

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
Heather Anderson, Senior Attorney, 415-865-7691,
heather.anderson@jud.ca.gov

DATE: September 18, 2007

SUBJECT: Appellate Procedure: Overlength Briefs in Capital Cases (amend Cal. Rules of Court, rule 8.630 and adopt new rule 8.631) (Action Required)

Issue Statement

Rule 8.630 of the California Rules of Court addresses briefs in appeals from judgments of death (capital cases). Subdivision (b) of this rule establishes limits on the length of these briefs. Under this rule, appellants' opening briefs and respondents' briefs may be up to 95,200 words long if prepared on a computer or 280 pages if typewritten. Most appellants' opening briefs and many respondents' briefs exceed these limits, however. Rule 8.631(b)(5) provides that the Chief Justice may, for good cause, allow parties to file briefs that exceed the brief length limits. Currently, however, rule 8.630 does not specify the factors that will be considered in determining whether good cause exists to grant an application to file an overlength brief, nor does it specify when a party must file such an application. The Supreme Court requested that the Judicial Council consider amending rule 8.630 to incorporate standards for what constitutes good cause to permit an overlength brief in a capital appeal or to increase permissible length of briefs in these cases.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council effective January 1, 2008:

1. Amend rule 8.630 to:
 - a. Increase the permissible length of appellants' opening briefs and respondents' briefs in capital appeals to 102,000 words if prepared on a computer or 300 pages if typewritten; and

- b. Provide that if the Chief Justice permits the appellant to file an opening brief that exceeds these limits, the respondent's brief may not exceed the length of appellant's opening brief approved by the Chief Justice.
2. Adopt new rule 8.631 to establish an application procedure for requests to file overlength briefs in capital appeals that:
 - a. Applies to capital appeals in which the certified record is filed in the California Supreme Court on or after January 1, 2008;
 - b. Sets out eight factors that will be considered in determining whether good cause exists for filing an overlength brief and requires that parties address these factors in their applications; and
 - c. Requires that, if no extension of time to file the brief is sought, applications to file an overlength brief be filed either 45 days (appellant's opening brief and respondent's brief) or 30 days (appellant's reply brief) before the brief is due. If an extension of time to file the brief is sought, the application would be due on the date specified in the court's order concerning the extension of time.

The text of the proposed amendments to the rules is attached at pages 7–11.

Rationale for Recommendation

Because rule 8.630 does not currently provide counsel with any guidance about what constitutes good cause to grant an application to file an overlength brief, such applications often do not contain specific information about why a longer brief is needed. In addition, because rule 8.630 does not specify when such an application must be filed, these applications are often filed with the proposed overlength brief on the date that the brief is due. Such applications place both the court and counsel in a difficult situation. Without information in the application about the circumstances necessitating additional briefing, the only way for the court to assess whether good cause exists for the overlength brief is to read and analyze the brief and the record early, rather than waiting for the respondent's brief and the reply brief. Furthermore, if the court denies the application at this late stage of the appeal, it would delay the appellate process and burden counsel, as counsel would be required to edit down what they had considered to be a final brief.

At least in part because of these difficulties, applications to file overlength briefs in capital appeals have been routinely granted. Between 1990 and 2005, only one application—which sought to file a brief of more than 1,300 pages—was denied. The end result has been a large number of long briefs that strain the resources of both the court and counsel. Between the years 2000 and 2004, nearly 60 percent of appellants' opening briefs and 20 percent of respondents' briefs exceeded the length limit stated in rule 8.630. The routine granting of these applications also may have diluted one benefit of limitations on the length of briefs—requiring counsel to focus and refine arguments, thereby producing a more effective work product.

To address these concerns, the Supreme Court requested the Judicial Council to consider two alternative approaches to revising this rule:

(a) First, developing standards for the determination of good cause to permit overlength briefs; and

(b) Second, if the first option proved to be impracticable, increasing the basic page limits for appellant and respondent's opening briefs in capital appeals from the current 280 pages to 330 pages, but allowing *no* good cause exception to that new page-length rule except in cases of extraordinary record length.

The task of developing a proposal in response to the court's request was assigned to the Appellate Advisory Committee. The committee formed a working group of experts in the field of capital litigation to consider the first option identified by the court—developing standards for the determination of “good cause.” The working group reviewed statistics from the previous four years regarding the length of appellants' opening briefs in capital cases and the length of the record in these cases. The group also reviewed sample applications to file overlength briefs and sample briefs and shared ideas about the factors that contributed to lengthy briefs. Supreme Court attorneys participated in each of the working group's meetings to provide background information about the court's request and its procedures.

Based on its review of this information, the working group developed a proposal for a new rule concerning applications to file overlength briefs. This new rule—proposed rule 8.631—which the Appellate Advisory Committee is now recommending for adoption, sets out eight factors that will be considered in determining whether good cause exists for filing an overlength brief and requires that parties address these factors in their applications. These factors should help counsel assess, early on, whether it is appropriate to file an application to file an overlength brief and, if so, what needs to be included in such an application. In addition, these objective factors should assist the court in determining whether good cause exists for granting the application without having to read the entire record and draft brief. Proposed rule 8.631 is analogous to rule 8.63, which lays out the policies governing extensions of time and the factors the court must consider in deciding whether such an extension is warranted. Many of the factors listed in subdivision (c) of proposed rule 8.631 are similar to those considered by the courts in determining whether to grant an extension of time or in categorizing a capital case under the Supreme Court's fixed fee guidelines.

Proposed rule 8.631 also requires parties to file applications for overlength briefs earlier in the case. Under this proposal, if no request to extend the time for filing the brief is filed, an application to file an overlength appellant's opening brief or respondent's brief would be due 45 days before the brief is due. In most capital cases, however, one or more requests for an extension of time to file the opening brief are filed. If an extension of time to file the brief is sought, rule 8.631 would require that an application to file an

overlength brief be filed at the time specified in the court's order regarding the extension of time. This will allow the court to set the deadline for filing the application based on the deadline it sets for filing the brief. Similarly, rule 8.631 requires that any application to file an overlength reply brief be filed no later than 30 days before the reply brief is due if no extension of time to file the brief is sought and as specified in the court's order if one is sought. Requiring applications to file overlength briefs to be filed well before the brief is due should give the court sufficient time to act on the application and counsel sufficient time after the court acts to draft the final brief with the applicable length limit in mind.

In addition, to accommodate most capital briefs and reduce the number of cases in which an application to file an overlength brief would be required, under this proposal, the basic limit on the length of appellants' opening and respondents' briefs in capital appeals would be increased to 102,000 words if prepared on a computer or 300 pages if typewritten. Between 2001 and 2004, more than half the opening briefs filed by appellants in capital appeals were less than 102,000 words/300 typewritten pages long. Another 22 percent were within 27,200 words/80 pages of this limit. The committee anticipates that there will be a reduction in the typical brief length as a result both of the implementation of this proposal and of the Supreme Court's decision in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, which clarified the extent of briefing required on issues previously considered and rejected by the court. With these anticipated reductions in the typical brief length, the committee believes that many briefs that would previously have been about 301–380 pages will also come within the proposed new 102,000 words/300 page limit and, thus, that the need to file applications to file overlength briefs will be eliminated in many cases.

The Supreme Court has reviewed the amendments recommended by the committee and supports their adoption by the Judicial Council.

Alternative Actions Considered

In addition to increasing the basic brief length permissible under rule 8.630, the committee also considered the idea of further graduated increases in the basic brief length based on the length of the record. Ultimately, however, the committee decided not to recommend this approach. As noted above, the committee's proposal includes eight factors that are intended to be objective measures of the case's complexity. The committee viewed record length as essentially another, somewhat imprecise, proxy measure for the complexity of the case. The committee therefore viewed it as duplicative to provide both automatic increases based on this proxy measure of complexity and also individualized increases based on the more direct measures of complexity embodied in proposed rule 8.631. In general, the committee believed that it was preferable to use the factors in proposed rule 8.631 because these are more accurate measures of the complexity of the case and thus of the need for additional briefing.

The committee also considered recommending that even in cases in which the appellant has requested an extension of time to file the brief, applications to file overlength briefs be filed 45 days before the due date for the appellant's opening brief. Ultimately,

however, the committee concluded that it would be preferable for the court to set the deadline for the application. The due date for the appellant's opening brief is often extended many times. If the court sets the application deadline in its extension of time order, it allows the court to set the application deadline based on the date the court anticipates that the brief will actually be filed.

Comments From Interested Parties

These proposed amendments were circulated as part of the winter 2006 comment cycle.¹ Seventeen individuals or organizations submitted comments on this proposal. Five of the commentators approved of the proposal without submitting any narrative comments, three commentators indicated they would approve the proposal if modified, six opposed the proposal, and three either did not state a position or the position was unclear. The full text of the comments received and the committee's responses are attached at pages 12–51.

The California Appellate Defense Council Capital Case Committee indicated that some of its members believed the proposal, as circulated for comment, would impose unrealistic and unnecessary bureaucratic burdens on appointed counsel in these cases. Several individual commentators also echoed this concern. The committee believes that this proposal, as modified based on the public comments, should not impose substantial burdens on counsel. This proposal does not add a new application requirement; counsel have always been required to prepare and file an application if they wished to file an overlength capital brief. The current rules, however, provide no guidance to counsel about when such an application should be filed or what should be included in the application. Proposed new rule 8.631 will provide counsel with helpful direction about what constitutes good cause for filing an overlength brief, which should make it easier for counsel to determine whether it is appropriate to file such an application and, if so, what information should be included in the application. In addition, while the applications that are filed may contain more detailed information, as discussed below, the committee has modified the proposal as suggested by many commentators to increase the basic brief length and to set the deadline for the application based on when the brief is due. This should reduce the number of cases in which applications are necessary and address concerns about burdens stemming from the application being due too early in the briefing process.

