

IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 14D2827

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IN THE MATTER OF DISCIPLINE OF  
HOWARD NEIL SHIPLEY

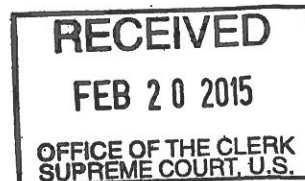
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RESPONSE TO ORDER TO SHOW CAUSE  
ISSUED ON DECEMBER 8, 2014 [REDACTED]

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Howard Neil Shipley, through undersigned counsel, respectfully submits this Response to the Order to Show Cause issued by this Court on December 8, 2014.

### INTRODUCTION

In this case, attorney Howard Shipley had to reconcile the competing demands of the duty of loyalty that he owed his client and the duty that he owed this Court as a member of the Supreme Court Bar. Mr. Shipley's client had deeply held views about patent law and insisted on articulating his basic argument (that the Federal Circuit was ignoring the guidance of this Court) in his own words, as he had done in prior *amicus* briefs filed in this Court by other counsel. The result is an unorthodox petition that clearly and faithfully reflects the views of the client, right down to the client's favored locutions and acronyms employed in his other writings about the patent system. Mr. Shipley counseled the client and helped to ensure that the petition complied with this Court's rules on matters such as format and the necessary components. The petition is not the one Mr. Shipley would have filed for a more deferential client, but the petition undoubtedly reflects his client's wishes and instructions.

Mr. Shipley certainly had the option to withdraw from the representation, but doing so likely would have prejudiced his client's ability to pursue the last legal option available to save his patent from invalidation. And, of course, even if Mr. Shipley had withdrawn, any substitute counsel retained by Dr. Schindler would have faced the same dilemma as Mr. Shipley. Mr. Shipley ultimately did not withdraw, and he made the arguments his client wanted this Court to hear. That decision was a good-faith effort to reconcile the competing demands of the ethics rules. Other lawyers

may well have made a different choice, but Mr. Shipley's decision does not amount to sanctionable misconduct. The proper remedy for filing an unconventional or difficult-to-follow certiorari petition should be denial of the petition (or rejection of the filing), not disciplining the lawyer who filed it.

## BACKGROUND

### A. Supreme Court Bar Admission and Discipline

Since 1790, the Bar of this Court has been broadly open to attorneys of good moral and professional character who have been qualified to practice before a state's highest court for at least three years. *See Shapiro et al., Supreme Court Practice* 981-82 (10th ed. 2013). The Court has never sought to limit admission to the Bar to those with unique experience or qualifications as appellate counsel. *Id.* As a result, lawyers who typically practice before other courts but on a rare occasion may have a matter go "all the way to the Supreme Court" are free to join the Bar and handle their own cases before this Court. The Court's longstanding policy of generally open admission means that the Bar of this Court includes thousands of practitioners who will likely handle only one or two matters (if that) before this Court over the course of their careers.

Under Rule 8.1, a member of the Bar who has been disbarred or suspended from practice by another court must show cause why this Court should not impose a similar reciprocal sanction. Rule 8.2 further provides that "the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court." Over the Court's history, the vast

majority of disciplinary actions have involved reciprocal discipline based on a sanction imposed by another court (Rule 8.1), rather than a disciplinary action based on actions taken directly in this Court (Rule 8.2). This is not surprising, since a court that depends heavily on an applicant's good standing before another court for admission purposes obviously needs to rely on those other courts and take reciprocal action when it comes to discipline. In cases of reciprocal discipline, the past precedents and sometimes elaborate procedures of the primary disciplinary courts provide notice to practitioners of impermissible practices and the requisite procedural protections to ensure that a lawyer is not deprived of the means necessary to ensure a livelihood without due process of law.

But in cases of direct, as opposed to reciprocal, discipline, this Court cannot rely on the precedents and procedures of the primary disciplinary court to provide notice of unethical practices and an opportunity to be heard. And the Court's heavy emphasis on reciprocal discipline also means that its past disciplinary proceedings provide very little guidance about ethical issues for lawyers practicing before the Court. To the best of counsel's knowledge, there has been only one instance in the last 50 years in which the Court took public disciplinary action against an attorney for misconduct in a filing before this Court. See *In re Moore*, 529 U.S. 1127 (2000) (ordering attorney disbarred by 5-4 vote). The Court did not issue an opinion in that case, but a district court noted in a subsequent reciprocal disciplinary proceeding that the attorney in question had filed two petitions that were filled with abusive language, such as: accusing the Second Circuit of being a "corrupt enterprise" under

RICO and a “den of racketeers”; describing that court as “a cancer in the legal system”; and referring to “chief injustice Ralph Winter” and his fellow “injustices.” *In re Teddy Moore*, 177 F. Supp. 2d 197, 199 (S.D.N.Y. 2001).

