

Appendix: Excerpts from relevant Committee records

December 1991 Appellate Rules meeting (minutes here: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP12-1991-min.pdf>):

Committee discusses issues raised by responses of circuits in the course of reviewing their local rules. One issue concerns Rule 32's requirements:

4. Recurring Issues Raised by the Circuit Responses

The responses of the circuits evidenced concern with some recurring themes.

A. Typeface

Fed. R. App. P. 32 governs the form of briefs, appendices, and other papers. Rule 32(a) requires printed matter to be in 11 point type. In the age of computer generated documents, that terminology is obsolete. Several circuits have or are developing local rules that are keyed to computer generated type styles.

Judge Ripple stated that in light of the changing technology and the slow process for changing the federal rules, the committee might consider removing the type style requirements from the national rules. Instead, the national rules could require parties to use one of the type styles approved by the Administrative Office. The general counsel for the Administrative Office was of the opinion that such a delegation would be appropriate.

Judge Williams expressed a preference for having the federal rules include at least a safe harbor, that is state that "X" typeface is acceptable, as well as any others on the list approved by the Administrative Office.

Mr. Kopp was of the opinion that leaving that determination to the Administrative Office would not be prudent. At least if the changes go through the Advisory Committee, the users -- the judges and lawyers -- are involved in the decisional process.

The consensus was that the topic should be placed on the agenda as a discussion item for a future meeting.

December 1992: Standing Committee votes to publish for comment proposed amendments to, inter alia, Rule 32, "to seek public comment during a period that would end on April 15, 1993." (See <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST12-1992-min.pdf>) The report to the Standing Committee submitted in advance of that meeting (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP12-1992.pdf>) explained in part:

Rule 32 governs the form of documents; it has been amended in a number of ways. The amended rule requires that a brief or appendix prepared by any method other than the standard typographic process must be printed with no more than 11 characters per inch. The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. The number of a case must appear at the top center of a brief or appendix, and the title of the document must include the name of the party or parties on whose behalf the document is filed. The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix; the new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner. Only a pro se party proceeding in forma pauperis may file carbon copies.

April 1993 (minutes here: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP04-1993-min.pdf>)

The Appellate Rules Committee discusses comments on the published proposal, which would have required that non-commercially-printed briefs have no more than “11 characters per inch.” Debate includes discussion of the relative merits of characters-per-inch and characters-per-line and characters-per-page.

May 1993 (report to Standing Committee here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1993.pdf>):

Appellate Rules Committee asks permission to re-publish two alternative drafts of a revised Rule 32 proposal for further public comment. The “committee-approved” alternative sets the following requirement for non-typewritten (i.e., commercially printed) briefs:

(3) A brief or appendix produced by any other process must not exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing and must include a certification of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document. Such a

The alternative “preferred by two members of the advisory committee” would instead have set alternative limits for such briefs, one of which involved a word count of 300 words per page:

long may be indented and single spaced. Any such brief must i) be typed or printed with no more than 11 characters per inch or ii) be in 11 point type or larger and contain on average no more than 300 words per page, including footnotes and quotations, and include a certificate of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document.

June 1993 Standing Committee meeting (minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1993-min.pdf>):

The Standing Committee discusses the two alternatives noted above plus 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.

September 1993 Appellate Rules Committee meeting (minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap9-22.htm>):

Most discussion centers on proposals to address motion length limits. Rule 32 briefly discussed: “Professor Mooney summarized the status of Rule 32, noting that 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.”

April 1994 Appellate hearing and meeting (minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap4-25.htm>):

Appellate committee meets after hearing “testimony regarding the proposed amendments to Rule 32.” Witnesses were “Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation.”

The relevant portions of the minutes are worth quoting in full:

Rule 32

The witnesses who had just completed their testimony, Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation, were present. So that the Committee would be able to take advantage of the speakers expertise, Judge Logan began the meeting with discussion of Rule 32. Judge Logan stated that his goal for the morning was to have the Committee make substantive decisions about the direction of Rule 32 rather than to approve precise language. Judge Logan indicated that following the initial discussion, he would appoint a drafting subcommittee to prepare a new draft for the Committee's consideration the following morning.