The proposal that was circulated for public comment did not include any change in the basic brief length limit set by rule 8.630 but did solicit input concerning this length limit. Ten commentators submitted narrative comments concerning this limit. One commentator supported leaving the basic brief length limit at its current level but tracking the number of applications for overlength briefs. The other nine commentators suggested that this basic limit should be increased. Many of these commentators expressed concern

¹ This circulation took place before the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Thus, in the invitation to comment, rule 8.630 was numbered as rule 36 and proposed new rule 8.631 was numbered as proposed rule 36.1.

that enforcement of the current 95,200 word/280 page brief length limit would result in lower-quality briefs and many applications to file overlength briefs. Based on these comments and the statistics showing that approximately 60 percent of appellants' opening briefs filed between 2001 and 2004 were longer than the current length limit, the committee decided to recommend that this limit be increased from 95,200 words/280 pages to 102,000 words/300 typewritten pages.

The proposal circulated for public comment would have required that an application to file an overlength brief be filed within 90 days after the certified record is filed in the Supreme Court. Eleven commentators submitted narrative comments suggesting that this deadline was too early. In general, these commentators suggested that at 90 days after the record is certified for accuracy, counsel typically do not yet know with sufficient certainty what issues they will raise in their briefs and, even if they have identified the issues, do not yet have an accurate picture of how many words/pages will be required to brief each of the issues. Many of these commentators suggested that, because of counsel's uncertainty about the issues and the likely brief length at the 90-day point, this early deadline would result in counsel filing prophylactic applications for overlength briefs in most cases. This, they suggested, would create more work for both appointed counsel and the court. Based on these comments, the committee changed its proposal to require that, if no request to extend the time for filing the brief is filed, and an application to file an overlength appellant's opening brief or respondent's brief is due 45 days before the brief is due and if an extension of time to file the brief is filed, any application is due at the time specified in the court's order regarding the extension of time.

Implementation Requirements and Costs

Requiring that counsel include more information in their applications to file overlength briefs may impose some additional burdens on these counsel, and since these counsel are generally compensated by the state, potentially additional costs to the state. The committee believes, however, that this burden and associated costs will not be large. Counsel must currently prepare applications to file overlength briefs without any guidance on what factors to address. This proposal will help counsel prepare more focused applications. In addition, the increase in the basic brief length should decrease the number of applications that must be filed.

Requiring that, if the appellant or respondent seeks an extension of time to file a brief, the court must set the application deadline in the order regarding the extension of time will imposing some additional work on the court staff who prepare the extension of time orders. The committee does not believe that this will be a large burden, however, because this staff already reviews each case on an individual basis for the purposes of preparing these extension orders and because standardized language concerning the application deadline can be included in the orders. As noted above, the court has reviewed this proposal and supports its adoption by the Council.

Attachments

Rule 8.630 is amended and rule 8.631 of the California Rules of Court is adopted, effective January 1, 2008, to read:

1 **Rule 8.630. Briefs by parties and amicus curiae**

2
3 (a) * * *

4
5 (b) **Length**

6
7 (1) A brief produced on a computer must not exceed the following limits,
8 including footnotes:

9
10 (A) Appellant's opening brief ~~and respondent's brief: 95,200~~ 102,000 words.

11
12 (B) Respondent's brief: 102,000 words. If the Chief Justice permits the
13 appellant to file an opening brief that exceeds the limit set in (1)(A) or
14 (3)(A), respondent's brief may not exceed the length of appellant's
15 opening brief approved by the Chief Justice.

16
17 (C) Reply brief: 47,600 words.

18
19 ~~(D)~~ (D) Petition for rehearing and answer: 23,800 words each.

20
21 (2) A brief under (1) must include a certificate by appellate counsel stating the
22 number of words in the brief; counsel may rely on the word count of the
23 computer program used to prepare the brief.

24
25 (3) A typewritten brief must not exceed the following limits:

26 (A) Appellant's opening brief ~~and respondent's brief: 280~~ 300 pages.

27 (B) Respondent's brief: 300 pages. If the Chief Justice permits the appellant to
28 file an opening brief that exceeds the limit set in (1)(A) or (3)(A),
29 respondent's brief may not exceed the length of appellant's opening brief
30 approved by the Chief Justice.

31
32 (C) Reply brief: 140 pages.

33
34 ~~(D)~~ (D) Petition for rehearing and answer: 70 pages each.

35
36 (4) The tables, a certificate under (2), and any attachment permitted under rule
37 8.204(d) are excluded from the limits stated in (1) ~~or~~ and (3).

38
39 (5) On application, the Chief Justice may permit a longer brief for good cause. An
40 application in any case in which the certified record is filed in the California
41 Supreme Court on or after January 1, 2008, must comply with rule 8.631.

1
2 (c)–(h) * * *

3
4
5 **Rule 8.631. Applications to file overlength briefs in appeals from a judgment of**
6 **death**

7
8 **(a) Cases in which this rule applies**
9

10 This rule applies in appeals from a judgment of death in which the certified record
11 is filed in the California Supreme Court on or after January 1, 2008.

12
13 **(b) Policies**
14

15 (1) The brief limits set by rule 8.630 are substantially higher than for other
16 appellate briefs in recognition of the number, significance, and complexity of
17 the issues generally presented in appeals from judgments of death and are
18 designed to be sufficient to allow counsel to prepare adequate briefs in the
19 majority of such appeals.

20
21 (2) In a small proportion of such appeals, counsel may not be able to prepare
22 adequate briefs within the limits set by rule 8.630. In those cases, necessary
23 additional briefing will be permitted.

24
25 (3) A party may not file a brief that exceeds the limit set by rule 8.630 unless the
26 court finds that good cause has been shown in an application filed within the
27 time limits set in (d).

28
29 **(c) Factors considered**
30

31 The court will consider the following factors in determining whether good cause
32 exists to grant an application to file a brief that exceeds the limit set by rule 8.630:
33

34 (1) The unusual length of the record. A party relying on this factor must specify
35 the length of each of the following components of the record:

36
37 (A) The reporter's transcript;

38
39 (B) The clerk's transcript; and

40
41 (C) The portion of the clerk's transcript that is made up of juror
42 questionnaires

43
44 (2) The number of codefendants in the case and whether they were tried
45 separately from the appellant;

- 1
2 (3) The number of homicide victims in the case and whether the homicides
3 occurred in more than one incident;
4
5 (4) The number of other crimes in the case and whether they occurred in more
6 than one incident;
7
8 (5) The number of rulings by the trial court on unusual, factually intensive, or
9 legally complex motions that the party may assert are erroneous and
10 prejudicial. A party relying on this factor must briefly describe the nature of
11 these motions;
12
13 (6) The number of rulings on objections by the trial court that the party may
14 assert are erroneous and prejudicial;
15
16 (7) The number and nature of unusual, factually intensive, or legally complex
17 hearings held in the trial court that the party may assert raise issues on
18 appeal; and
19
20 (8) Any other factor that is likely to contribute to an unusually high number of
21 issues or unusually complex issues on appeal. A party relying on this factor
22 must briefly specify those issues.
23

24 **(d) Time to file and contents of application**
25

- 26 (1) An application to file a brief that exceeds the limits set by rule 8.630 must be
27 served and filed as follows:
28
29 (A) For an appellant's opening brief or respondent's brief:
30
31 (i) If counsel has not filed an application requesting an extension of
32 time to file the brief, no later than 45 days before the brief is due.
33
34 (ii) If counsel has filed an application requesting an extension of time to
35 file the brief, within the time specified by the court in its order
36 regarding the extension of time.
37
38 (B) For an appellant's reply brief:
39
40 (i) If counsel has not filed an application requesting an extension of
41 time to file the brief, no later than 30 days before the brief is due.
42
43 (ii) If counsel has filed an application requesting an extension of time to
44 file the brief, within the time specified by the court in its order
45 regarding the extension of time.

1
2 (2) After the time specified in (1), an application to file a brief that exceeds the
3 applicable limit may be filed only under the following circumstances:

4
5 (A) New authority substantially affects the issues presented in the case and
6 cannot be adequately addressed without exceeding the applicable limit.
7 Such an application must be filed within 30 days of finality of the new
8 authority; or

9
10 (B) Replacement counsel has been appointed to represent the appellant and
11 has determined that it is necessary to file a brief that exceeds the
12 applicable limit. Such an application must be filed within the time
13 specified by the court in its order setting the deadline for replacement
14 counsel to file the appellant’s brief.

15
16 (3) The application must:

17
18 (A) State the number of additional words or typewritten pages requested.

19
20 (B) State good cause for granting the additional words or pages requested,
21 consistent with the factors in (c). The number of additional words or
22 pages requested must be commensurate with the good cause shown. The
23 application must explain why the factors identified demonstrate good
24 cause in the particular case. The application must not state mere
25 conclusions or make legal arguments regarding the merits of the issues on
26 appeal.

27
28 (C) Not exceed 5,100 words if produced on a computer or 15 pages if
29 typewritten.

30
31 **Advisory Committee Comment**

32
33 **Subdivision (a).** In all cases in which a judgment of death was imposed after a trial that began after
34 January 1, 1997, the record filed with the Supreme Court will be the record that has been certified for
35 accuracy under rule 8.622. In cases in which a judgment of death was imposed after a trial that began
36 before January 1, 1997, the record filed with the Supreme Court will be the certified record under rule
37 8.625.

38
39 **Subdivision (c)(1)(A).** As in guideline 8 of the Supreme Court’s Guidelines for Fixed Fee Appointments,
40 juror questionnaires generally will not be taken into account in considering whether the length of the
41 record is unusual unless these questionnaires are relevant to an issue on appeal. A record of 10,000 pages
42 or less, excluding juror questionnaires, is not considered a record of unusual length; 70 percent of the
43 records in capital appeals filed between 2001 and 2004 were 10,000 pages or less, excluding juror
44 questionnaires.

45
46 **Subdivision (c)(1)(E).** Examples of unusual, factually intensive, or legally complex motions include
47 motions to change venue, admit scientific evidence, or determine competency.
48

1 **Subdivisions (c)(1)(E)–(I).** Because an application must be filed before briefing is completed, the issues
2 identified in the application will be those that the party anticipates *may* be raised on appeal. If the party
3 does not ultimately raise all of these issues on appeal, the party is expected to have reduced the length of
4 the brief accordingly.

