

Using an Overall Page Limit to Improve Motion Practice

Andrew J. Wistrich

There is a limit to everything.¹

People think of courts primarily as places where trials are held. That perception is no longer accurate.² Most cases are civil cases,³ and only a handful of civil cases reach trial.⁴ According to most estimates, approximately two-thirds are settled, and about one-quarter are decided on the basis of a motion.⁵ Only 2.1% are tried.⁶

What these statistics show, among other things, is that motions matter. Of the roughly 30% of cases that are decided rather than settled, the decision is about ten times more likely to be based on a motion than on a trial. In addition, since most cases settle before a trial or a dispositive motion, even non-dispositive motions can be important.⁷ Therefore, although the ongoing efforts to improve the efficiency and quality of trials are

worthwhile, efforts to improve motion practice deserve at least as much attention because motions are so much more common.⁸ For those who are interested in improving the efficiency and quality of adjudication as a whole, measures that would strengthen motion practice merit consideration.

Perhaps the best way to begin thinking about how motion practice might be improved is to explain what motions are. The term "motion" has been defined as "[a] written or oral application requesting a court to make a specified ruling or order."⁹ Defined this broadly, motions are an unavoidable feature of our justice system as it is presently configured.¹⁰ The question, then, is not whether motions can be eliminated, but how they can be kept within appropriate bounds.

Footnotes

1. American proverb, *quoted in* WOLFGANG MEIDER, STEWART A. KINGSBURY & KELSIE B. HARDER, *A DICTIONARY OF AMERICAN PROVERBS* 377 (Oxford University Press, 1992).
2. That perception used to be more nearly correct. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636 (concluding that in 1938, 63 percent of the adjudicated terminations of federal civil cases were trials, while in 1990 the figure was only 11 percent).
3. See BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 95* (1996) (reporting that civil cases comprised 70 percent of the cases filed in state courts of general jurisdiction during 1995); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 16* (1999) [hereafter U.S. COURTS 1999 REPORT] (indicating that 85 percent of the cases pending in federal district courts on September 30, 1999 were civil cases).
4. Trials are surprisingly rare. For example, in the United States District Court for the Central District of California, the largest federal trial court in the nation, there were only 91 civil jury trials and 64 civil nonjury trials during the twelve-month period ending September 30, 1999. See U. S. COURTS 1999 REPORT, *supra* note 3, at 367 tbl. T-1. Similarly, during 1994, there were only 292 state court civil jury trials in Los Angeles, 178 in Manhattan, and 57 in San Francisco. See ERIK MOLLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985 7-11* (Rand Institute for Civil Justice, 1996).
5. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1100 n.17 (1996) (reporting that in one database of state and federal cases, 69 percent were settled, 7 percent were tried, and 24 percent were terminated by some other form of adjudication (such as a motion)); Robert I. Weil, *This Judge for Hire*, CAL. LAW., August 1992, at 41, 42 (estimating that of every 100 cases filed, 67 are settled, 30 are decided by motion, and only 3 are tried); Herbert M. Kritzer, *Adjudication to Settlement*, 70 JUDICATURE 161, 162-164 (1986) (estimating that 22 percent of cases are resolved by trial, motion, or arbitration).
6. This figure is derived from statistics regarding the federal district courts for the year ending September 30, 1999. During that year there were a total of 272,526 civil cases terminated, and there were a total of 5,724 jury trials and bench trials on the ultimate issue. See U. S. COURTS 1999 REPORT, *supra* note 3, at 130 tbl. C & 365 tbl. T-1. These numbers do not include preliminary proceedings during which testimony was taken. The percentage of civil cases tried in state courts is only slightly higher. See OSTROM & KAUDER, *supra* note 3, at 22 (reporting that 3.3 percent of the civil cases terminated in state courts during 1995 were resolved by a trial). The exact percentage of civil cases tried in any particular court, of course, varies depending on the types of cases that predominate in the court's caseload, the attitudes of the judges and the bar toward settlement, and other factors.
7. See WILLIAM W. SCHWARZER, A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, *CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL* § 12:1 ("Because most cases settle before trial, pre-trial motions often play a major role in litigation.").
8. The statistics cited include only dispositive motions. When non-dispositive motions, which are far more common, are included, the gap between the number of motions and the number of trials becomes much wider.
9. BLACK'S LAW DICTIONARY 1031 (7th ed., 1999); see Fed. R. Civ. P. 7(b)(1) (defining a "motion" as "[a]n application to the court for an order. . ."); but see Fed. R. Civ. P. 77(c) (providing that certain "motions" "which do not require allowance or order of the court are grantable of course by the clerk. . .").
10. See William E. Steckler, *Motions Prior to Trial*, 29 FR.D. 299, 302 (1962) ("Justice does require an adequate opportunity to present motions to the court with supporting points and authorities,—an opportunity to oppose motions presented by an adverse party,—and a determination thereof by an informed court.").