The Reporter summarized two additional comments on Rule 32 that had been received since the preparation of the materials for the meeting.

The speakers, during their earlier testimony, had presented an alternative draft for the Committee's consideration. Judge Logan called for a vote on whether the Committee preferred to work with the published draft or with the new draft. The Committee preferred the new draft by a vote of six to one. A copy of the draft is attached to these minutes.

Subdivision (a) of the draft contained definitions. Paragraph (a)(1) defined a "monospaced typeface" as one in which "(i) all characters, including spaces, have the same advance width, (ii) there are no more than 11 characters to an inch, and (iii) the weight of the typeface design is regular or its equivalent." One member of the Committee asked whether justifying the right margin would make the advance width nonuniform since justification adds white space. Another member of the Committee responded that the spacing added to justify the right margin is not technically "advance width."

The definition of a "proportionately spaced typeface" in paragraph (a)(2) stated that it is a typeface in which "(i) individual characters have individual advance widths, (ii) the x-height (the height of the lower case 'x') is equal to or greater than 2 millimeters, (iii) the em-width (the width of the upper case "M") is equal to or greater than 3.7 millimeters, (iv) the design is of a serifed, text, roman style, and (v) the weight of the typeface design is regular or its equivalent."

Some members of the Committee initially reacted negatively to including that level of detail in the national rule. Judge Logan reminded the Committee that it decided to address the typeface issue because of the proliferating local rules. The Committee concluded, however, that the draft rule seemed to address not only lawyers who prepare briefs, but also people who design typefaces and software. The Committee

hoped to simplify the draft so that it would be readily understandable by both audiences.

A suggestion developed that it might be possible to eliminate the "x" height and "em" width if the rule did three things:

1. required 1-1/4 inch side margins and 1 inch top and bottom margins;
2. limited a brief to a total of 14,000 words; and
3. limited each page to no more than 280 words.

If the text extended to the margins specified, each page contained no more than 280, and the brief as a whole were limited to no more than 14,000 words regardless of the total number of pages, the "x" height and "em" width would likely be met by default. This would permit the use of proportionately spaced typefaces and ensure that the typefaces were of sufficient size to be easily legible.

The Committee concluded that it wanted to permit both monospaced and proportionately spaced typefaces but that the rule should state a preference for proportionately spaced typefaces. Because of concern about the technical nature of the definitions, it was suggested that examples might be added to the definitions.

The Committee conceptually approved paragraphs (a)(3) and (a)(4) of the definitions.

Subdivision (b) of the draft dealt with the form of a brief and an appendix. The Committee conceptually approved paragraphs (b)(1), (b)(2), (b)(4), (b)(9) and (b)(10).

Paragraph (b)(3) established different margins for briefs using proportionately spaced typefaces and for those using monospaced typefaces. The draft suggested wider side margins (resulting in shorter lines of text) for proportionately spaced typeface. A proportionately spaced typeface fits more material in the same amount of space than a monospaced typeface of the same size. If the same line length is used for both typefaces, there is not only more text in the lines produced with a proportionately spaced typeface but the comprehensibility of the proportionately spaced document also declines. Therefore, the Committee approved different margins dependent upon the typeface used. Paragraph (b)(3) also authorized the use of pamphlet sized briefs. Technology is developing to the point that law firms soon will be able to produce the pamphlet sized briefs in-house. The consensus was that the pamphlet sized briefs are preferred and the rule should continue to permit them.

Paragraph (b)(7) of the draft provided that "[a]ll case citations in a brief must be underlined. A brief typeset in a proportionately spaced typeface accompanied by a true italic typeface may use the italic in lieu of underlining." A member of the Committee noted that the current rule is silent about the treatment of citations and there may be

no need to include such a provision. Other members of the Committee expressed preference for the use of italic rather than underlining and stated that if the rule deals with the issue, it should state a preference for italics. The Committee did not reach a consensus about the appropriateness of a provision such as (b)(7).