5
6 **Subdivision (c)(1)(I).** Examples of unusual, factually intensive, or legally complex hearings include jury
7 composition proceedings and hearings to determine the defendant’s competency or sanity, whether the
8 defendant is mentally retarded, and whether the defendant may represent himself or herself.

9
10 **Subdivision (d)(1)A(ii).** To allow the deadline for an application to file an overlength brief to be
11 appropriately tied to the deadline for filing that brief, if counsel requests an extension of time to file a
12 brief, the court will specify in its order regarding the request to extend the time to file the brief, when any
13 application to file an overlength brief is due. Although the order will specify the deadline by which an
14 application must be filed, counsel are encouraged to file such applications sooner, if possible.

15
16 **Subdivision (d)(3).** These requirements apply to applications filed under either (d)(1) or (d)(2).

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases
 (amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

List of All Commentators, Overall Positions on the Proposal, and General Comments

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
1.	California Appellate Defense Council Capital Case Committee Wesley A. Van Winkle, Chair	N	Y	<p>I am writing on behalf of the California Appellate Defense Counsel capital case committee to comment on proposed Rules 8.630 and 8.631 [rules 36 and 36.1 as circulated for comment] . Our members have exchanged views on these proposed rules on our organization’s listserve during the past several weeks. However, since not all members are able to comment individually, I am writing to present the following summary of the comments of CADC listserve participants. Although I have tried here to summarize most comments, this should not be viewed as an exclusive list of the concerns of capital counsel regarding the proposed rule changes.</p> <p>The rules committee particularly requested comments regarding two matters: first, the proposed deadlines for filing an application to file an overlength brief (i.e., the proposal to require filing of the application to file an overlength opening brief within 90 days after the certified record is filed in the California Supreme Court, and to file an application to file an overlength reply brief within 30 days of the filing of the respondent's brief) and second, the brief limits imposed by Rule 8.630 [rule 36 as circulated for comment]. The vast majority of the comments of our members pertained to these two matters.</p>	The committee believes that this

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				<p>Some listserv participants also expressed the view that the proposed new rules would impose an unrealistic and unnecessary bureaucratic burden upon counsel and therefore convey the wrong message to counsel at a time when the court is struggling to find qualified attorneys willing to undertake the often difficult and demanding representation of capital clients. These participants argued that by adopting rule changes like these, the court would not only ignore the extraordinary burdens already placed on capital counsel but would actually increase those burdens by requiring more paperwork regarding a trivial matter, thereby discouraging attorneys from taking capital appeals. At least one very experienced attorney indicated that the proposed rule changes, if adopted, would make it unlikely that the attorney would ever apply for appointment in another capital case.</p> <p>Thank you for the opportunity to provide these comments on the proposed rule changes. Please do not hesitate to contact me if there is any additional information I can provide.</p> <p>See comments on specific provisions below.</p>	<p>proposal should ease burdens on both the court and counsel associated with applications to file overlength briefs. Counsel have always been required to prepare and file an application if they wished to file an overlength capital brief. The current rules, however, provide no guidance about when such an application should be filed or what should be included in the application. Proposed new rule 8.631 will provide counsel with helpful guidance about what constitutes good cause for filing an overlength brief, which should make it easier for counsel to determine whether it is appropriate to file such an application and, if so, what information should be included in the application. In addition, as discussed below, the committee has modified the proposal as suggested by many commentators to increase the basic brief length and to set the deadline for the application based on when the brief is due. This should reduce the number of cases in which applications are necessary and address concerns about burdens</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
					stemming from the application being due too early in the briefing process.
2.	Mary Carnahan Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
3.	Bruce Eric Cohen Attorney Berkeley	N	N	Colleagues have confirmed that at least some of the briefing the court receives is long, bloated, and of poor quality. My concern is that the proposed rule will reduce the quality of all briefs—good and bad—and will increase the work of the court. See comments on specific provisions below.	The committee believes that this proposal will help improve the quality of briefs by informing counsel of the permissible length of their briefs early enough in the briefing process that counsel can draft their briefs with this length in mind. The committee also believes that, with the changes made in response to the public comments, this proposal will reduce the work of the court associated with considering applications to file overlength briefs.
4.	State Public Defender Michael J. Hersek San Francisco	AM	Y	See comments on specific provisions below.	
5.	David Jetton Court Administrator	A	N	No narrative comments submitted.	No response required.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
	Superior Court of Los Angeles County				
6.	Joan McCoy, Volunteer CASA of Fresno and Madera Counties	A	N	No narrative comments submitted.	No response required.
7.	Richard Moller Attorney Redway	N	N	See comments on specific provisions below.	
8.	Richard Neuhoff Attorney New Britain, CT		N	See comments on specific provisions below.	
9.	Hon. Kathleen R. O'Connor Superior Court of Yuba County	A	N	No narrative comments submitted.	No response required.
10.	C. Renard Deputy State Public Defender San Francisco	AM	N	See comments on specific provisions below.	
11.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A	Y	No narrative comments submitted.	No response required.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
12.	Richard Rubin Attorney Oakland	N	N	<p>I am writing to express my strong opposition to the proposed amendment to rule 8.630 [rule 36 as circulated for comment] regarding the length of briefs in capital cases. In my opinion, this proposed rule is impractical and unworkable and would greatly impair the ability of appointed appellate counsel to effectively represent his or her capital client.</p> <p>Representing a capital defendant in an automatic appeal is already a daunting and highly demanding task even for a highly experienced criminal appellate attorney. Proposed rule 8.630 [rule 36 as circulated for comment] would make counsel’s job even more difficult than it presently is. At the present time I have not made any personal decision whether I would accept any further direct appeal appointments from the California Supreme Court in death penalty cases in the future. However, if proposed rule 8.630 [rule 36 as circulated for comment] or anything similar were enacted, I doubt very much that I would ever apply for another capital appeal appointment from the California Supreme Court.</p> <p>See comments on specific provisions below.</p>	Please see response above to comments of the California Appellate Defense Council Capital Case Committee.
13.	R. Seaman Attorney Prescott	N	N	<p>I do not agree with the proposed changes to rule 8.630 [rule 36 as circulated for comment]. They are in large measure unwise, unworkable, and simply the wrong approach to solve the court’s workload problems. I am appellate counsel for 4 inmates on death row and the</p>	Please see response above to comments of the California Appellate Defense Council Capital Case Committee.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				<p>proposed rule changes would not be beneficial in any of those cases.</p> <p>See comments on specific provisions below.</p>	
14.	State Bar of California Committee on Appellate Courts San Francisco	AM	Y	<p>The State Bar of California’s Committee on Appellate Courts submits the following comments on the Invitation to Comment, Appellate Procedure: Length of Briefs in Capital Cases. The Committee commends the excellent work of the Appellate Advisory Committee, and appreciates the opportunity to submit these comments.</p> <p>This position is only that of the State Bar of California’s Committee on Appellate Courts. This position has not been adopted by the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.</p> <p>See comments on specific provisions below.</p>	No response required.
15.	State Bar of California Standing Committee on the Delivery of Legal Services		Y	<p>This proposal would amend rule 8.630 [rule 36 as circulated for comment] and adopt new rule 8.631 [rule 36.1 as circulated for comment] to establish policies and procedures for requests to file overlength briefs in appeals from judgments of death. The State Bar Standing Committee on the Delivery of Legal Services</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				supports in principle the concept of establishing well defined standards for requesting leave to file a more lengthy brief in capital cases as set forth in the proposal, so long as it does not impede defense counsel's ability to raise all appropriate issues.	
16.	Richard Targow Attorney	N	N	See comments on specific provisions below.	
17.	Wesley A. Van Winkle Attorney Berkeley	AM	N	See comments on specific provisions below.	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule 8.360 (former rule 36) – Brief Length Limit

