A (MICROSOFT) WORD TO THE WISE—BEWARE OF FOOTNOTES AND GRAY AREAS: THE SEVENTH CIRCUIT CONTINUES TO COUNT WORDS

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The process of writing appellate briefs has, in many ways, been simplified by the use of word processing programs. Simple tasks, such as editing and inserting footnotes, are taken completely for granted by practicing lawyers, who must strain their collective memories to recall the way these tasks were done in days gone by. More complex tools of the trade, such as the automatic generation of tables of contents and tables of authorities, require a bit more mastery, but their utility is welcomed by those who ever spent time writing up lists of cases or sorting index cards filled with references. Newer attorneys and students of the law find themselves in a symbiotic relationship with computerization because the sophistication of these programs lets an attorney easily manipulate the format and content of the brief in subtle ways. Nevertheless, attorneys must be aware that when it comes to these capabilities of word processing programs, courts are now catching up on the learning curve.

The courts' increasing understanding of the computerization of appellate practice has developed slowly but surely. Some, like the United States Court of Appeals for the Seventh Circuit, have been integrating type size and space limitations into their local rules over the past years. In particular, the Seventh Circuit has been concerned with attorneys fudging the size of margins and typeface.[1] The court has also criticized

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1. *See, e.g.*, Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 425 n.* (7th Cir. 1987). There, the court noted that the attorneys manipulated the line spacing and type size

attorneys for dumping textual arguments into footnotes where the smaller type size and single spacing allowed more text in less space.[2] In one such case, the court fined counsel $1,000 for their tactics, specifically stating that "[c]ounsel may not pass this penalty on to [the client]."[3] On other occasions, the court encountered crafty attorneys who "played typographical tricks to squeeze into the brief more words."[4] In that case, the court chastised counsel, stating that "[t]he statement of facts was bloated and argumentative [and] the brief larded with subsidiary arguments that on a quick reading appeared unnecessary."[5] Not surprisingly, counsel for the plaintiff-appellant was issued an order to show cause why the appeal should not be dismissed.[6]

Shortly thereafter, in 1992, the court added a circuit rule regulating typeface pitch, permitting no more than 11 characters per inch.[7] In 1996, the court again amended its circuit rules to address typeface and text volume, adopting rules that addressed the typeface size for monospaced and proportionally spaced type, the use of serifs, type point size (height), volume, and certification of compliance.[8]

The court reduced the page-length limit from fifty to thirty pages, and introduced an alternative in the form of word and character counts. Specifically, the court allowed a principal brief to exceed thirty pages where the word count did not exceed 14,000 or the character count did not exceed 90,000.[9] In 1997,

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to effectively "stuff a 70-page brief into 50 pages." *Id.* They lamented that the "clerk's office did not catch the maneuver." *Id.*

2. *See id.* In *Westinghouse*, the court ordered counsel to file a brief that complied with the rules. Westinghouse's counsel, however, "responded by moving gobs of text into single-spaced footnotes." *Id.*

3. *Id.* at 425.

4. EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082, 1083 (7th Cir. 1990).

5. *Id.* at 1083-84.

6. *Id.* at 1084.

7. *See* 7TH CIR. R. 32 (amended Feb. 1, 1992), *available in* SULLIVAN'S LAW DIRECTORY 110c (1994).

8. The rule allowed proportional or monospaced type, while limiting proportional fonts to 12-point or larger size and monospaced fonts to 10 ½ characters per inch. 7TH CIR. R. 32(b)(1), (2) (amended Jan. 1, 1996), *available in* SULLIVAN'S LAW DIRECTORY 112c (1996). The court required proportionally spaced text to have serifs, but allowed sans-serif type in headings and captions. *Id.* R. 32(b)(1). With the brief, counsel had to file a certificate of compliance with the rules. *Id.* R. 32(d)(3).

9. The principal brief could contain "no more than the greater of 14,000 words or 90,000 characters." *Id.* R. 32(d)(2)(A). A monospaced brief could "contain no more than

the court modified this rule to require counsel to include the word or line count in the certification of compliance.[10]

In December 1998, the Federal Rules of Appellate Procedure (FRAP) were amended to incorporate some of this technological development previously addressed by the Seventh Circuit.[11] More recently, in *DeSilva v. Dileonardi*,[12] the already experienced Seventh Circuit had occasion to address the interplay between the FRAP rule change and word processor-assisted brief preparation. This article will discuss the new FRAP rule and the recent Seventh Circuit decision, then address the implications of that decision for appellate practice.

