supreme Court briefs and on an earlier Seventh Circuit rule.<sup>67</sup> Judge Easterbrook stated that he “continued to think [14,000 words] a suitable cap for a brief that can be filed without special permission.”<sup>68</sup> Moreover, one commenter on the proposed rule observed that “250/280 word discrepancy may have its roots in the lack of consensus over what it means to be double-spaced.”<sup>69</sup> The convention for double-spacing in word-processing programs expands the traditional convention for leading between lines, thus resulting in fewer words per page than for those who maintain traditional conventions.<sup>70</sup>

Whatever may be the provenance of the word limits on principal briefs, our study suggests that a downward adjustment could cut most sharply against appellants in counseled civil appeals. The American Academy of Appellate Lawyers argues in its public comment opposing the proposed rule that “reducing the word limits would impair appropriate development of difficult and controversial legal issues.”<sup>71</sup> Civil cases that go to trial “tend to be the most complex and to involve the highest stakes.”<sup>72</sup> The Academy fears that the proposed reduction in the word limits “will adversely impact the presentation of arguments in appeals presenting more complex factual and legal issues, where the current limits are needed most.”<sup>73</sup>

Based on the results of our study, the appellant lawyer challenging the District Court ruling in a civil case may be in greater need of space to present a winning argument on appeal. The appellant lawyer has the burden of overcoming general appellate court deference to trial court judgments, providing the full factual and legal context to demonstrate error, and anticipating which route to reversal is most likely to appeal to the appellate judges. Given “the sequential process of filings briefs,” the appellant has “more of the burden of transforming a case from the trial posture” to the appellate context.<sup>74</sup>

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<sup>66</sup>Frank Easterbrook, Comment on Proposed Rule, Sept. 11, 2014, available at <<http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0006>>; see also American Academy of Appellate Lawyers, *supra* note 46, at 5 (saying its “research has not identified any basis to support the comment that the 1998 Advisory Committee was confused or mistaken”).

<sup>67</sup>Easterbrook, *supra* note 66.

<sup>68</sup>*Id.*

<sup>69</sup>Council of Appellate Lawyers, American Bar Ass’n, Judicial Division, Appellate Judges Conference, Comments on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules, Comment 10 (Feb. 13, 2015) [hereinafter Council of Appellate Lawyers], available at <<http://www.regulations.gov/#!documentDetail;D=USC-RULES-AP-2014-0002-0041>>.

<sup>70</sup>*Id.*

<sup>71</sup>American Academy of Appellate Lawyers, *supra* note 46, at 8–9.

<sup>72</sup>*Id.* at 9.

<sup>73</sup>*Id.*; see also Council of Appellate Lawyers, *supra* note 69, at 2 (supporting Academy’s position).

<sup>74</sup>See Moyer, Collins & Haire, *supra* note 1, at 73.

As shown in Figure 1, appellant briefs from 10,001 to 14,000 words were correlated with higher than average rates of reversal. A point of diminishing returns in brief length obviously exists for persuasive value, busy judges necessarily need to impose limits, and reasonable people will disagree as to the right balance. Our study suggests that for appellants in complex civil appeals, the mark of marginal utility might not be reached under 14,000 words.

Moreover, our study hints that plaintiffs are more likely to be appellants, as nearly three-quarters of the appeals in our model were from judgments entered before trial at either the pleading or summary judgment stages (see Table 1). Accordingly, reducing the space available to make the winning argument is likely to have more negative impact on plaintiffs than on defendants.

As we suggested earlier, the point here is not that longer briefs causally bring about appellate success for appellants, but that the kind of civil cases in which reversal is most warranted may also be of the sufficiently complicated variety to justify a more extended treatment in the appellant's brief.

### *B. Evidence of Correlation Between Lawyer Experience and Appellate Success*

Building on the successful example of appellate specialization before the Supreme Court in the Solicitor General's office for the federal government,<sup>75</sup> many private law firms in the last few decades have established separate appellate practices as a distinct specialty.<sup>76</sup> A growing number of state governments have also consolidated appellate work in a State Solicitor General, especially for Supreme Court advocacy.<sup>77</sup>

Premised on the view that “[a]ppellate advocacy is a different area of the law,” appellate practitioners contend such work is “best left to those who know what they’re doing in the appellate courts.”<sup>78</sup> In addition to skills in legal analysis, research, and writing for “crafting an effective appellate brief,” the appellate specialist is called on “to provide an independent perspective on the relative merits of the case and the potential issues for appeal.”<sup>79</sup> Indeed, some now urge that a “legal team should have an appellate specialist on board from day one.”<sup>80</sup>

<sup>75</sup>George B. Brunt & Laurie Webb Daniel, Appellate Counsel: Why Hiring Them Early Pays Off, 22(1) ACC Docket 64, 66 (2004).