Rule/Issue	Commentator	Comment	Committee response
<p>Rule 8.360 (former rule 36) Brief Length Limit</p>	<p>California Appellate Defense Council Capital Case Committee Wesley A. Van Winkle, Chair</p>	<p>Addressing the page limits first, there was general agreement that the policy expressed in the <i>Schmeck</i> opinion will likely result in a substantial reduction in the length of briefing on the issues the court has described as “routine” and “generic.” (<i>People v. Schmeck</i> (2005) 37 Cal.4th 240, 304.) Listserve participants noted, as the committee itself has done, that to a large extent the <i>Schmeck</i> policies seem likely to bring the majority of opening briefs—perhaps as many as two-thirds—within the 280-page limit, and many of the remaining briefs are likely to exceed the limit by a relatively small percentage. Thus, <i>Schmeck</i> itself may have already addressed much of the problem the committee is attempting to address with the proposed new rules.</p> <p>(Listserve participants raised some concerns about the <i>Schmeck</i> policy itself. One frequently expressed concern was that whether a particular claim has been “fairly presented” so as to preserve it for federal review is a federal issue, and briefing which the California Supreme Court itself might consider repetitive or unnecessary may in counsel’s judgment be required in order to preserve the issue for federal review in spite of the teaching of <i>Schmeck</i>. Other attorneys noted that there are often particularized, case-specific reasons for raising and briefing “routine or “generic” issues, e.g., as in a case raising particular aspects of international law unique to a particular case. However, most listserve comments appeared to agree that post-<i>Schmeck</i> generic issue briefing will reduce the length of opening briefs in the future.)</p> <p>There was complete agreement that no further reduction in the page limit was warranted. Some participants felt the existing page limit was adequate for most cases. There were, however, several very</p>	<p>Based on this and other comments, the committee is recommending that rule 8.630 be amended to increase the permissible length of appellants’ opening briefs and respondents’ briefs to 102,000 words/300 pages.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>experienced participants who strongly believed that the page limit should be increased. Some of the more experienced attorneys on the listserv noted that their opening briefs over the last ten years typically fell within the range of 450 to 650 pages, and that even reductions achieved by the <i>Schmeck</i> policies would not bring these briefs within the 280-page limit. These participants noted that even if every attempt is made to be concise in drafting issues, the number, length and complexity of the issues raised are ultimately determined by the need to legally and factual exhaust claims in order to preserve them for federal court. Many commentators recommended increasing the page limit for opening briefs to 350 or 400 pages, noting that since the distinct majority of opening briefs were likely to fall within this range after <i>Schmeck</i>, the number of motions to file overlength briefs would be reduced, thereby reducing accordingly the workload of both counsel and the court. Some listserv participants argued that the page limit especially needed to be raised in view of the more burdensome and time-consuming nature of the application to exceed the limit which would be required by new rule. At least one participant recommended eliminating page limits entirely for a period of time to see whether <i>Schmeck</i> itself had essentially solved the problem the new rules are attempting to address. At least one participant asked whether payment guidelines or adjustments to the fixed fee were contemplated for the new work required by the application to file an overlength brief.</p>	
<p>Rule 8.360 (former rule 36) Brief Length Limit</p>	<p>Bruce Eric Cohen Attorney Berkeley</p>	<p>I believe that a tightly-edited brief is a better brief. I have taught moot court and appellate advocacy and supervised younger attorneys at the OSPD [Office of the State Public Defender] and in those roles have edited ruthlessly. Yet the capital AOBs [appellants’ opening briefs] I have filed have ranged from 489 to 652 pages, and the one I am currently writing will be the longest yet, even after ruthless editing</p>	<p>See response above to comment of California Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>and after the reductions made possible by <i>Schmeck</i>.</p> <p>Length can overcome quality by numbing the reader. It can also enhance quality. I was a research attorney at the Court of Appeal in S.F. [San Francisco] in 1978, shortly after the Office of the State Public Defender was created. The justices and their research attorneys were unanimous in their view that the briefs filed by the OSPD were far better—and far more helpful to the justices—than the much shorter briefs filed by the vast majority of attorneys under the preproject appointments system. I believe the projects were conceived in large part in recognition of that fact.</p> <p>In my year at the court, a research attorney wrote a bench memo that one justice referred to as a law review article. Rather than rebuke the attorney, the justice—upon being appointed to this Court (the CSC [California Supreme Court])—asked the young lawyer to clerk for him. That was consistent with what I perceived the year I clerked for the Alaska Supreme Court: overworked justices (and their research staffs) always appreciated it when a litigant’s brief contained a comprehensive analysis of a difficult subject.</p> <p>Many of the issues raised in capital briefs arise out of complicated facts, involve more-difficult-than-average concepts, and reflect an ever-changing body of federal as well as California law. More often than not, well-researched briefing that provides the court with an accurate understanding of the facts and the law will facilitate the court’s own research into and analysis of the issue. Brevity is nice, but not at the expense of clarity and accuracy.</p> <p>A rule whose aim is shorter briefs across the board runs the serious risk of increasing the court’s workload by generating two kinds of</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>briefs: bad shorter briefs that would have been bad bloated briefs; and unhelpful shorter briefs that would have been helpful long briefs. That’s because capital attorneys must, first and foremost, be concerned about exhaustion. If a competent attorney believes 30 non-generic issues have merit (at least to support a claim of cumulative-error), those 30 issues will be raised no matter what the page limit. Because the exhaustion doctrine is vague and changing, furthermore, most claims cannot safely be raised in a page or two: at least the main points of the argument must be “presented” to this court. The arguments also must pay attention to essential sub-issues such as forfeiture and ineffective assistance of counsel. (In federal court, the AG [Attorney General] regularly claims non-exhaustion with respect to any way in which the federal claim differs from the way it was presented to the CSC.) A brief that has to fit 30 non-generic arguments (with multiple sub-issues) into 280—or even 480—pages will ordinarily have to undergo much chopping. What gets sacrificed, in my experience, is specificity and objectivity, both in the Statement of Facts and the presentation of the issues. Rather than state and discuss the facts and cases that are harder to deal with, briefs will tend to cut out any material that does not support the claim. That is exactly what I see in capital appellate briefs in states with strictly-enforced page limits. The end result does not serve either the appellant or the Court very well.</p> <p>My understanding is that the problematic briefs the court has been seeing is a reflection of their quality rather than their length. If that is true, then an effective long-term solution has to look at both improved attorney screening and more quality control at the editing stage by CAP [California Appellate Project]. I know that those are both difficult problems.</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>It is also possible that <i>Schmeck</i> alone could go a long way toward alleviating the problem. Given the procedural minefield in federal court that state capital attorneys—who by and large do not practice in federal court—are warned about, they (we) naturally live in fear of federal default. If CAP posts a 125-page omnibus argument that is only intended as a sample argument, the less confident the attorney the more likely s/he will be to copy it verbatim. If the post-<i>Schmeck</i> omnibus becomes 12 pages, many briefs will be 123 pages shorter.</p> <p>One suggestion is that the court and council wait a year to see what effect <i>Schmeck</i> has before definitively taking action on the proposed rule. If it has the desired effect, and the court still wants shorter briefs, it might consider former Justice Brown’s idea that the court reject claims on the merits without finding procedural default. That would eliminate another fertile source of anticipatory bloating borne of the perceived need to establish a beachhead against the independent-state-ground argument the Attorney General is bound to make in federal court.</p>	
<p>Rule 8.360 (former rule 36) Brief Length Limit</p>	<p>Richard Moller Attorney Redway</p>	<p>I suggest that this court use its power to rule that global, boilerplate challenges to the death penalty are preserved without briefing or simply by citing to one case. It is still unclear how much counsel must write to exhaust these issues, which took me about 100 pages to brief.</p> <p>I suggest that the 280 page limit be kept for records under 5000 pages and increase the limit by 100 pages for every additional 5000 pages. As the record increases in size, so do the issues.</p>	<p>Based on this and other comments, the committee is recommending that rule 8.630 be amended to increase the permissible length of appellants’ opening briefs and respondents’ briefs to 102,000 words/300 pages. The committee is not recommending that there be additional graduated increases based on record length because it believes that the eight factors listed in 8.631 are better measures of case complexity, and thus the need for additional briefing, than the length of the record by itself.</p>
<p>Rule 8.360</p>	<p>Richard Neuhoff</p>	<p>I would suggest that the rule be altered so as to increase the size of</p>	<p>See response above to comment of California</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
(former rule 36) Brief Length Limit	Attorney New Britain, CT	briefs for which no permission is required to 350 pages.	Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.
Rule 8.360 (former rule 36) Brief Length Limit	C. Renard Deputy State Public Defender San Francisco	Finally, given that most issues now require extensive multi-prong analyses of: 1) procedural issues (primarily procedural default/waiver); 2) the merits of an error under both: a) state law; and b) federal constitutional law; and 3) prejudice, I do not believe that the 280-page limit is practicable in many cases. Should that page limit remain, the court should be very liberal in its assessment of good cause for exceeding it. Should that page limit increase, the assessment of good cause could accordingly be more conservative.	See response above to comment of California Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.
Rule 8.360 (former rule 36) Brief Length Limit	Richard Rubin Attorney Oakland	<p>I have been appointed as appellate counsel in three death penalty appeals: in 1999 I filed a 474-page opening brief in <i>People v. Darren Stanley</i>, S022224, raising 23 appellate issues. In 2001 I filed a 514-page opening brief in <i>People v. Richard Vieira</i>, S026040, raising 32 appellate issues. I am presently working on the opening brief in <i>People v. Paul Hensley</i>, S050102.</p> <p>The proposed 280-page presumptive page limit is totally inadequate to raise the issues that competent and conscientious appellate counsel is called upon to raise in the opening brief of a death penalty appeal. It is critical that all potential federal issues be raised in the California direct appeal so that they may be preserved for federal court. I not believe that I could have effectively represented any of my three capital clients if I was constrained by a 280-page limit for the opening brief.</p>	See response above to comment of California Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.
Rule 8.360	R. Seaman	Court Workload - Alternative Approaches	Based on this and other comments, the