The next step is to identify the objectives that motions can and cannot accomplish. Broadly speaking, motions have at least four purposes.¹¹

First, a motion may be used to resolve purely procedural issues, such as which court should handle a case, or the sequence or location in which depositions should be taken. Although these motions can be useful and occasionally are essential, they increase the transaction costs¹² of litigation without addressing the merits. Ideally, they should be kept to a minimum.

Second, a motion may be used to clarify, narrow, or eliminate issues, or to eliminate unnecessary parties. Examples include a motion to dismiss an especially weak claim or defense, or a motion to dismiss a party who was not involved in the underlying events. These motions can promote the efficiency by streamlining a case. They, too, however, increase the transaction costs of litigation. Therefore, they should be filed only when such issues cannot be adequately addressed by the common sense of counsel, the agreement of the parties, or the capitulation of counsel after prodding by the court during a status conference.

Third, a motion may be used to obtain judicial resolution of a question of law or fact in order to presage the likely outcome of a case. For example, a party might file a motion in limine to establish that a crucial piece of evidence, on which the opposing party hopes to rely at trial, will be inadmissible. Such motions may cause the predictions of the parties about how the case probably will be resolved to converge, thereby facilitating settlement.

Fourth, a motion may be used to resolve a case, or a substantial portion of a case, on the merits. The best example is a motion for summary judgment. Motions that possess a realistic chance of resolving all or most of a case should be encouraged, because most motions are cheaper than most trials.¹³ Bringing them early minimizes the transaction costs incurred by the parties and the court, and preserves resources for investment elsewhere.

Although motions are potentially useful tools, many are

unnecessary, most are expensive, and nearly all are too long. As an example, motions to dismiss claims or defenses are common, but many do little to advance a case, even if they are meritorious. Most pleading defects can easily be circumvented by amendment, and claims or defenses so weak that they never should have been pleaded usually are abandoned eventually—at the pretrial conference, if not before. Parties ought not to be put to the burden of filing or opposing motions to get rid of such claims or defenses, and courts ought not to be put to the burden of considering and deciding them.

Similarly, although discovery motions occasionally are necessary or important, many are not. Most could be avoided if one side (or both sides) were more diligent, more courteous, more reasonable, or more assiduous in attempting to reach a practical solution by negotiation. Many are laden with tedious details about what one lawyer said to another lawyer that have little or nothing to do with the issues the court must resolve. Few involve anything other than an issue wholly collateral to the merits, namely, what information should be disclosed by the parties in advance of settlement or trial.

Motions designed to facilitate settlement by resolving a pivotal issue, on the other hand, can be highly efficient. Asymmetric information or divergent expectations about the likely outcome can hinder or delay settlement.¹⁴ The value of this use of motions may be more limited than generally recognized, however, because litigants and their counsel are vulnerable to “egocentric” or “self-serving” biases. These biases cause each side to overestimate its prospects for success and to underestimate the importance of negative information about its position.¹⁵ Therefore, such motions are worthwhile only if the

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11. Although the term “motion” includes written and oral applications or requests made before, during, and after trial, this article focuses on written pretrial motions. A comprehensive description of motions and their purposes lies beyond the scope of this article. For a more complete description of motions and their purposes, see 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1190 (2d ed. 1990).

12. “Transaction costs” have been defined as “the costs of effecting a transfer of rights.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (1972).

13. On the other hand, many trials are fairly short. See U. S. COURTS 1999 REPORT, *supra* note 3, at 368 tbl. T-2 (reporting that 60 percent of civil trials lasted 3 days or less); DALE ANNE SIPES, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 9 tbl. 1 (1988) (reporting that in one study of 1,500 state court civil and criminal trials, the average length of the civil trials, which included both jury trials and bench trials, was just 13 hours and 30 minutes). This suggests that the widespread assumption that trials are far more costly than dispositive motions is frequently untrue.

14. See, e.g., Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209, 209 (1995) (“Economic theory posits that trials occur when plaintiffs expect to receive more from trial than defendants expect

to lose.”); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 423 (1973) (explaining that “a reduction in the variance between the parties’ estimates of the probability of prevailing and the true probability will [generally] increase the settlement rate”); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296 (1973) (observing that “a critical component in the motivation of . . . individuals to settle out of court is agreement on the probabilities of the court’s action”); see generally Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J. LAW & ECON. 451 (1998).

15. See, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 119-120 (1997) (noting that “the parties—even with complete information—interpret the situation in different ways”); George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 157-159 (1993) (presenting evidence that egocentric biases cause both plaintiffs and defendants to overestimate the strength of their positions, and concluding that “[t]his study reveals the shakiness of the assumption that the parties will integrate the information revealed through [discovery and motions] in an unbiased manner in order to settle.”).

