

MEMORANDUM

DATE: October 3, 2014
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: A short history of the 1998 amendment to Rule 32

The proposals that are currently out for comment include proposed amendments to Rules 5, 21, 27, 35, and 40 that would impose type-volume limits for documents prepared using a computer. In addition, the proposed amendments would shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page (and would correspondingly shorten the word limits set by Rule 28.1 for cross-appeals).

Concerning the latter facet of the proposals, the Committee Note to the proposed amendments to Rule 32 states in part:

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

Judge Colloton's report to the Standing Committee further explained:

The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark.

In case it might be of assistance to Committee members in assessing the comments submitted on the pending proposals, this memo explores in slightly more depth the origins of the 14,000-word limit. This memo is based solely on a review of the

official records of the Advisory Committee and Standing Committee (i.e., meeting minutes and Committee reports) that are available on www.uscourts.gov. A comment submitted by Judge Easterbrook – who was a member of the Standing Committee during the 1990s and was for part of that time the Standing Committee’s liaison to the Appellate Rules Committee – provides additional information about the deliberations that produced those amendments.

I think it is fair to say that the proposals that became the 1998 amendments were supported repeatedly by statements that 14,000 words was equivalent to 50 pages. Discussions of words-per-brief limits arose a few years into the Committee’s discussions of possible changes to Rule 32. In 1994, the Committee heard testimony that 50 pages would equal 12,500 words on an “office typewriter” but would equal 14,000 words or more “today, using a proportionately spaced typeface.” Based on charts showing that 12-point Courier font yields 250 words per page, and on the DC Circuit’s new rule, the Committee crafted a proposal featuring a 12,500-word-per-brief limit.

Public comment on that proposal argued that a 12,500-word limit would reduce the length “below the traditional 50 page limit”; those commenters suggested a limit of 14,000 or 14,500 words. Some Committee members noted that sample pages using 280 words per page looked appropriate; conversely, other Committee members argued for the 12,500 limit, but did so without appearing to dispute the commenters’ contention that 12,500 would shorten the existing limit. The Committee reverted to proposing a 14,000-word-per-brief limit, and its 1995 draft stated the belief “that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations.”

Later in the process, when the Appellate Rules Committee in 1997 discussed and gave final approval to the Rule 32 proposal, some members apparently suggested “that 14,000 is not a good equivalent to the old 50-page brief”; these members argued for a 13,000-word limit, maintaining that 14,000 words “is closer to the length of a professionally printed ... 50-page brief.” A Committee member responded, though, that “this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial.” Other members favored 14,000 words “in order to avoid reopening the controversy.” The Committee kept the limit at 14,000 words.

When Judge Logan presented the proposal to the Standing Committee in 1997 for final approval, “[h]e pointed out that a 50-page brief would include about 14,000 words.”

Here is a somewhat more detailed chronology. (In the appendix to this memo, I include excerpts from the documents on which i relied in compiling this chronology.)

1991: Appellate Rules Committee starts discussing Rule 32's type face requirements.

1992: Characters-per-inch:

The Appellate Rules Committee requests permission to publish for comment proposed amendments to Rule 32. The amendments would require, inter alia, that briefs prepared "by any method other than the standard typographic process" have "no more than 11 characters per inch."

The Standing Committee approves the proposal for publication.

1993: Characters-per-inch, same-content-per-page, words-per-page:

In April, the Appellate Rules Committee discusses the public comments and compares the relative merits of characters-per-inch, characters-per-line, and characters-per-page limitations.

In May, an Appellate Rules Committee report seeks permission to publish two alternative drafts of a revised Rule 32 proposal for further public comment. A majority of Appellate Rules Committee members favor a version that would require briefs (that were not produced by "standard typographic printing") to not "exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing." A two-member minority favors alternative limits of 11 characters per inch or 300 words per page.

In June, the Standing Committee discusses these two proposals and at least one other alternative. It votes to "rewrite the committee note and republish the entire Rule 32 for further public comment." The minutes do not make entirely clear what will be published.

In September, the Reporter (Professor Mooney) updates the Committee as follows: "a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page."¹

1994: First detailed discussion of word / page conversion ratios

In April, the Appellate Rules Committee holds a combined hearing and meeting. The witnesses are from a typography company and from Microsoft. The Committee decides to adopt (and adapt) a new draft of

¹ At this time, Judge Easterbrook was on the Standing Committee, but then-Chief Judge Sloviter was the Standing Committee's liaison to the Appellate Rules Committee. By October 1995 (if not earlier) Judge Easterbrook had become the liaison.

Rule 32 proposed by the witnesses. Participants initially propose setting conjunctive limits of 14,000 words per brief and 280 words per page. “The Committee asked the printing experts how those limits compare to the current 50 page limitation. The printing experts responded that in 1970 using an office typewriter, a 50 page brief would have contained approximately 12,500 words; but today, using a proportionately spaced typeface, a 50 page brief can greatly exceed 14,000 words without abusive use of footnotes or compacting the print, etc.” The Committee decides to include a 50-page “safe harbor” for monospaced briefs (and also a safe harbor for proportionally spaced briefs).

Later in the meeting, the 14,000-word limit is lowered to 12,500 words: “In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words.” The safe harbors are lowered as well – for monospaced briefs, the safe harbor is 40 pages.

In May, the Appellate Rules Committee report requests publication of the new Rule 32 proposal, which would set limits of 12,500 words per brief and 280 words per page. (“The latter limitation is included to ensure that the typeface used is sufficiently large to be legible.”)

In June, the Standing Committee approves the proposal for publication.

1995: Further discussion of conversion ratios

In April, the Appellate Rules Committee discusses the public comments and the conversion ratio and decides to change the proposal back to a 14,000-word limit:

Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.

Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient.

Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A longer, more complete brief can be of significant assistance to the court.

The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.

The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

In June, the Committee's report seeks publication of the latest draft of Rule 32. The proposal sets conjunctive limits of 14,000 words per brief and 280 words per page. The Committee Note explains in part:

The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather [than] 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

In July, the Standing Committee decides to defer publication of the Rule 32 proposal pending further consideration of assorted drafting issues.

In December, the Appellate Rules Committee report requests permission to publish yet another Rule 32 proposal (now folded into the restyling package). The latest proposal retains the 14,000-words-per-brief and 280-words-per-page limits, but lowers the safe-harbor to 30 pages. The Committee Note explains in part:

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing ‘tricks’ available with most personal computers to file a brief far longer than the ‘old’ 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

1996: New draft approved for publication

At the January 1996 Standing Committee meeting, Judge Easterbrook (who prepared the new Rule 32 draft) presents the draft. The Standing Committee approves the draft for publication.

1997: Further discussion of conversion ratios, and final approval

In April, the Appellate Rules Committee discusses the public comments, revises the proposal, and gives it final approval. The minutes state in part:

[T]he requirement that the average number of words per page not exceed 280 words was deleted....

There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old

50-page brief. Fourteen thousand is closer to the length of a professionally printed brief [sic] 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word limitation was not changed.

In May, the Appellate Rules Committee's report requests final approval of the proposal. The Committee Note is identical, in relevant part, to the passage quoted above from the Committee Note in the published version.

In June, the Standing Committee gave final approval to the amendments to Rule 32. The minutes recount in part:

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

Encl.