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
<p>(former rule 36) Brief Length Limit</p>	<p>Attorney Prescott</p>	<p>The very foundation of the relationship between government and its citizens is the fairness by which that relationship is conducted. When the state is in the business of executing its own citizens, fairness is absolutely the paramount consideration. While the workload on governmental agencies to achieve fairness is a consideration, it is a long way down the list of priorities. Indeed, I cannot imagine the vast bulk of California citizens are particularly concerned that in, deciding the fifteen or so death cases this court decides every year, the court must wade through an extra thousand pages of appellate claims that it would prefer not to consider. What those citizens are concerned about is that the result is just and fair.</p> <p>In our judicial system, it is not up to the court to decide what issues are meritorious enough to require full briefing and what issues are “generic.” The decision on what to brief and how to brief it is up to appellant and her counsel. The role of this court is to determine the merit of the issues presented, not to impinge on the substance of how counsel makes those arguments. While perhaps not intentional, the proposed rule acts in a way that defacto inserts the court into the substantive decision-making process of determining which issues are meritorious enough to warrant full briefing. Thus, the premise of lowering the page limit in order to limit the claims raised is fundamentally unsound as a matter of judicial policy.</p> <p>Moreover, the court has not made a particularly persuasive case for any rule modification. As I read the justification for the proposed rule change, the court is concerned that all of this appellate briefing has made its workload heavier. The justification implies that the court does not have the resources necessary to handle this extra work.</p> <p>While the court provides numerous statistics on how many briefs</p>	<p>committee is recommending that rule 8.630 be amended to increase the permissible length of appellants’ opening briefs and respondents’ briefs to 102,000 words/300 pages. The committee is not recommending that there be additional graduated increases based on record length because it believes that the eight factors listed in 8.631 are better measures of case complexity, and thus the need for additional briefing, than the length of the record by itself.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>deviate from the established page limits, there is no statistic on how much extra work this creates for the court. Is it fifty percent, less than one half of one percent? Without some realistic estimate of the burden this statistical deviation creates, the court has failed in the most basic justification for any rule change. Indeed, if the problem is simply that there are just a lot more “boiler plate” issues in a brief than there used to be, it appears that the court can address that difficulty by issuing a lot more “boiler plate” denials than in the past. There is no need to enact a rigid page limit to deal with that sort of problem.</p> <p>Tied to the foregoing is the absence of any explanation concerning why the court chose to retain 280 pages (or its word count equivalent) as the page limit for an opening brief. I assume that 280 pages was originally chosen as a page limit because it provided some reasonable accommodation between the statistical average length of a capital appellate brief and the court’s ability to manage its caseload. Since the 280 page limit was placed in the court rules, however, the court has increased its capital case unit staffing. Additionally, the court’s own statistics show that the average length of a capital appellate brief is well above the 280 page limit. Undoubtedly these changes have been driven by the increasing complexity of capital litigation and the increasing sophistication of the capital appellate bar. Making the 280 page limit a more rigid ceiling does nothing to address the complexity problem. Instead, it forces counsel to make unpalatable choices to forego briefing meritorious issues, particularly issues that are based on complex factual scenarios and that cannot be easily condensed by judicious editing. While that choice might be acceptable in a non capital context, it is less so at the capital level. Given the Eighth Amendment requirement for heightened reliability in capital cases, a relatively inflexible “one size fits all” page limit will surely</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>shortchange long record cases with many complex issues.</p> <p>(The commentary notes in passing that 280 pages is well in excess of the length permitted or usually briefed in cases at the courts of appeal. Omitted, however, is any acknowledgment that relatively few trial records in the court of appeal exceed 3,000 pages and less than a handful even approach 10,000 pages, let alone the 15,000 pages that are the norm for capital cases. As a rule, longer records produce more issues and longer briefing.)</p> <p>If the court is adamant that a strict page limit is necessary to replace the current flexible system, then perhaps it should consider a higher page limit that more closely corresponds with the statistical average length of briefs. At least the larger more complex cases would not have to make unreasonable briefing sacrifices to meet the page limit.</p> <p>A related proposal might be to graduate the page limits based on the length of the record. That is, short record cases would have a lower briefing page limit than long record cases. The court rules already integrate the graduated concept into fixed fees as well as the time required to file motions to collect the record according to record length. Presumably these graduated levels are based on recognition that longer record cases require more effort and produce more issues. The same reasoning would seem to apply to the length of briefs.</p> <p>Even leaving aside the foregoing suggestions, to the extent that there is a role for an institution to play in preventing a bevy of simply outrageously overlength briefs with little quality control, that role is filled by CAP [California Appellate Project]. If the court is legitimately concerned that its time is being wasted by deciding marginally meritorious issues, then it needs to get together with CAP</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>to arrive at some accommodation on what is acceptable briefing and what is not. CAP was created with the encouragement of this court to provide consistency in the briefing process and to assist practitioners to achieve the high quality these cases require and this court expects. CAP has the enforcement authority to ensure full briefing of meritorious issues and encourage the “weeding out” of those with less merit.</p> <p>If CAP decides an issue has merit and should be fully briefed, then this court should abide by that decision and simply decide the issue. If CAP is failing in this effort, than the court should be in discussions with CAP to set appropriate briefing standards. Using the rule making process to preempt CAP usurps the very process that this court set up to ensure quality briefing. Moreover, by using the blunt instrument approach of the rule making power to limit briefs, this court eschews CAP’s delicate scalpel that helps counsel separate the fat from the muscle in the briefing process.</p>	
<p>Rule 8.360 (former rule 36) Brief Length Limit</p>	<p>State Bar of California Committee on Appellate Courts</p>	<p>The committee supports the Appellate Advisory Committee’s decision that no proposed changes be made to the brief limits in rule 8.630 [rule 36 as circulated for comment]. The committee recommends that if proposed new rule 8.631 [rule 36.1 as circulated for comment] is implemented, the percentage of applications granted and rejected should be tracked to help determine if the brief limits should be changed.</p>	<p>See response above to comment of California Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.</p>
<p>Rule 8.360 (former rule 36) Brief Length</p>	<p>Richard Targow Attorney Sebastopol</p>	<p>I have been an appellate attorney for 22 years and was appointed to my first capital case in 1993. I have filed opening briefs in two cases; I am currently reviewing the record in a third. My comments on the proposed changes regarding length of appellate briefs in capital cases, and motions for filing oversize briefs, follow.</p>	<p>The committee is not recommending that the length limit on capital briefs be eliminated but is recommending that the permissible length of appellants’ opening briefs and respondents’ briefs be increased to 102,000 words/300</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
Limit		<p>Of course, the entire rule would be rendered unnecessary by the elimination of the rule limiting the lengths of capital-case briefs. While I understand that there are some attorneys who are either not sufficiently competent writers to reasonably limit their briefs—a problem which no amount of rule-making, as opposed to more careful selection of counsel, would solve—it is also true that the vast majority of appointed counsel have no interest whatsoever in submitting unfocused and unrefined briefs.</p> <p>My own experience in the two opening briefs that I have filed is that the length of the brief was determined entirely by the length and complexity of the record and issues in the case, without any regard to the page limits set forth in the Rules of Court. In one of the cases, a significantly overlength brief was appropriately filed (the appellate record alone was between 45-50,000 pages); in the other, the fact that the page limits were met had nothing to do with the rules and everything to do with the facts and issues in the case. Insofar as counsel’s job, as I understand it, is to raise every reasonably arguable issue, any arbitrary page limit is, therefore, just that—arbitrary. Accordingly, I would propose an experiment in which there are no page limits in capital cases, to determine whether the average length of briefs would actually increase. My guess is that they would increase little, if at all.</p>	<p>pages and that applications to file overlength briefs address the factors that make the case sufficiently complex to warrant additional briefing.</p>
Rule 8.360 (former rule 36) Brief Length Limit	Wesley A. Van Winkle Attorney Berkeley	I have filed opening briefs in three capital cases before this court, the shortest of which was about 450 pages and the longest of which was about 550 pages. I agree that a substantial portion of these briefs consisted of issues which had been argued before and which were included to preserve issues for federal review, and this material could have been condensed significantly under the <i>Schmeck</i> procedures.	See response above to comment of California Appellate Defense Council Capital Case Committee concerning proposed increase in basic brief length to 102,000 words/300 pages.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>However, even taking <i>Schmeck</i> into account, in none of these cases would it have been possible for me to include and adequately brief all issues in less than 350-400 pages. Capital issues are factually dense and also require considerable federal research and briefing. I would also note that in two of these three cases, the appellate record was of only average or less than average length. Indeed, I cannot conceive of any capital brief being competently done within the 280 page limit unless there were unusually few issues. The procedural history and factual statements alone could easily consume 25-40% of the 280 page limit in an average case. I would respectfully recommend increasing the page limit to at least 350 pages, if not 400. Otherwise I believe the court will begin receiving and processing overlength brief motions in virtually every case.</p>	

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule 8.631(c)(1) (Rule 36.1(c)(1) as circulated) – Good Cause Factors

Rule/Issue	Commentator	Comment	Committee response
Rule 8.631(c)(1) (Rule 36.1(c)(1) as circulated for comment) Good Cause Factors	C. Renard Deputy State Public Defender San Francisco	I practiced in the Courts of Appeal (criminal) for over 12 years prior before representing defendants on automatic appeal. Many of the appellate courts, and divisions within the courts, were fairly strict about holding counsel to the page limit for appellant's opening briefs absent a showing of good cause. Based upon that experience, I believe that the factors listed under subdivision (c) of the proposed rule are thoughtful ones that should be taken into account, as they have traditionally been taken into account in the appellate courts.	No response required.
Rule 8.631(c)(1) (Rule 36.1(c)(1) as circulated for comment) Good Cause Factors	State Bar of California Committee on Appellate Courts	<p>Proposed rule 8.631(c)(1) [rule 36.1(c)(1) as circulated for comment] establishes factors that the California Supreme Court will consider in determining whether good cause exists to grant an application to file an overlength brief. The committee supports adoption of the proposed factors, subject to the following comments:</p> <p>The proposed advisory committee comment to subdivision (c)(5) [(c)(1)(E) as circulated for comment] lists examples of unusual, factually intensive, or legally complex pretrial motions. But subdivision (c)(5) [(c)(1)(E) as circulated for comment] itself does not require the party relying on this factor to specify the nature of the pretrial or trial motions. Similarly, subdivision (c)(1)(H) [note that this subdivision was deleted from the committee's proposal and the substance addressed as part of subdivision (c)(5)] does not require the party relying on this factor to specify the nature of the penalty phase motions. Without any description of these motions, it may be difficult for the Court to assess whether they were, in fact, unusual, factually intensive, or legally complex so as to constitute good cause to allow an overly long brief.</p> <p>Accordingly, the committee proposes that the following language be added to</p>	The committee agrees with these suggestions and has modified the amendments it is recommending for adoption to incorporate these changes. The committee has also deleted subdivision (c)(1)(h) and addressed posttrial motions as part of (c)(5).