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uncertainty is real rather than imagined, the issue is significant, and the losing party is willing to accept the negative signal sent by an adverse ruling. If the losing party will simply dismiss an adverse decision on a motion as unimportant, aberrant, or likely to

be reversed on appeal, the motion will do little to facilitate settlement.

Finally, despite their potential value, summary judgment motions pose significant problems. They are expensive for parties to prepare and time-consuming for judges to decide. Many require extensive consideration of the facts, as well as the interpretation and application of law. The papers supporting and opposing summary judgment motions frequently consume scores—or even hundreds—of pages. Although some summary judgment motions do end or meaningfully narrow a case, others are predestined to fail. Even some of the meritorious ones are not worth the effort invested in them, because the outcome was either a foregone conclusion or contributed little to restricting the scope of the case.

In addition, some summary judgment motions are filed to “educate the judge” about the merits or intricacies of the case, even if it is believed that they probably will be denied. This is an unfortunate practice. Judges need education about their cases, of course, but this is not the way to do it. A futile motion needlessly consumes judicial time and litigant resources. There are other, more efficient ways of achieving similar objectives, such as presenting necessary information in a status report, in a technology tutorial or instructional videotape, or by means of a court-appointed testifying expert or judicial advisor.

Motion practice, then, needs improvement. In its present

form, it is time-consuming for lawyers, expensive for clients, and burdensome for judges. For lawyers and judges, motion sickness has become an occupational hazard. What should be done?

Numerous proposals for reducing or improving motion practice have been made.¹⁶ In some courts, for example, counsel are required to meet and confer, and to attempt in good faith to resolve, discovery disputes or other contested issues before a motion may be filed.¹⁷ The purpose of these rules is to encourage the resolution or narrowing of motions on a consensual basis. Although not a panacea, such rules seem to reduce the number and narrow the scope of the motions that are filed.¹⁸ Similarly, rules allowing courts to impose sanctions for filing frivolous motions or oppositions are designed to keep to a minimum avoidable motions.¹⁹ Such rules, however, have enjoyed mixed success.²⁰

Faced with heavy caseloads and numerous lengthy motions, judges are adopting their own measures to control motion practice. Some forbid counsel from filing any motions without prior judicial approval. Others limit the number of motions that may be filed, such as by restricting each side to a single motion for summary judgment. Finally, some judges deny particular types of motions after only minimal scrutiny, acting on the theory that because so many motions of that type lack merit, scarce judicial resources are better deployed elsewhere.²¹

A better approach might be to establish a presumptive overall page limit restricting the aggregate length of the motions and oppositions to motions that could be filed in a case. Such a limit might be embodied in a local rule, or included in a case management order. The rule or order might provide that no party could file more than a specified number of pages of briefs or memoranda of points and authorities supporting or opposing motions during the pendency of a case, unless that number was enlarged by the court for good cause shown.²² The level of the limit would be set at less than the number of pages that

16. See, e.g., Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50 (1999) (arguing, among other things, that our justice system should make fewer decisions based on papers and make more decisions made based on the direct participation of the affected people); Mathew A. Hodel, *Ending the Paper Fight*, CAL. LAW., March 1999, at 44, 45 (arguing that “[w]e should make it more difficult to file a motion.”).

17. See U.S.D.C. C.D. Cal. Local Rule 7.15 (discovery motions); U.S.D.C. C.D. Cal. Local Rule 7.4 (non-discovery motions).

18. See Steckler, *supra* note 10, at 310 (“One of the most effective techniques of controlling motions which tend to delay, is the prompt issuance of an order requiring counsel to confer among themselves on or before a certain date and to report to the court in writing the results of the conference.”). Not everyone agrees with that assessment. See Hodel, *supra*, note 16, at 45 (“Let’s also eliminate the nonsense ritual of meet-and-confer. I’ve never had a motion voided simply because of this process.”).

19. See, e.g., Fed. R. Civ. P. 11 (authorizing courts to impose sanctions on attorneys and parties responsible for presenting to the court motions or other papers that lack an adequate basis in law or fact).

20. See A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L. J. 397, 425

(1993) (concluding that there are more effective and less costly ways of deterring frivolous litigation); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TULANE L. REV. 1033, 1118 (1993) (criticizing the abuse of discretion scope of review); Carl A. Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 875-877 (1992) (criticizing the safe harbor provision).

21. See Steckler, *supra* note 10, at 307 (suggesting that overworked judges might deny motions for summary judgment “should there exist the slightest doubt of an issue of fact being present”).