The Committee agreed that all references to the "appendix" should be removed from paragraphs (b)(1) through (5). An appendix is typically produced by photocopying existing documents. Paragraph (b)(8) provided that if photocopies of documents are included in the appendix "such pages may be informally renumbered if necessary." The Committee agreed that the pages must be renumbered in order of their appearance in the appendix. It was further suggested that it would be helpful if an appendix had a table of contents.

Subdivision (c) of the draft dealt with the length of a brief. It suggested that a principal brief should not exceed 14,000 words and that a reply brief should not exceed 7,000 words. The draft further required that a brief be accompanied by a declaration that it complies with the rule.

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 expressed a desire to create safe harbors for briefs using either monospaced or proportionately spaced typefaces so that certification of compliance would be unnecessary. The draft suggested that a 50 page brief set in monospaced typeface should be conclusively presumed to be within the 14,000 word limit. The Committee concurred that such a safe harbor is necessary so that a person producing a brief with a typewriter would not need to manually count the words in the brief. The Committee expressed a hope that it could develop a similar sort of safe harbor for a brief set in a proportionately spaced typeface.

One member mentioned the desirability of including a provision preempting any local rules concerning length.

Paragraph (d) of the draft dealt with the form of other papers such as petitions for rehearing, suggestions for rehearing in banc, etc. The draft contained the same provision as the published rule stating that such documents must have a cover the same color as the party's principal brief. Some of the commentators on the published rule objected to requiring a cover at all, others wanted the rule to require the colors required by their local rules. One member of the Committee stated that the inclusion of such detail in the published rule was tied to the preemption issue. The details had been included in the rule to eliminate the pitfalls created by varying local rules on such issues.

At the conclusion of the discussion of Rule 32, Judge Logan asked Mr. Munford and the Reporter to join him that evening to work on a new draft. Judge Logan thanked those persons who had testified both for their informative testimony and for their answers to the Committee's technical inquiries.

The minutes of the preceding meeting were unanimously approved with only one correction, on line 11, page 24, the word "advice" should be changed to "advise."

Judge Logan then informed the Committee that he would take up the remaining proposed amendments that had been published for comment.

* * *

Rule 32

On the basis of the discussion the preceding day, a new draft of the first part of the Rule 32 had been prepared for the Committee's discussion. The new draft read as follows:

(a) Form of a Brief, an Appendix, and Other Papers

(1) A brief may be produced by typing, printing, or by any duplicating or copying process that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper, both sides of the paper may be used if the resulting document is clear and legible. Carbon copies of a brief or appendix must not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(2) Either proportionately spaced typeface or monospaced typeface may be used in a brief but proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, text, in roman style. For example, Dutch Roman, Times Roman, and Times New Roman are all proportionately spaced typefaces.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. For example, both a typewriter with Pica type, and Courier font in 12 point are both monospaced typefaces.

(3) A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper

(i) using a proportionately spaced typeface must have margins of 1-1/4 inch on the sides and 1 inch on the top and bottom;

(ii) using a monospaced typeface must have margins of 1 inch on the sides and 1-1/4 inch on the top and bottom; and

(iii) must be double spaced, but quotations more than two lines long may be indented and single-spaced; headings and footnotes may be single-spaced.

(B) A brief on 6-1/8 by 9-1/4 inch paper

(i) must use proportionately spaced typeface;

(ii) must have typeface not exceeding 4-1/6 by 7-1/6 inches; and

(iii) must be single spaced or its equivalent in leading.

(4) A brief may use bold typeface only for covers, headings and captions. Case citations must be underlined unless a distinct italic typeface is used.

(5) Except by permission of the court, a principal brief must not exceed 14,000 words and a reply brief must not exceed 7,000 words, and in either case there must be on average no more than 280 words per page including footnotes and quotations. The word count shall not include the corporate disclosure statement, table of contents, table of citations, certificate of service and any addendum containing statutes, rules, regulations, etc. The brief must be accompanied by a certification of compliance with the word limits of this paragraph. In preparing this certificate, a party may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least 12 point proportionately spaced typeface and does not exceed

(i) 40 pages for a principal brief, or

(ii) 20 pages for a reply brief; or

(B) in monospaced typeface and does not exceed

(i) 50 pages for a principal brief, or

(ii) 25 pages for a reply brief.