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>the end of subdivision (c)(5) [(c)(1)(E) as circulated for comment]: “A party relying on this factor must briefly specify the nature of those pretrial or trial motions.” The committee proposes that the following language also be added to the end of subdivision (c)(1)(H): “A party relying on this factor must briefly specify the nature of those penalty phase motions.”</p> <p>Finally, the Committee proposes that “nature” be substituted for “type” in subdivision (c)(7) [(c)(1)(G) as circulated for comment] because “nature” seems broader and likely to call for more information.</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule 8.631(d) (Rule 36.1(d) as circulated) – Time to File Application

Rule/Issue	Commentator	Comment	Committee response
<p>Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>California Appellate Defense Council Capital Case Committee Wesley A. Van Winkle Chair</p>	<p>With respect to the proposed deadline for filing applications to exceed the page limit, there was almost uniform opposition, much of it quite heated. Most participants expressed the view that the proposed deadline, or even any deadline tied to formal record certification rather than the anticipated filing date of the brief itself, is unworkable and unrealistic. Commentators noted that a capital case brief evolves gradually over time, and that merely knowing which issues are likely to be raised provides very little guidance in accurately estimating the number of pages the brief will require. Many participants noted that the CAP review process often contributes substantially to the length of the brief and sometimes requires substantial rewriting of large sections of the brief, and that the page length of the opening brief therefore cannot be determined until that process is nearly complete. The attorney has little control over when the CAP process takes place, but the reality is that comments from CAP are often not received until a few weeks before the brief is finally filed. CAP is vastly overburdened; its staff attorneys are carrying caseloads which are typically two or three times the size CAP once considered a full attorney caseload. Some listserv participants suggested that if the deadline for the application were actually to be set 90 days after certification, applications to exceed the page limit would be submitted in most cases as a precautionary measure, and that in many cases the court would receive late applications after the CAP review process was complete plus additional applications for relief from default for filing a late application, resulting in an unnecessary increase in paperwork for all concerned.</p> <p>(Some participants thought there might be some confusion regarding the deadline due to ambiguity in the meaning of the phrase “certified record,” since the appellate record is certified at different times for accuracy and completeness. CADC assumes the committee intends to refer to the filing of the record on appeal following record correction and final certification of the appellate record. However, further definition of the phrase might be useful, perhaps by reference to rule 35(e).)</p>	<p>Based on these and other comments, the committee changed its proposal to require that an application to file an overlength appellant’s opening brief is due 45 days before the appellant’s opening brief is due if the appellant does not file a request to extend the time for filling the opening brief, and if the appellant does file a request for an extension of time to file the opening brief, an application is due at the time specified in the court’s order regarding the extension of time.</p> <p>The advisory committee comment concerning 8.631(a) clarifies what is meant by certified record.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>Participants recognized that the court encourages and expects attorneys to work on the opening brief during the time record correction is taking place, and most attorneys attempt to do so to the extent that their caseloads permit. However, only one of the attorneys who participated in our discussion reported ever drafting enough of the opening brief and receiving sufficient comments from CAP during record correction to be able to estimate the length of the opening brief within the period contemplated by the proposed rule. That attorney added that she was able to do so only because she had no other pressing demands in 2002, when the court first made it possible for counsel on a fixed fee to receive payment for drafting the brief before the record was certified and filed. All other participants reported that prior deadlines, including work on other capital cases, made it impossible for them to file their briefs until at least a year after the certified record was filed, and many reported that periods of 18 to 24 months between record certification and filing of the opening brief were typically required.</p> <p>In view of the time required for the CAP review process, and since counsel must currently estimate a filing date for the opening brief prior to obtaining a first extension of time, most commentators viewed it as more reasonable to set the date for filing the application at a certain number of days prior to the final estimated filing date. Many recommendations ranged from 30 to 90 days prior to the estimated filing date, and at least one commentator suggested that the application deadline be set 30 days after receipt from CAP of CAP’s final suggestions and comments. (Most comments focused specifically on the opening brief deadline, but the recommendation of setting the deadline a certain number of days prior to the estimated filing date was endorsed by the few who commented on it as equally applicable to the reply brief as well.)</p>	
Rule 8.631(d)	Bruce Eric Cohen Attorney	I am getting to the end of drafting my fourth capital AOB [Appellant’s Opening Brief] [I just completed argument 30 yesterday. Approximately 75%	See response above to comment of California Appellate Defense

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
<p>(Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>Berkeley</p>	<p>of the arguments are unique to this brief and depend almost entirely on original research. (Non-<i>Schmeck</i> issues, in other words.) Argument 30 is just such an original argument. It is not as strong as other issues in the brief but it relates to an instructional error having to do with factor (b) offenses and must be raised. There is no way I could have accurately estimated the length of the argument three days ago much less 4 years ago, when the record was certified. In my experience, that is the difference between issue-spotting and argument-drafting.</p> <p>Claims depend on the interrelation of case-specific facts and case law. Few issues in an appellate record are black and white. Problems with black and white answers tend to get resolved correctly at the trial level. Appellate lawyers are almost always applying old cases and law to unique facts, new cases and law to unique facts, or new cases and law to a classic set of facts. As a result, I'm never really sure what my issue will turn out to be until I'm deeply into it. The process is dynamic. It is not until I sit down to draft the claim—and have to provide record citations and describe the action in complete sentences—that I master the pertinent facts. Those facts then frame the issue. It is at that point that the serious reading of cases occurs. That reading always contains big surprises. No treatise or digest can ever do justice to an opinion's complexity; its relevance to the specific issue at hand will often lie in a sentence not often cited or in a fact set never previously cited. That opinion, moreover, will lead to another that I've never read (or read that part of, or with the present focus). That case may not help directly but may contain a procedural twist I hadn't considered or articulate an old principle in a new and helpful way. Or it may point up the need to hunt down additional facts in my own case. Those new discoveries, in turn, make cases that I previously considered irrelevant relevant, and vice versa. I am not referring to Alabama case law from the 19th century. I am thinking mainly of this court's capital decisions (where my research for argument 30 centered, and involved reading at least 50 such cases), and recent decisions by the federal courts and that other Supreme Court. (One of the interesting ramifications of having to deal with AEDPA [Antiterrorism and Effective Death Penalty Act] and 28 U.S.C.</p>	<p>Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>§2254(d) is the resurgent attention on older U.S. Supreme Court case law.) Then, after imposing coherence on the unruly case law, I try to apply my new and deeper understanding to my facts, often finding that some fact or some case that I had not paid much attention to is now at the center of my argument. This process occurs with every issue, and within every issue, dozens of times in the course of drafting a capital brief.</p> <p>Judge Kozinski once gave a talk at which he referred to an opinion that had gone through 65 drafts before being published. In my experience, that is how good arguments get written. They evolve. Because they are the product of intelligent design. Of the 22 original issues in my current brief, I'd say none is the same issue I thought I'd be raising 4 years ago.</p> <p>The only situation in which I can imagine being able to make an accurate estimate 90 days after certification would be this: I take the direct appeal only—no habeas component; decks are completely clear at the time I take the case so that I can work on it exclusively; record certification takes at least a year; and I have the brief more or less completely drafted within the 90 days.</p> <p>It used to be that the only attorneys for whom the above scenario would have been feasible were those who had no financial concerns (e.g., big-firm counsel). Now that the fixed-fee installment for drafting the AOB is paid in quarters and can be paid while the record is being certified, the scenario described above is more feasible for more of us. Still, not many attorneys are going to be in that position. For the rest of us, the 90-day rule is either: (1) going to be both burdensome and impossible; or (2) result in even fewer of us taking these cases.</p> <p>The court should have the right to refuse to read or file bad, overly long briefs. The only rule I can think of that would serve that goal—if it were enforced by an experienced capital-brief reader—would be to: (1) require us to file, no later than the date on which the brief is due, one copy of the proposed brief (without</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		a table of authorities) with a motion for permission to file; (2) followed by a ruling that will either (a) give us the green light to make our table and copies; or (b) require us to file a brief of specified length within 60 days.	
Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application	Richard Moller Attorney Redway	I suggest that the application to file an oversize brief is timely with 60 days of the last due date for the AOB [appellants' opening brief]. I agree it makes sense to require this application before a brief is actually printed, copied, and mailed, but until the brief is in final draft form, it is difficult to estimate the number of pages.	See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.
Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application	Richard Neuhoff Attorney New Britain, CT	<p>1. The time limit for filing the motion for oversized brief is not fair or reasonable. According to information I obtained from CAP [California Appellate Project], the average time for filing an AOB [appellants' opening brief] is 2 years after the certified record is filed in the Supreme Court. If this is correct, then it is not realistic to expect someone to know in 3 months how many pages that brief will take. Many lawyers will have a tentative sense, after compiling a list of issues, which issues are most likely to be addressed and which of these are likely to be complex. But the assessment of which issues are likely to be addressed cannot be treated as a final decision, and even if it could, translating that final decision into projected page count in a finished product is something very few of us, if any, are capable of, at least not accurately.</p> <p>What we are talking about at the pre-briefing stage is a tentative sense of issue complexity. Though I am an experienced appellate lawyer, I know that issues can and often do expand beyond expectations as they are researched in depth, so that estimates I make before actually working on an issue can turn out to be inaccurate. And if that is true for someone with capital case experience, I can't imagine how lawyers with little or no capital appellate experience could</p>	See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>possibly live with the 90-day rule, and even less those with no criminal appellate experience. For these reasons, I fear the rule may turn out to be a disincentive for recruiting talented appellate lawyers who are inexperienced in capital appellate work.</p> <p>2. The problem is compounded by the fact that the proposed rule does not leave any room for reevaluations of brief size as the research goes along. There is no provision for an extension of time to file the oversized-brief request (the limitation on belated filings of oversized brief requests (see next comment) suggests no extensions will be allowed), and there is no provision for bringing a supplemental request as the research progresses.</p> <p>3. The proposed rule does allow for making a first request after the 90 days has run out, but the scope of that allowance is so narrow as to be essentially nonexistent. What if a lawyer realizes after the 90 days that, contrary to earlier assessment, the page limits for the issues previously known will be exceeded? If a motion cannot be brought at that later time, then any appellate lawyer will know that he or she has to obtain permission to file an oversized brief in virtually every case, to make sure that the necessary space will be available in light of later developments.</p> <p>4. Having communicated with a couple of the lawyers with whom the committee consulted, I am sympathetic to the court's concern. However, I believe much of the problem is that many of the oversized briefs the court receives are unhelpful to the court, not because of the page lengths per se but because of the lack of quality in the briefing. Good appellate lawyers do not normally write briefs that are excessively long in light of the issues to be covered. Poor appellate lawyers seem to act as if a blizzard of words will make up for a lack of substance or understanding or will hide an unwillingness to look into additional potentially meritorious issues. A premature and inflexible time limit on the filing of a motion to extend the length of an AOB will not address the problem of poor briefing, and it will discourage and frustrate the good lawyers and, ultimately, result in briefing that is less helpful to the court.</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>In conclusion, I would suggest that the rule be altered so as to (1) increase the size of briefs for which no permission is required to 350 pages, (2) re-set the deadline for filing an initial oversized brief motion to at least a year after the certified record is filed in the California Supreme Court (if there were some way to tie the motion into a period of time after CAP reviews the draft AOB, that would be ideal but I am not sure how that could be implemented), (3) allow for an extension of the time to file a first oversized brief motion, (4) allow for a supplemental motion in light of subsequent developments, (5) expand the ability to make first oversized brief motion after the time limit has been exceeded.</p>	
<p>Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>C. Renard Deputy State Public Defender San Francisco</p>	<p>In my good cause showings, I commonly set forth the efforts I made to limit the length of the brief, such as including related arguments under one main argument heading and addressing prejudice in one sub-argument, referring—when possible—to earlier discussions of the law and/or evidence rather than repeating them in later arguments, and abbreviating arguments raised for preservation purposes only. For this reason and others, it simply is not practicable to require a good cause showing only 90 days after the record is certified—well before even a first draft of the Opening Brief is prepared. In my opinion, it is impossible to make any meaningful assessment of the complexities of a case, the final organization of the issues, and the corresponding need to exceed the page-limit or the ability to remain within it, until counsel has completed, or come close to completing, a first, rough draft of the brief. At the very least, a reasonable assessment of the amount of briefing necessary to provide the effective assistance of appellate counsel cannot be made until counsel has identified all of the legal issues that will be raised and conducted fairly extensive research into those issues—tasks that in most cases simply cannot be completed within 90 days of record certification.</p> <p>I believe that the current proposal will result in applications being filed and granted that ultimately prove to be unnecessary, in applications presenting showings of good cause that are not truly made in good faith, and risks</p>	<p>See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		depriving clients of the effective assistance of counsel when inexperienced counsel fails timely to obtain permission to file an oversized brief because he or she has underestimated the complexities of the issues.	
Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application	Richard Rubin Attorney Oakland	The proposed deadline of 90 days following certification of the record for applying to file an oversize brief is completely unrealistic. As a general rule, the opening brief is not filed for at least a year or more following certification of the record. It is simply not practical or realistic for appellate counsel to have a definitive list of appellate issues, much less an accurate estimation of the number of pages necessary to brief those issues, within 90 days after certification of the appellate records.	See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.
Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application	R. Seaman Attorney Prescott	<p>Aside from the unrealistically low page limit, the most unfortunate part of the proposed rule is the 90 day requirement for filing the motion to exceed the page limit. The premises underlying this time frame appear to be that three months after the record is filed in the Supreme Court of California, appellate counsel will have had sufficient time to make an appropriate determination on the issues she intends to raise and a pretty fair idea of how many pages each issue will require. These premises are demonstrably at odds with reality.</p> <p>First, the time frame when a record is certified to the Supreme Court varies wildly between courts and even between cases within the same court. I've had cases where the record was not certified to this court until after I completed a draft of the opening brief and sent that draft to CAP [California Appellate Project] for review. On other cases, the record has been certified to this court within a few months of filing my initial record correction motion. Moreover, my experience has been that as the trial courts become more sophisticated in dealing with the unique requirements of producing records in capital cases, they make fewer of the kinds of errors that require lengthy record correction proceedings. Thus, (with a few notable exceptions) the time required for record</p>	See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>correction has been shortened considerably. That shorter time frame allows counsel less time to review and assess appellate issues.</p> <p>More importantly, however, the notion that within 90 days of record certification counsel has a realistic idea of the issues she actually will raise and how many pages these issues will require borders on the simply preposterous.</p> <p>Most appellate counsel work through a trial record noting virtually every objection and every questionable ruling in a long list. Potentially every item on this list is an appellate issue. In longer record cases, this list usually highlights well over a hundred potential issues. Experience teaches that this list will be whittled down as each issue is evaluated in the context of the record and the other issues. Nevertheless, the ultimate list of potentially meritorious issues is rarely finalized until well into the briefing process, often a year or more after the research and writing actually begins. Even then, it more the rule than the exception that additional issues suggest themselves as the research proceeds on other issues or related issues. Finally, it is not uncommon that after review by CAP, even more issues are deemed suitable for briefing. NONE of these matters could have been reasonably foreseen in the 90 day period allowed under the proposed rule.</p> <p>Additionally, even if counsel could accurately determine at the 90 day mark how many issues actually will be briefed (which most mortals cannot), she has no earthly idea how many pages each issue will require in the briefing. Again, it is more the rule than the exception that a fairly straightforward issue develops a number of subtleties and nuances as the research and drafting progresses that were not immediately apparent when the briefing began. Moreover the final editing process can vary the length of an issue by a considerable amount. It is for these reasons that most counsel do not ask for permission to file an overlength brief until the brief is fully drafted, edited and ready to go.</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>In that regard, it does not appear that there is any provision in the rule for an extension of time beyond the original 90 days to ask for permission to file an overlength brief. Experience suggests that there will be many occasions when issues or the significance of certain facts were not apparent to counsel at the 90 day mark. There is no provision for remedying that problem—short of deleting other meritorious issues—in order to meet the page limit.</p> <p>The failure to provide any sort of relief mechanism to extend the page limit after the 90 day mark has important practical consequences for both the court and counsel. Because counsel rarely have any sort of accurate gauge for the page length of a brief so early in the briefing process, most counsel likely will file a lengthy motion as a matter of course to preserve the option of filing an overlength brief should that become necessary. Thus, instead of cutting down the cost of these cases and reducing the time required for adjudication by reducing page length, the proposed rule will increase both. The cost of appellate counsel will increase because the court will have to pay for drafting these lengthy complex motions. The time required to adjudicate these cases will not drop appreciably because the court will be inundated by these motions. In short, the proposed rule creates yet another hassle for counsel and the court while doing little or nothing to reduce the cost or time devoted to litigating capital appeals. This is clearly a “lose-lose” proposition.</p> <p>Nevertheless, if there absolutely has to be some sort of pre approval process, I would suggest that the best time would be approximately 18 months after the record is certified. That time frame roughly accords with when I believe most counsel have a fair degree of certainty on what the main issues will be and some approximate idea of how long the brief is likely to be. Moreover, the reason that there is some certainty by that date is because in most instances, the bulk of the research will have been completed and a substantial portion of the rough drafting will have been completed.</p>	
Rule 8.631(d)	State Bar of California Committee on Appellate	The committee is of the view that the deadlines under proposed rule 8.631(d)(1) [rule 36.1(d)(1) as circulated for comment] may not afford parties	See response above to comment of California Appellate Defense