22. Of course, such a limit could be expressed in terms other than pages. See Richard C. Reuben, *Courts Playing Against Type*, 82 A.B.A.J. 42 (August, 1996) (explaining that some courts are adapting to advances in word-processing technology by expressing limits on the length of briefs in words or characters rather than in pages); see also U.S.D.C. C.D. Cal Local Rule 3.4.1, 3.4.2 & 3.4.7 (presenting the type size, page size, and spacing of documents filed with the court). For simplicity, however, I shall continue to refer to it as a “page limit.”

counsel normally would spend, but not so much less as to prevent counsel from bringing or opposing motions that truly needed to be brought or opposed in a reasonable manner. The overall limit might be 30 pages per party in a simple case and 100 pages per party in a complex case.²³ Although usually the same overall page limit should apply to each party, disparate treatment might be warranted in some circumstances, such as where there are either multiple plaintiffs or multiple defendants who could achieve economies by coordinating their activities, such as by joining in one another's motions and oppositions. In cases such as these, imposing the limit on each side, rather than each party, might make more sense.²⁴

Of course, an overall page limit must be reasonably applied. The same limit should not be rigidly imposed in all cases.²⁵ Some cases require more motions—or lengthier motions—than others. Instead, there should be a presumptive limit that would be reasonable for the majority of cases, and the court should be given the discretion to increase—or even decrease—the presumptive page limit depending upon the needs of the case after discussion with counsel. As each case proceeded, further adjustments to the overall page limit might be appropriate for good cause, depending on the evolving circumstances.

The approach could be taken one step further. In addition to the losing party's pages, the winning party's pages also could be attributed to the losing party, so that the losing party would be "taxed twice" for failing to reach a pre-filing agreement regarding a motion: once for the pages it used in filing or opposing the motion, and once for the pages the winning party should not have been required to expend in filing or opposing the motion. The test, of course, should be one of reasonableness: was the losing party's failure to agree substantially justified? If it was, then the winning party's pages should not be

attributed to the losing party. But if the losing party's failure to agree was unreasonable, then the winning party's pages should be attributed to it as well. This added risk would provide both counsel with an additional incentive to reach agreement regarding potential motions. If the opposing counsel's briefing turned out to be extensive, the cost in lost pages of filing a dubious motion or opposition could be unexpectedly high.

An overall page limit would help to alleviate some of the flaws in motion practice. To begin with, it would force lawyers to prioritize. Rather than reflexively filing a questionable motion to transfer a case, or to dismiss one of the peripheral causes of the action alleged in the complaint, counsel might choose to conserve those pages for use in bringing a lengthy but potentially dispositive summary judgment motion later on. Similarly, rather than filing a pointless opposition to a meritorious discovery motion, counsel would have an extra incentive to stipulate to all or part of the relief requested. An overall page limit would encourage counsel to seriously attempt to resolve almost every potential motion during a pre-filing conference so that actually filing or opposing the motion would be unnecessary. If an avoidable motion were filed, both the moving party and the opposing party would be forced to expend unnecessarily pages that they might need later. Their desire to avoid regretting an improvident choice would provide them with an incentive to compromise.²⁶

An overall page limit also would encourage counsel to economize on the length of the motions—and the oppositions—they did elect to file. The result would be shorter papers that

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23. One issue that would have to be addressed is whether the overall page limit should include supporting material, such as affidavits, declarations, or exhibits submitted with a motion or in an opposition to a motion. Existing page limits typically regulate only the length of briefs or memoranda of points and authorities, rather than the length of motions or oppositions in their entirety, and therefore do not restrict the quantity of evidence and other supporting material that may be submitted. There is some justification for applying the limit to all documents filed in support of or in opposition to a motion. Often it is the bulk of the supporting material that is the most wasteful, burdensome, and unnecessary aspect of a motion or opposition. In addition, counting the pages of affidavits, declarations, and exhibits against the limit would discourage attempts to evade the overall limit by shifting argument, discussion of legal authorities, or other matters typically included in a brief or memorandum of points and authorities into other documents in order to conserve pages.

On the other hand, as long as effective measures are taken to prevent such manipulation, pages of supporting material probably need not be counted against the overall page limit. Such documents are really meant to substantiate assertions made in a brief or a memorandum of points and authorities, and are not necessarily intended to be read by the court in their entirety. Moreover, the need for supporting material may vary in less predictable ways

than the need for argument. The best course would be to exclude pages of supporting material from the overall page limit, but to make it clear to counsel that shifting material such as legal argument from a brief or memorandum of points and authorities into other documents would not be tolerated, and might result in the court counting all of the pages of supporting material against the overall page limit.

24. See 28 U.S.C. § 1870 (allowing the court to consider several defendants or several plaintiffs as a single party for the purposes of determining the appropriate number of peremptory challenges to prospective jurors).

25. See generally *Amerel v. Connell*, 102 F.3d 1513, 1494 (9th Cir. 1996) (explaining that "[r]igid and inflexible hour limits on trials . . . are generally disfavored"); *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) (same) (explaining that time limits on trial presentations should not sacrifice justice for the sake of efficiency), *cert. denied*, 516 U.S. 1146 (1996); *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) (same), *cert. denied*, 499 U.S. 919 (1991).