(6) An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record may be included. The pages of the appendix must be separated by tabs, one for each document, or consecutively numbered.

In paragraph (a)(1), the draft provided that brief may be produced using both sides of the paper as long as the brief is clear and legible. This was responsive to one of the comments on the published rule. Two members of the Committee noted their circuits

had affirmatively rejected a suggestion that briefs be double sided. A motion was made that the rule be left silent on the issue of single or double-sided briefs, leaving determination of the issue to local rule. The motion was defeated by a vote of 3 to 5 so the double-sided provision remains in the draft.

Paragraph (a)(2) defined proportionately spaced and monospaced typefaces. The second and third sentences of (a)(2)(A) were amended to read as follows: "The design must be of a serified, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino." The second sentence of (a)(2)(B) was amended to read as follows: "Examples are Pica type and Courier font in 12 point."

In paragraph (a)(4) the words "bold typeface" were replaced by "boldface," and "[c]ase citations" was changed to "[c]ase names."

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 page limits in the safe-harbor provisions in (a)(5) were lowered to 30 pages for a principal brief and 15 pages for a reply brief using a proportionately spaced typeface and to 40 pages for a principal brief and 20 pages for a reply brief using a monospaced type face. With regard to a brief prepared with a typewriter rather than a computer, it was recognized that such a person should be able to file a 50 page brief. But it was further recognized that unless such a brief was larded with footnotes, the certification could honestly be made without counting every word. If a typed brief is heavily footnoted, several members of the Committee felt that it would be appropriate to require the preparer to count all the words in order to make the certification.

The first sentence of paragraph (a)(6), regarding preparation of the appendix was amended to state: "An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record or of a published court or agency decision may be included." The sentence requiring the pages of an appendix to be tabulated or consecutively numbered was omitted.

The remainder of the Rule was taken from the draft prepared prior to the meeting beginning at page 71 of the GAP materials.

On page 73, paragraph (b)(1) was omitted and paragraph (b)(3) was amended by making it applicable to a petition for rehearing, a suggestion for rehearing in banc, and any

response to either. The effect of those changes was to omit any cover requirements for those documents.

The Reporter was asked to consider all of subdivision (b) in light of the redrafting of subdivision (a) and to make the word limitation and certification requirements inapplicable to papers other than briefs.

May 1994 report of Appellate Rules Committee (available here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1994.pdf> ; proposed Rule 32 amendment starts at page 45 of the PDF):

Requests publication of a new Rule 32 proposal; this time,

The rule establishes new length limitations for briefs. A principal brief is limited to a total of 12,500 words and a reply brief may not exceed 6,250 words. In addition, the average number of words per page may not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible.

June 1994 Standing Committee meeting (minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1994-min.pdf> , with relevant part starting at p.12 of PDF):

The Standing Committee approves the proposal for publication.

April 1995 Appellate meeting (minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-ap4.htm>)¹:

The advisory committee's discussion of comments on the length limits in proposed Rule 32 was as follows:

4. Length

Regarding the length limitation, twelve commentators opposed use of word limitations (both total words per brief and average number of words per page); one other opposed applying word limits to pro se litigants proceeding in forma pauperis. Another five commentators implicitly rejected the word limitations by saying that the rule should use page limits. A motion was made to use word counts. The motion passed unanimously.

¹ The copy of the agenda book posted on the AO site (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/AP1995-04.pdf>), appears to have its pages out of order and may be incomplete. I was unable through word searches to find any comments pertinent to the length issues.

One commentator suggested that the word counts should be replaced by a character count because a character count eliminates the variations resulting from the different word counting methods used by software programs. Although various word processing programs count words differently, a difference of 200 or 300 words per brief is insignificant compared to the variation possible under the current rule. No motion was made to use a character count.

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.

The next issue considered was retention of the 280 words per page limit. Retention was unanimously approved.

The next day, the Committee discussed a proposed re-draft and decided to seek re-publication of that proposed re-draft.

