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The Honorable Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.,
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Judge Sutton:

We write in response to the Advisory Committee's proposed amendments to Rules 28.1 and 32 of the Federal Rules of Appellate Procedure.

The undersigned attorneys at Wiley Rein are active litigators in the federal courts of appeals. Wiley Rein's appellate litigators handle appeals concerning a wide variety of legal matters. Our appellate practitioners are particularly experienced in handling technically complex issues in the areas of telecommunications and patent law. Our attorneys also represent pro bono clients throughout the various courts of appeals. Based on our experience, we hereby recommend that the proposed reduction in brief length be rejected.

The proposed amendments to Rules 28.1 and 32 would reduce the word limit from 14,000 words to 12,500 words. We strongly urge the Rules Committee to reject the proposed amendments because they would not substantially improve appellate advocacy. Any potential improvement would be outweighed by the detriment to briefing in complex appeals, particularly in patent and telecommunications appeals.

At a minimum, there appears to be a dispute about the actual basis for the 1998 amendments to the Federal Rules of Appellate Procedure that introduced the 14,000-word limit for briefs. Prior to the 1998 amendments, the rules imposed a 50-page limit for briefs. The Advisory Committee's June 6, 2014 Report concludes that the change from 50 pages to 14,000 words was based on an erroneous "conversion rate" of 280 words per pages. The Advisory Committee submits that the more accurate number should have been 250 words per page.

Judge Frank Easterbrook concludes otherwise. Judge Easterbrook explains that he "drafted Rule 32" and that "[t]he 14,000 word limit came from Seventh Circuit Local Rule 32, not from any new calculation and Seventh Circuit Rule 32 came



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from a detailed count of words in briefs filed in the Supreme Court, not from a word-count or line-count of briefs filed in the court of appeals.”

We are certainly in no position to quarrel with Judge Easterbrook’s explanation of the genesis of the 1998 amendments. At a minimum, the apparent disagreement about the 1998 amendments should give the Committee pause about adopting the current amendments to Rules 28.1 and 32. The only rationale provided by the Advisory Committee for reducing the word limit on briefs is the Advisory Committee’s conclusion about the supposed error in the “conversion rate.” But Judge Easterbrook’s explanation casts serious doubt on the correctness of the Advisory Committee’s conclusion.

More importantly, the Advisory Committee’s focus on a possible “error” some seventeen years ago misses the mark. The key inquiry should examine whether the current 14,000-word limit—a rule that has been in place for almost two decades—permits attorneys to sufficiently and effectively present the facts and legal issues on appeal. We submit that the current word limit is working well and should not be altered.

Furthermore, the current word limit is important to ensure that complex appeals involving patent and telecommunications issues are properly presented to the appellate courts for review. Wiley Rein’s appellate practice handles many appeals in the areas of patents and telecommunications. Disputes involving patents can be extraordinarily complex, ranging from the latest developments in smartphone technology to stem cell therapies for treating cancer. Indeed, patent appeals from decisions of the U.S. International Trade Commission routinely concern agency decisions on the merits that are hundreds of pages long.

Similarly, appeals concerning telecommunications disputes can likewise be complex. The statutory schemes are frequently convoluted. Many appeals implicate lengthy administrative hearings or rulemaking proceedings. In such cases, a party on appeal often faces a challenging task to cogently present the facts and issues to the reviewing court within the current word limit.

Every skilled appellate litigator knows the value of conciseness. Our goal with every appeal is to ensure that every word in an appeal brief has a purpose. If it does not, it is cut. The shorter the brief we present to the court, the more persuasive it likely will be, and thus the better we advocate for our clients before the courts. We



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have every incentive to make briefs as short as possible. Unfortunately, in our experience, certain appeals—particularly patent and telecommunications appeals—cannot be completely briefed in 12,500 words.

We recognize that the rules permit parties to ask for enlarged briefing. In comments submitted on February 3, 2015, Chief Judge Briscoe of the Tenth Circuit noted that “counsel may move for leave to exceed the word limit.” In our experience, courts of appeals are generally parsimonious with respect to granting such motions. We must therefore respectfully disagree with Judge Briscoe’s statement that “[t]he flexibility provided by such motions will mitigate any potentially adverse effects of the rule change.” Moreover, even if such motions are granted, the fact that such motions will have to be made more frequently will only add to the cost of appeals and to the burden on the courts in deciding the motions. Absent a sufficient justification for amending the current rules, the possibility of filing a motion for leave to exceed the word limit is not a sufficient safeguard.

Finally, the Advisory Committee’s primary impetus for the proposed change to the word limit on briefs is a decision to impose a word limit, as opposed to a page limit, on other submissions, such as motions. There are valid reasons to use word limits instead of page limits for all submissions to the courts, but the Advisory Committee has not identified a sufficient reason to reduce the existing word limits on briefs. Indeed, the Advisory Committee itself noted that “there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs.” *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure Report, at 18 (Aug. 2014).

Given the lack of any strong rationale to reduce the current word limits, and the apparent divide within the Advisory Committee itself, we respectfully submit that the proposed amendments to Rules 28.1 and 32 should be rejected.

Respectfully Submitted,

/s/ Andrew G. McBride

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