26. See generally *Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 1, 65-73 (1999) (describing regret aversion theory, and how it affects litigation-related decisions).

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The constraint of an overall page limit could have unanticipated collateral benefits. For example, it might result in innovations in motion practice, generating new techniques for presenting motions

concisely, persuasively, and comprehensibly. Perhaps counsel would apply the adage that “a picture is worth a thousand words,”²⁸ and explore methods for presenting portions of their arguments by means of pictures, charts, or graphs. Such measures could strengthen the impact of briefs or memoranda of points and authorities, and might even improve the quality of decisions based on motions.²⁹

Perhaps more important, an overall page limit might improve the quality of decision-making. Although the thrust of the proposal obviously is efficiency, there are reasons to suspect that it would improve the quality of decisions on motions as well. A judge who is tired from putting in full days at the courthouse, working on weekends, and who is conscious of the need to move on to the next motion, may be too exhausted or rushed to make the best possible ruling on a motion. Since judges benefiting from an overall page limit would have fewer pages of motions to review, they could give each motion a greater share of their attention. Similarly, because each particular motion would be shorter, a busy judge would be more likely to find the essential points, rather than

losing them in a sea of unimportant information.³⁰ For these reasons, then, an overall page limit would improve the quality of rulings on motions, even though that is not its principal objective.

Of course, an overall page limit might degrade the quality of decision making if it deprived courts of notice of controlling precedents or evidence of important facts because counsel presented too little information in their papers. This possibility seems remote. Counsel have powerful incentives to collect and present more information than is necessary.³¹ Seldom do lawyers present too little evidence or too few arguments. More commonly, the complaints are exactly the opposite: too much information presented, the wrong information presented, or the right information presented but obscured by other irrelevant or cumulative information.³²

One genuine risk posed by an overall page limit—a risk posed by any new procedural rule—is that it might encourage novel forms of strategic behavior, thereby canceling some of its benefits and further deflecting attention from where it ought to be, namely, the merits of the lawsuit.³³ For example, counsel might attempt to trick each other into expending pages unnecessarily by agreeing to the relief sought by a motion only after the motion was filed. Or they might plead unfounded claims or defenses even more often than they already do, hoping to lure opposing counsel into wasting pages to eliminate sham claims or defenses that the pleader never really intended to pursue. Of course, potential side effects such as these should be considered before an overall page limit is adopted. Provisions to avoid or counter such effects might need to be

27. See generally *Spaziano v. Singletary*, 36 F.3d 1028, 1031 n.2 (11th Cir. 1994) (“Effective writing is concise writing. Attorneys who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courts but also to their clients.”), *cert denied*, 513 U.S. 1115 (1995); see Daniel M. Freidman, *WINNING ON APPEAL: AN APPELLATE PRACTICE MANUAL* (1992) (“[M]ost briefs could be improved by tightening and sharpening. The shorter the brief, the more effective it will be.”).

28. American proverb, *A DICTIONARY OF AMERICAN PROVERBS*, *supra* note 1, at 463.

29. See ROBERT LEFFERTS, *HOW TO PREPARE CHARTS AND GRAPHS* 1-2 (1982) (“Many report writers . . . fail to achieve the full impact of their purpose because of the absence of graphics to supplement and complement the words and numbers that comprise their reports. . . . Graphics not only attract attention but also present material in a clearer and more interesting manner.”).

30. See Arno H. Denecke, et al., *Notes on Appellate Brief Writing*, 51 OR. L. REV. 351, 361 (1972) (“[Those] on the other side of the bench are not super-human in . . . their capacity to understand or to accomplish. If you overload them with irrelevant matter, or bore them to tears with tedious and repetitious arguments, you can only reduce their receptivity to your real points. Anything you can do to make your brief shorter, lighter, and more readable, will improve your chances of getting your point across.”); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 15 (D. Conn. 1977) (“[T]here are limits to the amount of factual material any trier, whether judge or jury, can realistically be expected to observe and assess. . . . [N]o matter how conscientiously they approach their task,

profusion of data threatens to impede their orderly and fair decision-making.”); *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986) (arguing that reasonable time limits enhance the quality as well as the efficiency of adjudication because “[p]roperly streamlined, the case is more effective for the ascertainment of truth. . .”).

31. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 342, 384 (1994) (arguing that parties have incentives to present too much evidence during adjudication).

32. See *Coca Cola Bottling Co. v. Reeves*, 486 So.2d 374, 383-384 (Miss. 1986) (“A lawyer never uses one word when two or three will do just as well. . . . The legal mind finds magnetic attraction in redundancy and overkill.”); see also William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 578 (1991) (stating that post-trial interviews of jurors “invariably disclose complaints about the lawyers’ prolixity and tendency to present too much evidence”); *Reaves*, 636 F. Supp. at 1578-1579 (“A court cannot rely on the attorneys to keep expenditures of time in trying a case within reasonable bounds. . . . Advocates tend to confuse quantity of evidence with probative quality.”).