I. THE NATIONAL CHANGE

In 1998, FRAP 32(a)(7)(A) was amended to limit principal appellate brief lengths to thirty pages, down twenty pages from the prior limit of fifty.[13] However, an attorney who is adept at the ways of the toolbar can write up to 14,000 words.[14] Thus, a "lazy" attorney gets thirty pages, but the computer-savvy attorney gets fifty-six pages (assuming 250 words per page). For a reply brief, all of the limits are halved.[15] This amendment went into effect, nationally, December 1, 1998. In jurisdictions whose local rules had not previously made such restrictions, this new rule has probably resulted in a significant alteration in the appellate attorney's strategies for writing appellate briefs.

1,300 lines of text." *Id.* In either event, the court spelled out which parts of the brief counted towards this total and which did not. *Id.* R. 32(d)(2)(C).

10. 7TH CIR. R. 32(d)(3)(i), (ii), *available in* SULLIVAN'S LAW DIRECTORY 111r (1998-99).

11. For an overview of the changes, see Warren W. Harris, *The New Federal Rules of Appellate Procedure: Changes in Style and Substance*, 1 J. APP. PRAC. & PROCESS 415 (1999).

12. 185 F.3d 815 (7th Cir. 1999).

13. "A principal brief may not exceed 30 pages, or a reply brief 15 pages." FED. R. APP. P. 32(a)(7)(A).

14. "A principal brief may not exceed 30 pages, . . . unless . . . it contains no more than 14,000 words; or it uses a monospaced face and contains no more than 1,300 lines of text." FED. R. APP. P. 32(a)(7)(B)(i). A monospaced face uses exactly the same amount of space for every letter despite size differences; thus an *m* occupies the same amount of space as an *i*. At twenty-six lines per page, this option produces a fifty-page brief.

15. "A reply brief is acceptable if it contains no more than half of the type volume." FED. R. APP. P. 32(a)(7)(B)(ii).

Although not previously expressing this concern to the same degree as the Seventh Circuit, the entire federal appellate judiciary finally grew weary of numerous attorney practices that pressed the limits of text volume that could be placed within the margins of the pages.[16] The advisory committee notes to the 1998 FRAP amendments spell out the national rationale for this change and describe the thirty-page option as a "safe-harbor provision."[17] To this end, the notes discuss how the prior fifty-page limit was "meaningless" and subject to much finagling, all of which was intended to undermine the process of complying with page limitations.[18] Some of the suspect techniques included using proportionally spaced typefaces,[19] using shorter fonts,[20] manipulating the line spacing,[21] and, most assuredly, other techniques that cannot be recounted here. By adopting changes to the format rules, the committee hoped to "create a level playing field" between those attorneys with a computer (and the drive to manipulate) and those without.[22] "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."[23]

Further, the rule change clarifies exactly which words count toward this total and which do not. The headings, footnotes, and quotations are considered in the total, while the total does not include the corporate disclosure statement, tables of contents and authorities, statements with respect to oral argument, addenda containing statutory, rules, and regulation texts, or certificates of counsel.[24] Every brief relying upon the type-volume limits must then include a certification, signed by

16. A recent Westlaw search of the other circuits resulted in non-specific references to lower court opinions in which some action had been taken as a result of attorney misconduct in complying with length limitations.

17. FED. R. APP. P. 32 advisory committee notes.

18. *Id.*

19. Compared to a monospaced face (*see* note 14, *supra*), the proportionally spaced typeface "greatly increase[s] the amount of material per page." *Id.*

20. Although everyone using proportionally spaced type must use a 14-point typeface, the height of these typefaces varies by font. *Id.*

21. In most word processing programs, one can alter the line spacing by tenths of an inch.

22. FED. R. APP. P. 32 advisory committee notes.

23. *Id.*

24. FED. R. APP. P. 32(a)(7)(B)(iii).

the attorney or unrepresented party, declaring compliance with this rule.[25] "The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief."[26]

Thus, the new rule 32 seemed poised to eliminate many of the existing and potential technological issues surrounding brief typeface and volume. Yet, not surprisingly, attorneys soon found a gray area in the rule.