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
<p>(Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>Courts</p>	<p>sufficient time before filing an application to file an overlength brief to analyze the issues that may be raised in the brief and assess how long the brief will likely be. An attorney diligently working on a capital brief may not know if he or she will need to request leave to file an overlength brief until much nearer the time when the brief is filed. Furthermore, under proposed rule 8.631(d)(2) [rule 36.1(d)(2) as circulated for comment], a party would only be permitted to file an application to file an overlength brief after the specified time in two very limited circumstances. As a result, it is likely that parties will file applications to file overlength briefs simply to preserve that option without necessarily being able to make an accurate assessment of whether the application is even necessary. Such motions would only appear to increase the workload of the court and would not address the current problems with rule 8.630 [rule 36 as circulated for comment].</p> <p>The committee believes that the deadline to file an application should be related to the date that a brief is filed, not the relatively early time in the process when the record is certified. The deadline should also allow the Court sufficient time to review the application and rule on it, and give the requesting party time to revise the brief, without delaying the appeal, should the Court deny the application. Under current procedures, a declaration in support of a request for extension of time must include “[a] good faith estimate of the amount of time required for the remaining work to be done, with regard to the uncompleted matter for which an EOT is sought, and a <i>proposed target date for the filing of that matter.</i>” (www.courtinfo.ca.gov/presscenter/newsreleases/NR54-01.HTM, emphasis added) Setting a deadline related to the proposed target date in the last extension of time request would appear to be more appropriate than the relatively early time proposed in rule 8.631(d)(1) [rule 36.1(d)(1) as circulated for comment], affording parties adequate time to analyze the issues that may be raised in the brief and more realistically determine whether it is even necessary to request leave to file an overly long brief.</p> <p>The committee proposes setting the deadlines so that the court must receive an</p>	<p>Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>application: (1) no later than 45 days before the time to file the briefs as set forth in rule 8.630(c) [rule 36(c) as circulated for comment]; or (2) if an extension of time to file a brief has been filed, no later than 45 days before the proposed target date, as stated in good faith in the declaration supporting the last extension of time request. Should the committee’s proposal be adopted, the proposed advisory committee comment to subdivisions (c)(1)(E) through (c)(1)(I) would also need to be adjusted accordingly.</p>	
<p>Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>State Public Defender Michael J. Hersek San Francisco</p>	<p>The Office of the State Public Defender (OSPD) represents more than 120 people on death row in California. Each year, OSPD accepts the majority of the capital-case appellate appointments made by the California Supreme Court. Accordingly, any change to the Rules of Court that affects death penalty appeals is of particular interest to the agency’s 47 capital litigators.</p> <p>After much reflection, we have concluded that the timing provision in proposed rule 8.631(d)(1)(A) [rule 36.1(d)(1)(A) as circulated for comment] is unworkable and should be modified. That provision requires an application to file an oversized brief to be filed “no later than 90 days following the filing of the certified record in the Supreme Court.” This is an unreasonably short period of time for any attorney to predict accurately the length of an opening brief in a capital case.</p> <p>Experienced attorneys who handle death penalty cases—at OSPD and in the private bar—often have more than one capital case at the same time, with each case at a different stage of the proceedings. Thus, experienced counsel will rarely have completed, within 90 days after record certification, the extensive and detailed analysis that is necessary to accurately predict whether an oversized brief is required, much less be able to articulate which of the good cause factors listed in subdivision (c) of the proposed rule apply.</p> <p>Of particular importance to OSPD, the proposed rule will require OSPD to alter significantly its current case-management methods and will negatively impact OSPD’s ability to take new cases. Many attorneys at OSPD have</p>	<p>See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>limited experience with capital appeals. A less experienced attorney works under the careful guidance of a supervising attorney, and spends a substantial amount of time researching potential claims and drafting arguments before the length of the final product can be even roughly predicted. As the case moves closer to the target date, some issues are expanded and others are weeded out; the page estimates fluctuate accordingly. Simply put, the less experienced attorney cannot complete this process and make a reasoned and informed decision regarding an application to file an oversized brief within the proposed time frame. Rather, if the proposed rule stands, the supervising attorney will have to conduct an independent and detailed review of the case at the very beginning of the briefing process to determine whether an application to file an oversized brief will be required. Placing these additional demands on OSPD’s most experienced attorneys will result in a wasteful duplication of effort and will decrease the number of new cases OSPD will be able to take from the court.</p> <p>These adverse effects on OSPD’s workload are unnecessary, because the proposed rule advances no discernable interest by requiring that the motion be filed in the earliest part of the briefing schedule. A far more reasonable alternative would require the application to be filed “no later than 120 days prior to the first agreed upon target date.” This flexible rule, rather than a one-size-fits-all approach, accounts for the peculiarities of individual cases and the diverse experience of counsel. Filing the application when the full scope of briefing is well understood by counsel will avoid disruption of OSPD’s ability to fulfill its mission of competently representing as many death-sentenced inmates as possible, while still providing the court sufficient notice of the need to file an oversized brief. In a typical case, unnecessary motions would be avoided and good faith motions would in any event be filed within several months of the date required under the court’s proposed rule. Additionally, four months prior to the target filing date provides counsel substantial time to further edit existing work if the application is denied.</p>	
Rule	Richard Targow	First, regarding the proposed time limits for filing a motion to file an oversize	See response above to comment of