33. See generally Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 785-786 (1995) (predicting that mandatory pre-discovery mutual disclosure rules will have unanticipated negative consequences, such as a tendency to discourage settlement).

incorporated into the rule or order imposing limit.³⁴

One predictable consequence of an overall page limit is that counsel might attempt to conserve pages by making motions orally instead of in writing. This possibility, however, is foreclosed by rules requiring that all motions, except those made during a hearing or trial, be made in writing.³⁵

Another potential problem with an overall page limit is that it might encourage counsel to file more motions or oppositions, or longer motions and oppositions, than they otherwise would have because they might feel that they should expend all of the pages fixed as the limit for the case. Perhaps this is a possibility,³⁶ but with so many other incentives in place—such as clients' concerns about cost, attorneys' concerns about malpractice liability, the characteristics of particular cases, and so on—it does not seem very likely. If it did occur, it would indicate that the level of the overall page limit was too high and might need to be refined. In any event, a court could make it clear to the bar what the overall page limit means.³⁷

An overall page limit also might cause difficulties in some circumstances. As an example, a lawyer might waste pages filing or opposing motions early in a case and then be left with too few to make a meritorious motion at a later stage of the case, when such a motion might not only benefit his or her client, but also might improve the efficiency of the trial. Judges would have to deal with such problems by employing the same flexible good judgment that they already must employ in dealing with the host of practical problems that may arise during the life of a case. I have no doubt that they would be equal to the task.

Of course, other types of limits on motions might be considered. A different approach would be to limit the number of motions that could be made. For example, each side could be limited to making no more than four motions or oppositions during the pendency of a case. This might make sense because the amount of judicial time consumed by motions may depend more on the number of motions filed than on the length of the papers filed supporting and opposing those motions.

This kind of limit, however, seems more problematic than

an overall page limit. It would tend to bar parties from filing entire motions or oppositions, rather than allowing the parties to make or oppose motions, but forcing them to present their arguments more concisely.

Moreover, some motions, such as motions in limine to determine what evidence may be presented at trial, serve salutary purposes by allowing courts to consider the issues in the calm of their chambers rather than the rough and tumble of the courtroom, to take the time to perform necessary legal research, to avoid consuming the jurors' time by delays during trial, and to reach better decisions. Although such motions often can be presented orally or in a page or two, and so probably would not be discouraged by an overall page limit, they would be discouraged or prevented by a limit on the number of motions that could be filed or made.

There is reason to suspect that any problems caused by an overall page limit would not be significant. As many readers probably already have noticed, the seemingly novel concept of an overall page limit is not really new. Instead, it is derived from, and consistent with, several existing rules. Like them, it is based on the insight that limits can be imposed on the investment of resources in a lawsuit in order to enhance efficiency without sacrificing fairness.

For example, it is no longer uncommon for judges to impose limits on the duration of trial presentations.³⁸ Some judges specify the amount of time that counsel can spend on opening statements, examination of particular witnesses, closing arguments, and so on. Others, perhaps more wisely, leave the priorities to be determined by counsel. This is similar to the kind of discipline imposed by an overall page limit, but the latter would apply to motions rather than to trials. The analogy is a close one, though. If we do not allow parties to waste

[L]imits can be imposed on the investment of resources in a lawsuit in order to enhance efficiency without sacrificing fairness.

34. As an example, if the parties stipulated to resolve a motion after it was filed but before it was considered by the court, the pages expended by the parties might not be counted against either of them. This, however, might allow richer parties, who could afford to spend resources on preparing pointless motions or oppositions, to take advantage of poorer parties, who could not tolerate such expense. Alternatively, the pages expended by the party who filed a motion might be taxed against the party who belatedly decided not to oppose it, on the theory that the latter should have capitulated during the pre-filing conference rather than forcing the moving party to invest resources in a motion that should not have been necessary. The latter approach, though more fair, might require that a separate motion be filed addressing only the issue of page shifting.

35. See Fed. R. Civ. P. 7(b)(1).

36. Cf. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519 (1996) (noting that people make decisions by beginning with whatever value is suggested and adjusting, often inadequately, from there).

37. Cf. Malcolm M. Lucas, *quoted in* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 196 (1992) ("Remember, you are writing a 'brief,' and if you do not need the page limit to set forth your arguments, stop.").

38. See, e.g., *Amarel*, 102 F3d at 1513 (affirming imposition of reasonable time limits by trial judge); *General Signal Corp.*, 66 F3d at 1507-1509 (same); *McKnight*, 908 F2d at 114 (declining to reverse imposition of unreasonable time limits, but only because the point had not been preserved for appeal); see generally Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663 (1993); Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 326-327 (1995). Similarly, adoption of pretrial time limits has been advocated to reduce the investment in pretrial proceedings. See generally John Burritt MacArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 887, 978 (1996) (arguing that "[p]retrial time limits are a reform whose time has come," and suggesting that a presumptive nine-month limit be placed on the duration of discovery).

