The Law Office of Richard L. Stanley
P.O. Box 7967
Houston, TX 77270
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VIA ELECTRONIC SUBMISSION

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

Re: *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure*

Dear Committee Members and any others whom it may concern:

I appreciate the opportunity to offer some reasons for my strong opposition to the pending proposal to amend Fed. R. App. P. 28.1 and 32(a)(7) so as to shorten the length of appellate briefs in federal court from 14,000 words to 12,500 words.

I have been an appellate attorney for over 25 years. My appellate practice is concentrated in appeals to the U.S. Court of Appeals for the Federal Circuit in patent litigation matters. However, I have briefed appeals to the Federal Circuit in other areas of that court's jurisdiction. I have also briefed appeals and filed amicus briefs in other U.S. Courts of Appeal as well as before the U.S. Supreme Court. I have also participated in the preparation of briefs in pro bono criminal appeals in both federal and state appellate courts.

Given that my practice is primarily focused on appeals in patent litigation matters, it would be far too convenient to rely on the premise that patent cases are inherently more complex than most federal cases, and thus appeals in patent cases justify a greater amount of words. Without venturing in that direction, I believe my briefing experiences are germane to any federal appeal involving a complex record, a lengthy trial, multiple and diverse claims, important issues of first impression or widespread interest, or other complicating factors.

To be sure, I have filed briefs in patent appeals containing substantially less than the maximum allowable number of words. However, those instances are few (and usually tied to unique circumstances such as briefing only a single issue or filing a brief in a case with multiple other parties and briefs on the same side). At various judicial conferences and CLE programs, I have heard appellate judges decry the number of briefs that appear on their desks containing just under the maximum number of words. I readily admit to having been responsible for many such briefs throughout my career. In my defense, I can attest that each of those briefs originally contained 15,000 words, or 17,000 words, or 20,000 words, or 25,000 words, or sometimes over 30,000 words before being painstakingly edited to the final sub-14,000 words in the version ultimately filed with the appellate court.

My uniform experience is that the latter stages of the appellate brief writing process under the current rules is already unduly focused on the labor-intensive, delicate, and often painful task of reducing each brief to the required word count in a manner that does not unduly sacrifice its meaning, clarity, or possible success. The primary reason that many of my briefs have been filed with just less than the allowed 14,000 words is that my brief-drafting task becomes complete at the instant that I am first able to reduce the word count to a number less than 14,000. Such an exercise in "word reduction" is not a matter of deciding which arguments to present or how to make the writing better by tightening and polishing the language for maximum clarity and persuasiveness. Those tasks have been done before I turn to the inevitably final task of removing words from the brief for no other purpose than to reduce its length—even under the existing 14,000 word limit.

My fundamental point is that it has been my experience over the past 20+ years that the extensive editing required to meet the existing word count limit is already undermining the effectiveness and usefulness of briefs filed in many complex cases. Recalling my own difficulties in reducing briefs to less than 14,000 words, I cannot imagine how an additional requirement to remove another 1,500 words from those prior briefs would have benefited either the reviewing judges or the administration of justice. Thus, it is my view that the proposed reduction from 14,000 words to 12,500 words will not turn "bad" brief writers into good ones, may turn some "good" briefs into "not so good" ones, and thus will not improve the quality of written advocacy presented to the federal courts.

As a former appellate law clerk and as a practicing appellate attorney, I have read appellate briefs containing 10,000 words or less that are redundant, unfocused, and confusing. On the other hand, briefs containing 20,000+ words that suffered from none of those flaws would still have to be reduced to the applicable 14,000 word limit. My belief is that many of those briefs as eventually filed were not as powerful or as clear or as useful to the reviewing court as might have been the longer versions that existed prior to the last few rounds of editing. If the final editing for length of briefs that are filed in complex federal cases is rendering them less clear and less useful to the appellate judges under the existing 14,000 word maximum, then such problem will be greatly exacerbated under a 12,500 word limit.

At no time in my career have I ever added words to an appellate brief merely to cause such brief to appear more substantial by approaching the applicable word count or page limit. If judges are noticing that most briefs being filed today are at or near the maximum word count, it is almost assuredly because those briefs were originally much longer when first drafted. If the maximum word count is reduced, it seems certain that the only briefs that will not be filed at or near that reduced maximum will be those briefs that would have been filed with less than 12,500 words under the current rule. The first complete draft of a brief is almost always the longest one. The iterative process of editing typically and properly causes the initial, longer draft to become clearer, tighter, and shorter. But just as it is doubtful that any attorney whose initial draft of a brief contains less than the required word count will add text merely for purposes of increasing its length, it is also doubtful that most attorneys whose briefs satisfy the word count will engage in extensive further editing merely to achieve a shorter brief.

