



# Wasteful *and* Disruptive Motions

*“The judiciary has quite enough to do deciding cases on their merits”*

By Joshua Yount <sup>1</sup>

**I**t is no surprise that the Seventh Circuit disfavors motion practice. As in all federal courts of appeals, the central activity of the Court is deciding appeals after receiving a full complement of merits briefs and hearing oral argument. Motions — ranging from those seeking summary affirmance to those seeking extensions of time — can disrupt the efficient operation of the ordinary appellate process. But in the last few years the Seventh Circuit has taken a particularly strong stand against motions that (in the Court’s view) needlessly multiple appellate proceedings or game the rules for appellate briefing and argument.

Filing such motions is a fast way to get on the wrong side of the Court and could even result in *sua sponte* sanctions. That means counsel in Seventh Circuit appeals must take care to avoid motions of the sort the Court considers wasteful or disruptive. Motions that effectively secure more time or more words for briefing without actually seeking such relief fall in that category. So do motions that require a motions judge or panel to undertake inquiries that the merits panel is better suited to and inevitably will conduct. While the Court has recently fixed its fire on motions for summary affirmance, to strike portions of a brief, to dismiss or transfer an appeal, and for leave to file an amicus brief, such motions can take many forms. Careful scrutiny for disguised extensions and wasted judicial effort, therefore, is necessary before filing any motion in the Seventh Circuit.

## **Motions to Strike Portions of a Brief**

Twice in the last year Judge Easterbrook has written to condemn motions to strike portions of a brief. In *Custom Vehicle, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006) (in chambers), Judge Easterbrook (during a stint as motions judge) considered such a motion asking that unsupported assertions of fact in an adversary’s brief be struck.

*Continued on page 40*

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## Wasteful and Disruptive Motions *Continued from page 39*

Expressing wonderment at the notion that a court of appeals would “redact” or “edit” a brief, he explained that “[t]he way to point out errors in an appellee’s brief is to file a reply brief, not to ask a judge to serve as editor.” He also noted parenthetically that “[i]f a material misrepresentation comes in the adversary’s reply brief, the appellee may ask for leave to file a supplemental statement.”

Motions to strike portions of a brief, he continued, do “nothing but squander time” by requiring “the court to increase from three to four the number of judges who must dig through the record and understand the legal issues” while the parties must brief the motion and possibly file new merits briefs. “No sane judicial system would fritter away resources in that fashion,” he concluded.

Accordingly, Judge Easterbrook further reported, he has “never granted such a motion (and never will)” and does not “believe that any of [his] colleagues grants such motions.” “To show that such absurd motions do not come for free,” Judge Easterbrook not only denied the motion to strike but also deducted twice the length of the motion from the offending party’s reply brief, “rais[ing] the stakes” on his prior practice of treating such motions as an “‘advance’ on the allowance of pages or words” for the party’s brief.

Writing for a merits panel facing motions by both parties to strike portions of the opposing parties’ briefs in *Redwood v. Dobson*, 476 F.3d 462, 470-71 (7th Cir. 2007), Judge Easterbrook reiterated the rule he articulated in *Custom Vehicles*: “The Federal Rules of Appellate Procedure provide a means to contest the accuracy of the other side’s statement of facts: that means is a brief . . . , not a motion to strike.” Even when such motions are deferred to the merits panel, they do “nothing except increase the amount of reading the merits panel must do, effectively giving each side argument on top of the word limit set by Fed. R. App. P. 32.” In short, the opinion concludes, “[m]otions to strike disserve the interest of judicial economy.”

### Motions for Leave to File An Amicus Brief

Similar reasoning has led Judge Posner, writing for himself and for the Court, to strictly limit the circumstances in which amici may file briefs under Fed. R. App. P. 29. In *Ryan v. CFTC*, 125 F.3d 1062 (1997) (in chambers), he first articulated his view that motions to file amicus briefs should be viewed in “a fish-eyed fashion” because the “vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief.” He concluded that such briefs “are an abuse” and “should not be allowed.”



Writing for a motions panel in *NOW, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000), Judge Posner explained the reasons for the “policy of this court” against granting “rote permission to file an amicus curiae brief.” One reason is that “court of appeals judges have heavy caseloads requiring [them] to read thousands of pages of briefs annually, and [they] wish to minimize extraneous reading.” Another reason, following *Ryan*, is that amicus briefs “may be intended to circumvent the page limitations on the parties’ briefs, to the prejudice of any party who does not have an amicus ally.” More recently, in another chambers opinion (*Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542 (7th Cir. 2003)), Judge Posner reiterated the Seventh Circuit’s hostility to duplicative amicus briefs, going so far as to charge that “those who pay lawyers to prepare such briefs are not getting their money’s worth.”