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
<p>8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>Attorney Sebastopol</p>	<p>brief—90 days after the certified record is filed for opening briefs, etc.—these are quite simply absurd. They appear to proceed from one or more false premises: (1) that as soon as the record is filed the attorney will be working mainly or exclusively on the subject case, whereas deadlines in other cases, including capital cases, may preclude any substantial work on the subject case during that period; (2) that within 90 days of certification (itself a date which is not within the control of appellate counsel), counsel will have a complete handle both on all of the issues that will be raised and the length and complexity of those issues, when in reality those factors only become clear in the research and writing of them, which for some of those issues might take place much closer to the end of the process than the beginning; or (3) that counsel are prescient enough to be able to make such predictions. None of the premises are based in reality.</p> <p>Similarly, the factors themselves require a detailed compilation of numerical data—e.g., the number of factually intensive, etc.—which may or may not relate directly to the number of pages needed to fairly present the case to the court. For example, in the case on which I am currently working (on which the proposed rules would not apply), there was one factually and complex change of venue motion, and I anticipate that arguing error in the denial of that motion will consume a large number of pages in the opening brief. At this point, however, other than “large number of pages,” it is impossible to predict with anything other than a pure guess the actual length of the factual and legal presentation of this issue in the brief.</p> <p>Moreover, it is my experience that research begets research. That is, what I often believe is a simple issue turns into a much more complicated issue as I try to apply the facts to what I believed was the law when I first identified the issue.</p> <p>Accordingly, the additional requirement in the proposed rule that counsel not only seek additional pages, but specify how many additional pages, at a time that is entirely unrelated to the actual work done on the brief, beggars belief.</p>	<p>California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>If the court wishes to avoid the simultaneous filing of the briefs and the motions to file oversize briefs, the deadlines should relate to the end of the process, not the beginning. For example, the rule might provide that in order to file an oversize brief, counsel must file a motion to file it at least 30 days before the brief is to be filed, with the additional provision that should the court deny the motion, an additional 30–45 days would be granted in order to revise and edit the brief, or for a renewed and more persuasive motion to be filed.</p> <p>There is also a danger here, because I believe that the most likely consequence of adopting the proposed rule will be to create a situation in which diligent counsel will routinely file requests for oversize briefs in every case, to cover their bases and avoid the risk of needing the extra pages and not being able to use them.</p>	
<p>Rule 8.631(d) (Rule 36.1(d) as circulated for comment) Time to File Application</p>	<p>Wesley A. Van Winkle Attorney Berkeley</p>	<p>I would also strongly urge the court to reconsider the deadline for filing the motion to file an overlength brief. In the majority of cases, counsel will have no idea how long the brief will be 90 days after the record is certified, and indeed will only have a fair idea of its expected length about 60–90 days before the brief is actually filed. This is not due to any delay or recalcitrance on the part of counsel, but rather to the process of CAP review and comment. Typically, counsel will send each issue to the CAP advisor as it is completed, and comments and suggestions for revisions and additions will be returned to counsel when the overburdened CAP advisor has time. Completion of all issues through this process may require a year or more, and only when it is nearing completion will counsel have the ability to make any meaningful good faith estimate of the expected length of the brief. If the deadline for filing the motion is not extended considerably, the court will begin receiving such motions in nearly every case as a “place-holder” which counsel will be obliged to file just in case the brief goes over the limit.</p>	<p>See response above to comment of California Appellate Defense Council Capital Case Committee indicating committee is recommending a later deadline for application.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule 8.631 (Rule 36.1 as circulated for comment) – Other Comments/Suggestions

Rule/Issue	Commentator	Comment	Committee response
<p>Rule 8.631 (Rule 36.1 as circulated for comment) Other Comments/Suggestions</p>	<p>Richard Neuhoff Attorney New Britain, CT</p>	<p>I would suggest that the new rule be made applicable to counsel appointed after January 1, 2007, rather than to records certified to the court after that date. In light of the fact that an oversized brief motion, under the proposed rule, is an elaborate filing and will, as I’ve said, be required in nearly all cases, counsel who were appointed under a fixed fee system prior to the new rule should not be expected—simply because the record was not certified to the court until after January 1, 2007—to absorb the cost of this new task within a fee agreement that did not contemplate this task. (This concern would not arise with regard to normal fee-and-expenses appointments, since the court would presumably pay for the newly imposed duty.)</p> <p style="text-align: center;">* * *</p> <p>I would suggest that the rule be made applicable to cases in which appointments (or at least fixed fee appointments) are made after January 1, 2007.</p>	<p>The committee is not recommending this change because it believes that the increase in the basic brief length limit should reduce the likelihood that an application will need to be filed in most cases. In those cases in which an application is necessary, the committee does not believe that this application should be overly burdensome.</p>
<p>Rule 8.631 (Rule 36.1 as circulated for comment) Other Comments/Suggestions</p>	<p>R. Seaman Attorney Prescott</p>	<p>Nevertheless, if reliance on CAP [California Appellate Project] is not sufficient to ameliorate the “unnecessary” work thrust upon the court as a result of death penalty appeals, then perhaps this court should ask the Attorney General to assert its statutory power over local District Attorneys and require each local prosecutor to first obtain approval from the Attorney General for a death penalty prosecution. On its face, it is absurd for small rural jurisdictions to send nearly as many people to death row as large urban centers. The overall homicide rate has fallen consistently for the last ten years. It is hard to imagine that despite that decline, rural counties have disproportionately more heinous crimes calling for the death penalty than the larger urban areas. Requiring approval from the Attorney General would introduce some consistency in the death penalty referral decision and likely reduce the overall number of death cases that this court is required to decide.</p>	<p>This proposal is not directed at relieving the court of the work associated with death penalty appeals or at restricting access to the court. These suggestions are beyond the scope of this proposal.</p>

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>Certainly a reduction in the overall number of death cases would significantly reduce this court’s workload. Moreover, it could not be seriously maintained that the Attorney General would be an ineffective decision maker for death cases. After all, once the trial is over, the Attorney General is responsible for all death penalty litigation in California.</p> <p>While it might be politically incorrect for this court even to suggest that the Attorney General impose some order and discipline on the death penalty referral decision throughout the state, it is certainly a procedure that is more rationally related to reducing this court’s workload in capital cases than an arbitrarily low page limit on the appellate briefing.</p> <p>Finally, if the rationale for the proposed rule change is that this court is being overwhelmed by death cases and does not have the resources adequately to deal with them, then it is incumbent upon the court to go to the Legislature to obtain the appropriate resource levels. Assuming the Legislature is in no mood to augment the court’s budget to allow for increased staffing of death penalty cases, then the court is going to have to make it plain that California can no longer decide death cases “on the cheap.” That is, the Legislature is either going to pay the staffing and other costs necessary to decide these cases properly, or the court will simply declare the death penalty unenforceable for lack of resources, commute the sentences to LWOP [life without possibility of parole] and transfer the cases to the various Courts of Appeal so the workload can be spread among those courts.</p> <p>By analogy, in the military, only a very senior commander can order a death penalty prosecution. Even though junior commanders can convene courts martial, the death decision is generally reserved for flag officers at major commands.</p> <p>While the latter idea might seem quaint or even downright silly, New York has effectively done exactly that. There, the superior court concluded that the</p>	

W06-01

Appellate Procedure: Overlength Briefs in Capital Cases

(amend Cal. Rules of Court, rule 8.630 [former rule 36] and adopt new rule 8.631 [circulated for comment as rule 36.1])

Rule/Issue	Commentator	Comment	Committee response
		<p>state’s death penalty statute was constitutionally infirm and threw the problem back to the Legislature to provide the mechanisms and the funds to remedy the death penalty program’s deficiencies. The Legislature refused to provide the resources. The lesson from this experience is that the Legislature made the final decision on whether or not there will be an effective death penalty in New York. Indeed, providing the resources necessary for effective decisionmaking is a Legislative problem, not a rule making problem for the court. It borders on the unconscionable to use the rule making process to restrict access to the courts in capital cases because the court lacks adequate resources. If additional resources are necessary, it is imperative that the court tell the public and the Legislature the truth about what it really costs to run a death penalty program.</p>	
<p>Rule 8.631 (Rule 36.1 as circulated for comment) Other Comments/Suggestions</p>	<p>State Bar of California Committee on Appellate Courts</p>	<p>Proposed Limit on the Length of the Application</p> <p>Proposed rule 8.631(d)(3)(C) [rule 36.1(d)(3)(C) as circulated for comment] limits the applications to 5,100 words if produced on a computer or 15 pages if typewritten. The committee supports the proposed limit on the length of the application.</p>	<p>No response required.</p>