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their money and the judge's time during trial, why should we allow them to do so before trial? Like a judge's time on the bench, a judge's attention in chambers is a scarce and valuable resource. It, too, should be rationed.

An overall page limit on motions also is similar to, but better than, widely used document-by-document page limits. Most courts limit the length of briefs or memoranda of points and authorities.³⁹ Such limits, though helpful, may not be as sound as they seem. First, because they must cover all sorts of motions, from the simplest to the most complex, the page limits contained in such rules usually are set at so high a level that they seldom come into play. Thus, they are not very effective in reducing the length of most briefs, and they do little to constrain the aggregate length of all motions and oppositions.

Second, a document-by-document page limit encourages counsel to file motions serially rather than combining all grounds for relief into a single motion. Such disaggregation is inefficient for the judge because it forces him or her to return to the case again and again, repeatedly "re-inventing the wheel" and making piecemeal rulings, rather than handling everything related to the case at once.

Third, by restricting the number of pages that can be devoted to a particular motion, a judge is substituting his or her judgment for the judgment of counsel, just as the judge would be if he or she micromanaged counsel's allocation of trial time among specific tasks. No busy judge relishes receiving a lengthy motion, but if an attorney makes a strategic choice to spend all of his or her pages on one lengthy but potentially meritorious summary judgment motion, rather than on a series of short but dubious motions to dismiss aspects of the complaint, why should the judge second-guess that strategy? An overall page limit is better than a document-by-document page limit because it intrudes less on the prerogatives and expertise of counsel.⁴⁰

Attributing the winning party's pages to the losing party—a remedy that might be referred to as "page shifting"—is similar to the attorney fee shifting that courts already are authorized to employ in connection with discovery motions.⁴¹ Deciding

whether fees should be shifted usually takes little time, and the risk of fee shifting helps to encourage compromise. Page shifting would have the same effect. In addition, unlike fee shifting, page shifting would affect rich and poor litigants equally.

This aspect of the proposal also is based upon existing rules. For example, local rules imposing document-by-document page limits can be modified for good cause.⁴² Similarly, the Federal Rules of Civil Procedure place presumptive limits on the number of depositions that may be taken and the number of interrogatories that may be served.⁴³ A party may ask for permission to take or serve more, if necessary.⁴⁴ Of course, the parties ought not to be permitted to simply stipulate around the overall page limit without obtaining the permission of the court, as they are allowed to do with respect to limits on the number of depositions taken and the number of interrogatories served. This is because the number of pages of motions and oppositions filed affects the court as well as the parties.

The rules upon which I have drawn in formulating this proposal have worked well. Document-by-document page limits reduce the cost and burden of particular motions. Limits on depositions and interrogatories minimize the unnecessary expenditure of resources during discovery. Time limits on trial presentations encourage lawyers to try cases more efficiently, inexpensively, and comprehensibly. Fee shifting discourages unmeritorious motions and pointless oppositions to meritorious motions. Finally, lawyer discretion in the allocation of limited resources, rather than judicial micromanagement, allows lawyers to use their superior familiarity with a case and their professional judgment to allocate resources most effectively.

What is missing from this panoply of existing rules is a measure to reduce the overall investment of time and resources in motions to a more manageable level without sacrificing the quality of decisions. This gap would be filled by an overall page limit.

The proposal is essentially a refinement of the concept of managerial judging. A judge who is an active case manager can accomplish part of what an overall page limit would achieve by pressing the parties to consider the strengths and weaknesses of their claims and defenses, to abandon those that are not worth pursuing, and to help the parties identify which motions are worth filing and which motions are not. Effective case management, however, is a challenging and time-con-

39. See, e.g., U.S.D.C. C.D. Cal. Local Rule 3.10 (limiting briefs and memoranda of points and authorities to 25 pages).

40. See Howard Ross Cabot & Christopher S. Coleman, *Hey, California, Listen Up*, CAL. LAW., July 1999 at 23, 25 (observing that "[w]hereas detailed limits on individual portions of a trial force courts to micromanage trial proceedings, overall limits allow courts to control the length of trial while leaving attorneys free to arrange the elements of their presentation to advance the interests of their clients."); SCM Corp., 77 F.R.D. at 14 (same); Schwarzer, *supra* note 32, at 579 (same). This does not necessarily mean that document-by-document page limits should be abandoned, although an overall page limit might render them superfluous for all practical purposes. Rather, the point is that principal reliance should be placed on the judgment of counsel to regulate their

behavior as they might see fit in light of the circumstances of each particular case, circumstances with which they are likely to be more familiar than is the court.