June 1995 Appellate report (available here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP6-1995.pdf>):

The report explains the proposed re-draft of the Rule 32 amendment as follows:

Rule 32 - Form of a Brief or Appendix

Rule 32 is amended in several significant ways.

- a. The amended rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface. Monospaced and proportionately spaced typefaces are defined in the rule.
- b. The provisions for pamphlet-sized briefs have been deleted.
- c. All references to use of carbon copies have been deleted.
- d. The rule establishes new length limitations for briefs which are defined separately for proportionately spaced briefs and monospaced briefs. A proportionately spaced brief is limited to a total of 14,000 words and a reply brief must not exceed 7,000 words. In addition, the average number of words per page must not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible. 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. If a page count is used rather than a word count, a monospaced principal brief must not exceed 40 pages, and a reply brief must not exceed 20 pages.
- e. The rule requires a certificate of compliance with the form, format, typeface, and length provisions of Rule 32(a)(1) through (4).

As explained in the proposed Committee Note, the 14,000-word limit was deemed the equivalent of 50 pages. In this iteration, the safe-harbor limit was set at 40 pages:

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.

July 1995 Standing Committee minutes (available here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST07-1995-min.pdf>);

The Standing Committee decided to defer publication of the Rule 32 proposal pending further consideration of assorted drafting issues.

October 1995 Appellate minutes (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-ap10.htm>):

No relevant discussion.

December 1995 Appellate report to Standing Committee (available here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP12-1995.pdf>)

Requests re-publication of yet another Rule 32 proposal (now folded into the restyling package). The safe-harbor limit is now down to 30 pages:

The rule establishes new length limitations for briefs. If page counting is used to measure the length of a brief, a principal brief may not exceed 30 pages, and a reply brief may not exceed 15 pages. Other counting methods that approximate the current 50 page limit are, however, permitted.

- **A brief may have a total of 14,000 words as long as the average number of words per page does not exceed 280.**
- **Alternatively, a brief may have a total of 90,000 characters as long as the average number of characters per page does not exceed 1,800.**
- **A brief using monospaced typeface may have 1,300 lines of text.**

The proposed Committee Note begins to resemble the Note that would ultimately accompany the final version. The Note states in part:

Paragraph (a)(7). Type-Volume Limitation.

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.

January 1996 Standing Committee minutes (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/jan1996.pdf>):

The Standing Committee approved the package (including Rule 32) for publication. The Rule 32 proposal was presented by Judge Easterbrook:

Judge Logan stated that the advisory committee had adopted a draft revision of Rule 32 prepared by Judge Easterbrook. He asked Judge Easterbrook to summarize the changes.

Judge Easterbrook stated that most of the features in the rule had been discussed by the Standing Committee at prior meetings. He had attempted to redraft the rule in light of various concerns expressed by committee members at the July 1995 meeting. He stated that the advisory committee's goal was to write a rule that would facilitate good practices by attorneys.

The revised rule strived for both simplicity and equality. It used simpler terms than earlier drafts, although printers' terms could not be eliminated completely. The revision also achieved equality between those who use computers and those who use typewriters.

Judge Easterbrook stated that uniformity was also an important objective of the rule.

As revised, it would abrogate local rules that impose requirements not set forth in the national rule. Therefore, a brief that complied with the national rule would be acceptable in every court.

On the other hand, the rule would allow the circuit courts to reduce requirements and accept documents not in full compliance with certain aspects of the national rule. For example, a brief in 14-point typeface would be acceptable everywhere, but a particular circuit court could authorize a brief printed in 12-point type.

Judge Easterbrook stated that the advisory committee had deferred consideration of a proposed amendment to require attorneys to file with the court a copy of the computer disk used to prepare their brief.

As amended, the rule would also require an attorney certificate of compliance with the length limitations. The certificate would serve two practical functions: (1) It would make it clear to the clerk's office that the lawyer is aware of the requirements of the rule and has tried to comply with them. (2) The court could rely on the lawyer's certificate and the word count or character count of the word-processing system used to prepare the brief.

The revised rule also contains a safe harbor provision providing that a certificate of compliance is not required for a principal brief that does not exceed 30 pages in length.