II. THE RECENT DECISION

In *DeSilva*, the Seventh Circuit, ever wary of attorneys trying to pull a fast one, decided to check the volume of a brief when appellants' counsel attempted to incorporate another document by reference.[27] The court found the brief in excess of the volume limits and issued an order to show cause why counsel should not be sanctioned.[28] Appellants had, in fact, used Microsoft Word 97 to count the words; however, the program counted only the main text, and did not count the footnotes, which under rule 32 must be included in the total word count. The problem, thus, was not in counsel's conduct but in the word-processing program.

The court found that Microsoft Word counts text and footnotes when the cursor is located anywhere in the document and no specific text is selected. In such instances, a checkbox in the word-processing program dialogue window is labeled "include footnotes and endnotes." Once the user checks this box, the word count includes both the text and the footnotes in the total. However, "if the user selects any text in the document this checkbox is grayed, and the program counts only the characters and words in the selected text."[29] Under this latter

25. FED. R. APP. P. 32(a)(7)(C).

26. *Id.*

27. DeSilva v. Dileonardi, 185 F.3d 815, 815-16 (7th Cir. 1999).

28. The court found that although counsel certified that the brief only contained 13,824 words (176 below the limit), it actually contained 15,056 words. *Id.* at 816.

29. *Id.* at 816. Actually, then, the attorneys brought this problem on themselves by limiting the words to be counted.

method, the footnotes cannot be added automatically into the total from the selected text.[30]

The court recognized that this word processing feature "complicates implementation" of the new rule 32 where counsel selects the text to be counted (e.g., highlighting all text following the tables of contents and authorities, which are not counted) and, in effect, omits the footnotes that accompany that text.[31] "Counsel who do not notice that the count-footnotes box has been dimmed out may unintentionally file a false certificate and a brief that exceeds the word limits."[32] The court recognized that this is what happened in *DeSilva*, and it further assumed that "even counsel who are aware that the brief contains footnotes may suppose that the software included these automatically."[33]

The court tested various word processing software on the market, finding the word count glitch to be true of Word 97 for Windows, Word 98 for Macintosh, and Word 2000 for Windows. The word count in Corel WordPerfect, however, "includes words in footnotes that are attached to the selected text."[34] The court warned attorneys to be mindful of this matter in the future and determined to send the opinion "to those responsible for such design decisions."[35] The court stated that it will "flag" this concern in the court's Practitioner's Guide and in materials distributed upon docketing an appeal.[36] Finally, the clerk's office will closely examine briefs prepared using Word if they are close to the word count limit and contain footnotes.[37]

III. IMPLICATIONS FOR APPELLATE PRACTICE

Counsel in *DeSilva* was, fortunately, spared sanction. Had the court thought counsel's actions intentional, it would

30. If counsel noticed the grayed box, then, of course, the footnotes could be counted manually and added to the text total.

31. *DeSilva*, 185 F.3d at 816.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 817.

36. *Id.*

37. The author knows from personal experience that the clerk's office is following through on the court's instructions. Recently, the court clerk checked the word count of a reply brief prepared in Word despite the page length being about half the allowed amount.

probably have imposed sanctions. As appellate attorneys across the nation spread the word about this case and its import, they must also check their word processing software and make any needed adjustments to their word-counting practices, at least until such time as Microsoft modifies the various versions of Word to correct the problem. The next "blind" violation like this will not receive such light penance. Thus, the Seventh Circuit's opinion stands as a stern reminder that counsel must pay close heed to the new national limits imposed by rule 32.

For the time being, attorneys who use Word have several options. For one, they must select the appropriate text and obtain a word count, select the corresponding footnote text and obtain a word count, then add the two numbers for their certificate of compliance. A second option would have counsel create separate Word documents for those parts of the brief that count toward the word count and those that do not. Then, prior to generating any tables for the part that counts, counsel must obtain a word count for the whole document (not selecting any particular text). A third but more costly option is to switch software. Finally, counsel could follow the advice of former court of appeals Judge Mikva and eliminate footnotes altogether.[38]

In general, counsel cannot and should not blindly use a word processing program to prepare briefs without exploring and knowing the limitations of that program. Being mindful that courts are paying close attention to these issues, wise counsel will not compromise client representation for a technical maneuver; otherwise sanctions will follow for those who knowingly evade the rule's limitations.

38. *See* Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985) ("The use of footnotes . . . has spread like a fungus.").