The sage observation to the effect that "if I had more time, I would have written less" has been attributed to countless earlier writers. However, the truth behind such adage is directly applicable to present-day appellate writing. Where a drafter of an overlong brief is working on an hourly basis, the client likely will not pay for the additional hours that would be needed to reduce the brief beyond what is required under the rules. In my experience, the client will likely have approved the contents of the brief at a point when there were still hundreds or even thousands of additional words left to be excised. Once the brief gets under the word limit, it is deemed done. Where a brief is being written for a fixed fee, the attorney or the law firm may be unable or unwilling to devote additional hours to the task of reducing the length of the brief below the maximum when such time could be more profitably devoted to other tasks.

The above adage reflects the reality that "if an attorney would be compensated for taking more time, he or she would have written less." For a legal aid attorney or a public defender, the above adage is more aptly modified to reflect the starker reality that "if I had fewer cases to handle, I would have written less." If focused and concise writing takes more time to accomplish, that is the one thing that the latter attorneys do not have in light of their extensive caseload (and they are often not being paid by the hour or by the case). Moreover, those same practical and economic disincentives may equally undermine an attorney's willingness to edit or craft a brief once it falls below the maximum word count.

The inescapable truth is that most attorneys do not have the luxury of unlimited time and budget to fashion each brief to its ultimate level of persuasiveness, readability, clarity, and brevity (even where such goals are not mutually inconsistent). Perhaps a book or law review author can wait to publish until there are no unnecessary words and each selected word is exactly right, but not a brief writer. Even the appellate judge has more ability to take as much time as is necessary to draft and craft an opinion before releasing it to the parties and the public. Needless to say, such authors and judges are also not laboring under a need to comply with a strict maximum word count. Yet, none of those authors is likely to write more than is believed necessary to convey their intended story or decision.

Under the existing rule, attorneys resort to a variety of techniques by which to wring individual words out of briefs without sacrificing substantive content. A single example may illustrate this point. I recently drafted and filed an amicus brief in a case before the U.S. Supreme Court on the opposite side of the case on which the government was an interested party. In the government's brief, I noticed that all citations to the U.S. Code and to the Code of Federal Regulations did not contain the "§" symbol, such that a citation to 15 U.S.C. § 1071 appeared as "15 U.S.C. 1071" and a citation to 37 C.F.R. § 2.120 became "37 C.F.R. 2.120." In briefs filed in other cases, I have observed a similar but less subtle modification of deleting the space between the "§" symbol and the code section in all such citations (e.g., "§1071"). Perhaps no real loss in meaning or clarity, but each dropped "§" symbol or the omitted space saved a word under the counting programs utilized within current word processing software.

Where the resulting brief as filed just barely complies with the applicable word count, omissions of that type do not seem to be accidental and would surely be more standard practice than noticeable quirk under a further reduced word count. The relevant point is that if skilled appellate attorneys (*i.e.*, those whose overlong briefs are indisputably not the product of poor

writing skills or insufficient attention to the task) are already resorting under the existing rules to such techniques in complex and important cases to eliminate single words or only a few words at a time, it is my opinion that there is no real remaining benefit to the judicial system to be gained by imposing a new rule that requires them to find a way to remove 1,500 more words. Given that attorneys have already reached the word-removal stage of having to edit their briefs with a scalpel, it is unrealistic to believe that briefs will be improved by forcing them to go back to editing with a blunt axe.

The current rule already requires appellate attorneys in complex cases to resort to word processing techniques and word counting tricks as a necessary complement to their literary, analytical, and advocacy skills. Some of those techniques are clever, some are dubious, and many are employed at a cost of clarity or readability. Quoted material in briefs is now more heavily excised through the use of ellipses to save words, which may require the reviewing court to examine the original source for its full context. Indeed, appellate attorneys have probably now discerned that use of the ellipsis symbol (…) rather than the traditional three periods separated by spaces (. . .) saves two words each time. If the proposed reduction in word count is adopted, my prediction is that attorneys will have no choice but to continue down the slippery slope of devising more pronounced shortcuts to accomplish the mandated word reductions.

As one prediction, existing citation conventions will likely cease to be followed. First, citations to cases will become more truncated. The traditional citation to a case entitled "Smith & Jones Trading Co. of Am. v. U.S. Int'l Trade Comm'n" will likely become "Smith v. USITC" in future briefs to save ten words. Because a full citation to each cited case or other authority cited in a brief will appear in the Table of Authorities at the beginning of each brief (where it is not subject to the word count), attorneys may soon realize that it will save words to employ only the short form citation to any such authority in the body of the brief. It will be slightly more inconvenient for the reader to have to refer to the Table of Authorities to find the full citation, but correspondingly less argument text will have to be excised. Eventually, case names may cease to be utilized at all outside of the Table of Authorities, such that only the unique reporter citation will appear within the brief itself.