<sup>76</sup>Thomas G. Hungar & Nikesh Jindal, Observations on the Rise of the Appellate Litigator, 29 Rev. Litig. 511, 511 (2010). On the rise of appellate litigators in private practice, see generally Symposium Transcript, The Rise of Appellate Litigators and State Solicitors General, 29 Rev. Litig. 545, 552–83 (2010) [hereinafter Rise of Appellate Litigators].

<sup>77</sup>Rise of Appellate Litigators, supra note 76, at 633–700.

<sup>78</sup>Cardone, supra note 7, at 25–26; see also Successful Partnering, supra note 8, § 66:4 (“If the case is worth appealing, or defending on appeal, it is worth using someone skilled in dealing with appeals.”).

<sup>79</sup>Hungar & Jindal, supra note 76, at 530–31.

<sup>80</sup>Brunt & Daniel, supra note 75, at 64.

Beyond the benefits of greater skill in appellate advocacy and specialization in appellate process and standards, changes in the economics of legal practice have accelerated development of appellate practices in major corporate law firms. Thomas Hungar and Nimesh Jindal contend that, given a “newly competitive market for legal services, law firms scrambled to find ways to distinguish themselves from their peers”—one of which was to create new appellate practice groups.<sup>81</sup> With higher stakes today in civil litigation because of greater risks of liability and the possibility of large punitive damage awards, sophisticated business clients now anticipate the need for appeal and want to have the best appellate practitioners on retainer.<sup>82</sup>

The question still remains whether “there is indeed an advantage to engaging a seasoned appellate attorney.”<sup>83</sup> As the American Academy of Appellate Lawyers bemoans, there has been a “dearth of literature about the effects of [appellate] lawyers’ activities on appellate justice.”<sup>84</sup> Fortunately, while still receiving lesser attention than empirical studies of influences on the legal substantive products of the appellate courts, a few important studies have begun to shed light on the value-added of lawyer experience in the appellate courts.

Early empirical work by Professor Kevin McGuire indicated that “lawyers who litigate in [the Supreme Court] more frequently than their opponents prevail substantially more often.”<sup>85</sup> A very recent study by Professors Ryan Owens and Patrick Wolfarth confirmed the value of appellate experts for states litigating in the high court, suggesting that “if states want to enhance their batting averages before the Supreme Court, they should create formal, professionalized [Solicitor General] offices with appellate specialists who argue their cases.”<sup>86</sup>

For the federal Courts of Appeals, which is the venue for our study as well, Professors Susan Haire, Stefanie Lindquist, and Roger Hartley found a “minimum threshold” of experience to be important for success in product liability appeals.<sup>87</sup> Examining “the impact of attorney expertise in appellate litigation” by number of prior appearances before the particular Court of Appeals under study (the Seventh Circuit), they found no

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<sup>81</sup>Hungar & Jindal, *supra* note 76, at 521–22.

<sup>82</sup>*Id.* at 525–26.

<sup>83</sup>See Cardone, *supra* note 7, at 29.

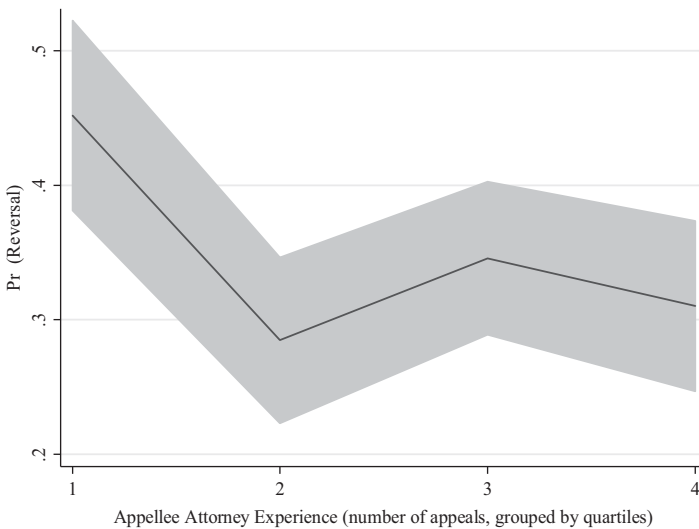
<sup>84</sup>American Academy of Appellate Lawyers, Statement on the Functions and Future of Appellate Lawyers, 8 J. App. Prac. & Process 1, 1 (2006).