April 1996 Appellate minutes (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP0496.pdf>):

Apparently no relevant discussion.

April 1997 Appellate minutes here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap4-97.htm>

The relevant discussion went as follows:

Rule 32

In addition to stylistic changes, several substantive changes were recommended in order to simplify the rule. First, the length limitations based on character counts were deleted because some word processing programs treat spaces and punctuation as characters, while other programs do not. Second, the requirement that the average number of words per page not exceed 280 words was deleted. Third, in 32(a)(5), the provision permitting footnotes to be in 12 point type was deleted. Fourth, in 32(a)(6) the restrictions on the use of boldface type and of all capitals were 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 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.

The commentator's suggestion that 32(d) be amended to emphasize that local variations concerning form are "one direction only" was discussed at length. Specifically the proposal was to state that a court may "waive" requirements but may not add to them. The suggestion was ultimately dismissed because the rule already makes it sufficiently clear that additional requirements may not cause a brief to be rejected.

There was discussion about the mixture of singular and plural nouns in the title of Rule 32. The Advisory Committee voted to make them all plural, but noted that the title of the rules do not consistently use either singulars or plurals. The Committee asked Bryan Garner to assume review of the titles.

The Advisory Committee noted that the Committee Note will need to be amended to conform to the changes made in the text of the rule. The Reporter was also asked to try to incorporate some of the examples found in the seventh circuit's explanation of its rule.

May 1997 Appellate report to Standing Committee (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1997.pdf>):

The report summarizes a number of comments; the commenters do not specifically address the word / page conversion ratio. The proposed Rules 32(a)(7)(A) and (B), shown at page 316 of the PDF, track the language of the current Rule. The Committee Note provides in part:

Paragraph (a)(7). Type-Volume Limitation.

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.

The length can be determined either by counting words, ~~characters~~, or lines. That is, the length of a brief is determined not by the number of pages but by the number of words, ~~characters~~, or lines in the brief. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page.

~~The word or character counting methods can be used with any typeface. One can choose to count either words or characters. A character count (count of each letter, number, punctuation mark, etc.) is highly consistent across word-processing programs but is not required by the rule because it is not easily done with some programs. A person using a typewriter, however, can easily determine the maximum number of characters per line and certify that the number of characters per page and in the brief does not exceed the maximum. (For example, a typewriter with pica type produces no more than 10 characters per inch. One line of text, therefore, has not more than 65 characters per line.) Different word-processing programs do not produce as consistent a word count, but the rule permits use of word counts because the variations from program to program are small and some programs do not count characters. The rule imposes not only an overall word/character limit (the number of words or characters in the brief) but also limits the average number of words or characters per page. This latter provision ensures legibility; it does not permit a person to squeeze too many words on a page.~~

A monospaced brief can meet the volume limitation by using the word or ~~character count~~, or a line count. If the line counting method is used, the number of lines may not exceed 1,300 — 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

June 1997 minutes of Standing Committee (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1997-min.pdf>)

The minutes provide in relevant part:

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Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be

accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

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.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

The minutes of the **fall 1997** Appellate Rules meeting (here:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap9-97.htm>) state:

Judge Garwood made a series of announcements: Prof. Mooney, longtime Reporter to the Committee, has been appointed a member of the Committee, and Prof. Patrick J. Schiltz of Notre Dame Law School has been appointed to replace her as Reporter. Mr. Letter has replaced Mr. Robert E. Kopp as the representative of the Acting Solicitor General. Judge Alex Kozinski has resigned from the Committee; his replacement has not yet been appointed. Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana has been appointed to the Committee, but was unable to attend today's meeting. Judge Phyllis A. Kravitch will replace Judge Easterbrook as the liaison from the Standing Committee, and Mr. Fulbruge will replace Mr. Fisher as the liaison from the appellate clerks.

Judge Logan explained that he technically remains Chair of the Advisory Committee until October 1, when Judge Garwood's appointment as Chair becomes effective. However, Judge Logan asked Judge Garwood to preside at today's meeting because the focus of the meeting will be to set priorities for Judge Garwood's tenure.