Where a case involves a company such as "Bank of America," there will be little reason to allow the repeated references to that entity's three-word formal name in a brief where a one-word label such as "BofA" will suffice. Of course, not all such abbreviations will be so well known or readily understandable. If the opposing party in such a case were the Red River Valley National Bank, there is no doubt that such party would become "RRVNB" every time it was referenced in the appellate briefing. As such acronyms multiply and cause some future level of opaqueness, a return to the impersonal but single word designations such as "Appellant/Appellee" or "Plaintiff/Defendant" or "Petitioner/Respondent" will eventually convey more useful information and clarity.

Some appellate attorneys are including a Table of Abbreviations following the Table of Authorities in their briefs, which both tightens the text and eliminates a need to use extra words to identify such abbreviations within the brief itself. There should be no doubt that the widespread use, complexity, and substantive content of such abbreviation pages will increase in the future. For example, the "person having ordinary skill in the art" is now abbreviated in

patent cases as the "PHOSITA" where obviousness under 35 U.S.C. § 103(a) is at issue. One need only examine the proliferation of lengthy acronyms within the government to imagine how difficult future appellate briefs may be to decipher despite having a reduced length. As further proof, one might also consider the quick development of the widespread shorthand conventions utilized to comply with the 140-character limitation imposed by Twitter. Just as "judgment as a matter of law" is now written as JMOL (and saves five words each time), perhaps the Twitter-like shorthand "M4NT" will soon become widely accepted as the abbreviation for a "motion for a new trial" in order to save four more words each time.

Nevertheless, the burdens imposed by the proposed amendment will not be solved by tricks and techniques that eliminate mere words, but will require the wholesale elimination of paragraphs, background, and context. Rest assured, whole arguments will always be the last to go. They may be stripped to the bone, but they will rarely disappear. Instead, reducing the applicable word count from 14,000 words to 12,500 words will cause attorneys to excise important procedural details or to incorporate factual background and even substantive material from citation to the record as mechanisms for eliminating enough words. The resulting need to look for information in places other than within the four corners of the parties' briefs will likely increase the burden on the reviewing judge (or the judge's staff) much more than what would be saved by not having to read a possible extra ten pages per brief.

For example, procedural histories of the case on appeal might end up being a single citation to the docket. Where a brief might formerly have contained a Statement of Facts that was carefully crafted to the issues on appeal, such statement might soon be replaced by a single citation to the district court opinion or to a similar section set forth in the party's earlier district court filings. In a patent case, the underlying technology might not be explained beyond a citation to the patent itself or to an expert report. Opinions on review may never again be summarized in a brief, even when only a subset of an opinion is relevant to the issues raised on appeal. Precedent now cited with accompanying parenthetical descriptions will likely be cited in future briefs without any helpful parentheticals. Stripped of such detail and background in the briefs, there will surely be a greater burden imposed on the chambers of the particular judge who is assigned the task of drafting the resulting appellate opinion.

In closing, I offer a few more predictions that what may come to pass if 12,500 words were adopted as the maximum. I predict that the courts of appeal will soon realize a need to adopt a formal rule like that in Supreme Court Rule 37.6 to prohibit counsel for parties from authoring any part of a supporting amicus brief and to prohibit both counsel and parties from making any monetary contributions to such amicus briefs. Otherwise, I predict a sharp increase in the number of amicus briefs filed in appeals as of right, particularly those involving large corporations, high stakes, and sophisticated counsel. I predict that the courts of appeal will also realize a need to adopt a formal rule to govern and restrict when multiple or related parties on the same side of an appeal can file separate briefs which address different issues while adopting the positions set forth in the parallel brief(s). Such rule will likely also need to address when such parties can file separate briefs using the same counsel or law firm, and set forth when resort to such overlapping briefs and counsel are prohibited. Until then, while the briefs may be shorter, it is quite possible that there will be more of them. Finally, the appellate courts will surely be burdened with increased motions for relief from the new maximum, such as those seeking

additional words or asking for judicial notice, and the court will also likely have an increased need to police and referee disputes over the minute details of proper and legitimate compliance with the word count requirements.

It is thus my strong belief that the proposed elimination of 1500 additional words from briefs filed in complex federal cases will cause the loss of important information that currently makes analyzing and deciding these cases easier for the appellate judges. Due to page limits and word counts, appellate attorneys have long been unable to adhere to Aristotle's instruction (as adopted by Toastmasters) to "tell them what you are going to tell them, tell them, and then tell them what you told them." There just is not enough space. Under the current 14,000 word limit, the final editing process leaves no doubt that material is being excised from briefs in complex cases such that the appellate court is never even told once about important and useful information. In my opinion, it is preferable for appellate judges to read many briefs that might state the same thing more than once than it would be for such judges to receive briefs in a complex case that do not have enough in them to provide the complete context for understanding and resolving the issues necessary for deciding the appeal.

I respectfully submit that the maximum word count in federal appeals should not be lowered any further. While I do not object in principle to the related proposal to change all existing page limits in the federal rules to a corresponding word count limitation, I also submit without further explanation that any such change should be based on a conversion ratio of at least 280 words per page, and preferably based on 300 words per page.

With regards,

/s/ Richard L. Stanley