41. See Fed. R. Civ. P. 37(a)(4); see also MICHAEL DE MONTAIGNE, *THE COMPLETE ESSAYS* 47-48 (trans. Donald M. Frame, Stanford University Press, 1976) (noting the ancient custom of "punishing, even with death those who obstinately defend a place which by the rules of war cannot be held.").

42. See U.S.D.C. C.D. Cal. Local Rule 3.10.

43. See Fed. R. Civ. P. 30(a)(2); Fed. R. Civ. P. 33(a).

44. See *Archer Daniels Midland Co. v. Aon Risk Services, Inc.*, 187 F.R.D. 578, 586-587 (D. Minn. 1999) (collecting cases regarding the evaluation of such requests).

suming process. Although some judges enjoy it and are good at it, others lack the time, the aptitude, or the inclination to engage in it. Moreover, even the most perceptive and active case managers are limited in their ability to appreciate the nuances of some cases as well as the lawyers can. Therefore, where judicial case management leaves off, an overall limit on motions can take over. An overall limit on motions is not a substitute for active judicial case management, but it can serve as a supplement to it.

Many courts probably would have the power to adopt an overall page limit by local rule, if they chose. Individual judges probably could include an overall page limit in their case management orders.⁴⁵ Courts, after all, possess the inherent power to regulate in a reasonable manner the conduct of proceedings before them.⁴⁶

There should not be any constitutional impediment to adoption of the proposal. It would not prevent litigants from filing a lawsuit, or from making or opposing motions seeking relief from the court during the pendency of a lawsuit, so it would not violate the right of access to the courts.⁴⁷ Similarly, as long as it was applied reasonably, it would not violate the right to due process of law.⁴⁸ An overall page limit would simply ration the time and energy of judges, a scarce and valuable resource. No litigant should be permitted to commandeer more than a reasonable share of that resource; otherwise, courts would be at the mercy of litigants who chose to occupy enormous quantities of court time, preventing courts from making high quality decisions in other cases, or from resolving other cases promptly.⁴⁹

Despite its advantages, I offer this proposal with ambivalence. I trust the professionalism of counsel, and I do not enjoy setting and enforcing arbitrary limits. Nor do I relish the

thought of asking counsel—or my courtroom deputy clerk—to keep track of the number of pages that have been expended on motions in a case. On the other hand, we have made a societal judgment to understaff the courts at every level.⁵⁰ Viewed against that background, reasonable limits on access to the courts—including motions—are unavoidable.

Whether an overall page limit on motions and oppositions would improve or worsen motion practice may be debatable. Because it is based upon principles that have proved successful in other contexts, however, there is a good chance that it would work. Perhaps it should be added to the list of case management tools from which judges may choose in attempting to manage their cases effectively.

Andrew J. Wistrich has served as a Magistrate Judge in the United States District Court for the Central District of California since April 1994. He received undergraduate degrees in philosophy and political science from the University of California at Berkeley in 1972 and 1973. Judge Wistrich received his law degree from the University of Chicago, where he was a member of the law review, in 1976. After law school, Judge Wistrich served as a law clerk to Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit. Before becoming a judge, he was a partner in the Palo Alto, California, law firm of Brown & Bain.

45. In some jurisdictions, amendment of existing rules or statutes might be required before the overall page limit on motions could be imposed.

46. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (recognizing “the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases”), quoting *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-632 (1962).

47. See generally *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 515 (1972) (holding that although the right of access to the courts is an aspect of the constitutionally protected right to petition the government for redress of grievances under U.S. Const. Amend. I, it is nevertheless subject to reasonable limitations).

48. *Cf. Amerel*, 102 F3d at 154 (noting that a limitation on cross-examination denies due process only if it is “so severe as to constitute a denial” of any meaningful cross-examination), quoting *Harris v. United States*, 350 F2d 231, 236 (9th Cir. 1965).

49. As one court observed in the context of limits on the duration of trials:

Public resources are squandered if judicial proceedings are allowed to proliferate beyond reasonable bounds. The public’s right to a “just, speedy, and inexpensive determination of every action” is infringed, if a court allows a case, civil or criminal, to pre-empt more than its reasonable share of the court’s time.

Reaves, 636 F.Supp. at 1578, quoting Fed. R. Civ. P. 1; see also *SCM Corp.*, 77 F.R.D. at 14 (“The Court has obligations to other parties who have cases to be heard.”) quoting *United States v. United States Shoe Machinery Corp.*, 93 F.Supp. 190, 191 (D. Mass. 1950).

50. See Judith Resnick, *Trial as Error; Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 998 (2000) (explaining that rather than expanding the federal Article III judiciary to satisfy the demand for adjudication services, Congress and the Judiciary have allowed adjudicatory functions to be shifted to non-Article III judges or to administrative fora, and have encouraged alternative forms of dispute resolution, such as mediation or extra-judicial arbitration).