### Motions To Transfer, To Dismiss, and for Summary Affirmance

The Seventh Circuit views eleventh-hour motions to terminate an appeal with similar hostility. Thus in *Ramos v. Ashcroft*, 371 F.3d 948, 949-50 (7th Cir. 2004), the Court criticized the Department of Justice for filing on the day before its appellate brief was due a motion to transfer an immigration appeal to the Eighth Circuit.



## Wasteful and Disruptive Motions *Continued from page 40*

According to the Court, “the problem” with the motion lay “in the belief that any motion automatically defers the deadline for filing the brief,” for “a motion is not a substitute for a brief.” Moreover, the Court explained, the motion “should have come well before *Ramos* filed his own brief” because a litigant “has no warrant to put its adversary to [the] cost and inconvenience” of potentially unnecessary appellate procedures.

Similarly, in *United States v. Lloyd*, 398 F.3d 978 (7th Cir. 2005), the Court criticized a government motion to dismiss for lack of appellate jurisdiction filed in lieu of an appellate brief. “The goal and often the effect” of such a motion, the Court asserted, “is to obtain a self-help extension of time even though the court would be unlikely to grant an extension if one were requested openly.” Such motions also “creat[e] busywork for the court and its staff,” as up to “seven appellate judges (plus two or three staff attorneys)” could “become involved in three waves of motions and briefs” over the course of several months. And a “separate motion to dismiss was unnecessary,” given that any jurisdictional problems could be flagged in the merits briefs and in fact should have been brought to the Court’s attention “at the outset” pursuant to Circuit Rule 3(c)(1).

Drawing on *Ramos* and *Lloyd*, the Court rejected a government motion for summary affirmance filed five days before the government’s brief was due in *United States v. Fortner*, 455 F.3d 752 (7th Cir. 2006). The Court reiterated *Lloyd*’s criticism of “self-help extension[s] of time” and complained that “the government has wasted the resources of this court.” On the latter point, the Court noted that “[s]ix judges will ultimately consider this appeal” and that the “government could have made these same arguments in a brief and moved to waive oral argument.” In any event, the Court explained, even a proper motion for summary affirmance “should be filed earlier rather than later — not right before the merits brief is due.” The Court instructed that summary affirmance motions “generally should be confined” to situations where an immediate ruling is necessary, the arguments in the opening brief are “incomprehensible or completely insubstantial,” or “a recent appellate decision resolves the appeal.”

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The lesson from all of these cases, despite their different factual settings, is that the Seventh Circuit has no tolerance for two types of motions: (1) disguised efforts to obtain more time or more words for briefing; and (2) demands that the

Court undertake time-consuming and unnecessary analysis. Such motions waste judicial resources and disrupt the orderly adjudication of appeals. As Judge Easterbrook put it in *Custom Vehicles*, “The judiciary has quite enough to do deciding cases on their merits.” 464 F.3d at 726. And *Custom Vehicles* itself shows that motions deemed wasteful and disruptive will no longer be allowed without consequence for the filing party.

So how does a litigant avoid motions the Seventh Circuit may deem wasteful and disruptive? Consider three guideposts. If an argument can be made in a merits brief, do not bother with a motion unless it is a real “show-stopper,” as when the Court lacks power to hear the appeal or only an immediate ruling can prevent irreparable harm. Act promptly and before merits briefing gets underway to bring appropriate motion matters to the Court’s attention. And be forthright in efforts to obtain more words or time for briefing by directly moving for such relief. Obviously every appeal has its own exigencies, but following these tips will in most circumstances point you in the right direction when contemplating a motion in the Seventh Circuit.

## Continuing to Have Trouble Creating PDF Documents?

As many of you know, the Seventh Circuit encourages parties to file copies of their briefs in electronic format, either by uploading the brief online (the preferred method), or by submitting the brief on disk. In order to submit an electronic copy of the brief, however, you must be able to produce the brief in PDF, or “portable document format.” Many practitioners and their staff members remain mystified about how to create PDF documents out of their trusty Word or WordPerfect texts. To help, the Seventh Circuit has provided on its web site information about several different ways to convert documents to PDF. To learn more, log on to [www.ca7.uscourts.gov](http://www.ca7.uscourts.gov), and click on the “FAQs” link at the bottom of the home page.