<sup>85</sup>Kevin T. McGuire, Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success, 57 J. of Politics 187, 188 (1995).

<sup>86</sup>Ryan J. Owens & Patrick C. Wohlfarth, State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court, 48 Law & Soc’y Rev. 657, 659 (2014).

<sup>87</sup>Haire, Lindquist & Hartley, *supra* note 1, at 667.

Figure 3: Average predictive probability of a reversal as a function of appellee attorney experience.



NOTES: The three attorneys who were listed as counsel in 16,870 cases during the 10-year period of this study were excluded from this analysis. Shaded area displays confidence intervals. Unreported alternative specification using covariate means generated substantively similar results.

evidence that increasing levels of lawyer experience directly corresponded to increasing rates of appellate success.<sup>88</sup> They did find, however, that counsel who did not meet a “minimum level of expertise” were at a disadvantage.<sup>89</sup> When measuring experience in two tiers between those with and without experience, attorneys who had never before appeared in the Seventh Circuit were more likely to encounter procedural questions of timeliness in preserving the appeal and, when representing plaintiffs in product liability cases, were significantly less likely to attract judicial support for their position.<sup>90</sup>

In a subsequent study of the impact of precedent citation in federal appellate briefs on the judges’ employment of precedent in the decision, Professors Laura Moyer, Todd Collins, and Susan Haire found that lawyer experience counts significantly in judicial receptivity.<sup>91</sup> They found that neophyte lawyers were less likely to influence the court’s framing of precedents, even when they won the appeal, while experienced

<sup>88</sup>Id. at 682.

<sup>89</sup>Id.

<sup>90</sup>Id. at 683–84.

<sup>91</sup>Moyer, Collins & Haire, *supra* note 1.

lawyers succeeded “in getting the court to adopt their use of precedent even when their clients lose.”<sup>92</sup>

In our study, APPELLEE LAWYER EXPERIENCE was significant at the 95 percent probability level ( $p < 0.05$ ) in the primary Mixed Model that included both published and unpublished decisions, and the regression coefficients were in the expected direction—that is, more experience for an appellee’s lawyer was negatively correlated with a reversal and thus with a win in the Court of Appeals. (APPELLANT LAWYER EXPERIENCE did not approach significance.) Thus, appellees fortunate to hire more experienced lawyers appeared to enjoy some advantage in preserving trial court victories against appeal.

Figure 3 illustrates the margin effect of lawyer experience (measured by increasing quartile) on reversal rate (which, of course, is a loss for an appellee), when controlling for all other independent variables in the regression model.

#### IV. CONCLUSION

Does greater experience in federal appellate work by a lawyer make that lawyer’s client more likely to prevail on appeal? The short answer from our study of civil appeals appears to be “yes,” at least for one side of the adversarial divide (appellees). Based on this intriguing finding and prior work by other scholars, the evidence grows that attorney experience matters in general and attorney experience in appellate work matters in particular.

Does setting out to write the most succinct brief pave the way to appellate success? The short answer from our study, for appellants in civil appeals where both sides are represented by counsel, appears to be “no.” But that cannot mean that fattening an appellate brief with more words is a promising strategy for appellate victory. The results are better understood as indicating that an appellant must do a thorough briefing job and not truncate necessary points for brevity’s sake alone. Rather than bolstering a foolish entreaty for wordiness, the results indicate that the appellate advocate needs to be given some breathing room to make the tailored argument, calibrating the necessary length of the brief to the underlying complexity of the case.

An apocryphal story is told about an exchange in 1782 between Emperor Joseph II of Austria and Wolfgang Amadeus Mozart upon the premiere of the composer’s new opera, *The Abduction from the Seraglio*.<sup>93</sup> The emperor is said to have complained about the length of the composition, muttering that it contained “monstrous many notes.”<sup>94</sup> Mozart famously replied that there were “exactly as many as are necessary, your Majesty.”<sup>95</sup>

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<sup>92</sup>Id. at 79.

<sup>93</sup>Matthew Gurewitsch, *Too Many Notes and Too Few Ears*, N.Y. Times, Apr. 28, 2002.

<sup>94</sup>Id.

<sup>95</sup>Id. In the 1984 Academy-Award-winning film, *Amadeus*, the emperor not only objects that “there are simply too many notes” in the opera, but proceeds to tell Mozart to “[j]ust cut a few and it will be perfect.” *Amadeus* (Orion Pictures Corp. 1984). Mozart returns, “[w]hich few did you have in mind, Majesty?” Id.