Just as this Court gives substantial weight to the discipline imposed by other courts, this Court’s disciplinary actions can have dramatic reciprocal effects in other courts and tribunals. As a result, an error in the Supreme Court where a lawyer appears only infrequently could cause that lawyer to lose her livelihood in the forum where she appears regularly. *See, e.g.*, D.C. Bar Rule XI, §11(c) (“Reciprocal discipline may be imposed whenever an attorney has been disbarred, suspended, or placed on probation by another disciplining court.”); 37 C.F.R. §11.24 (any “public censure, public reprimand, probation, [or] disbarment” by this Court would likely result in similar sanction from the Patent & Trademark Office).

#### **B. Background on Howard Shipley**

Mr. Shipley is a graduate of Virginia Polytechnic Institute and State University (B.S., 1987, engineering science and mechanics) and Officer Candidate School of the U.S. Navy. *See* Exhibit 1 (Shipley Decl.) ¶ 1. After serving as an active duty nuclear submarine officer in the Navy for 8 years, Shipley left active duty and joined the Patent and Trademark Office (“PTO”) as a patent examiner. *Id.* ¶¶ 1-2. He continued to serve as an officer in the Naval Reserve, from which he retired with the rank of Commander in 2007. *Id.* ¶ 1.

Shipley enrolled in the George Mason University School of Law as an evening student and received his J.D. in 1996. *Id.* ¶ 2. Following law school, he clerked for the Honorable Claude Hilton, U.S. District Judge for the Eastern District of Virginia.

*Id.* ¶ 4. Shipley was admitted to the Virginia Bar in 1996 and the District of Columbia Bar in 1998, and by virtue of those admissions is authorized to practice before the highest courts in those jurisdictions. *Id.* ¶ 3. He is also admitted to practice before the U.S. District Court for the Eastern District of Virginia, the U.S. Court of Appeals for the Fourth Circuit, the U.S. Court of Appeals for the Federal Circuit, and the PTO. *Id.*

After working as an associate at two other firms, Shipley joined Foley & Lardner in 2000 and was elected partner in 2005. *Id.* ¶ 4. He has served as one of the two Professional Responsibility Partners in Foley & Lardner's Washington office, and the Professional Responsibility Partner for the firm's Intellectual Property Department. *Id.* The bulk of Shipley's practice involves administrative matters before the PTO, where he represents clients in connection with patent interferences, reexaminations, and other contested proceedings. *Id.* ¶ 5. Shipley also has experience in intellectual property litigation before federal courts and the U.S. International Trade Commission. *Id.* He has been involved in several appeals before the Federal Circuit, but did not present oral argument in any of them and does not hold himself out as an appellate specialist. *Id.* In his nearly 18 years as a lawyer, Shipley has never been disciplined by any bar or court, nor has he been the subject of a bar or court inquiry or a client complaint. *Id.* ¶ 6.

### **C. Background on Dr. Sigram Schindler and SSBG**

Dr. Sigram Schindler was born in Poland in 1936 and has lived in Germany since 1945. He speaks and writes English, but it is not his first language. Dr. Schindler has pursued studies in mathematics, physics, and computer science, and

completed a doctorate and postdoctoral dissertation at Berlin Technical University (“BTU”). He has been a Professor of Operating Systems at BTU since 1972.<sup>1</sup>

Dr. Schindler is the inventor or co-inventor on 14 U.S. patents, and he has 23 patent applications pending before the PTO. He founded TELES Informationstechnologien AG (“TELES”) in 1983 to commercialize his inventions in the areas of telecommunications and computer/internet technology. TELES had revenue of 10.7 million Euros (approximately \$12.1 million) in 2013, and its shares are publicly traded in Germany. Sigram Schindler Beteiligungsgesellschaft mbH (“SSBG”) is a German corporation that was formed to hold TELES’s intellectual property. Dr. Schindler is the CEO of TELES and the President of SSBG.

As high-technology businesses, SSBG and TELES have a substantial interest in the protection of their intellectual property. In the course of managing SSBG’s and TELES’s intellectual property rights, Dr. Schindler also developed an interest in U.S. patent law and the operation of patent systems more generally. Indeed, Dr. Schindler has developed a patent system technology, including computer software based on artificial intelligence principles, that could be used to make patent eligibility determinations currently made by patent examiners at the PTO. Dr. Schindler’s system is designed to ensure that patent terms are consistently interpreted and that the protected subject matter in each patent is clear and well-defined. Dr. Schindler refers to his patent system technology as the “Facts-Screening-and-Transforming-

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<sup>1</sup> Dr. Schindler’s CV is available at <http://bit.ly/1LcTEhH>.

Processor Expert System” (“FSTP”) or the “Innovation Expert System” (“IES”). Since 2012, Dr. Schindler has filed eight patent applications relating to this technology.

Dr. Schindler writes and speaks frequently on his theories of patent claim interpretation, including those embodied in his patent system technology.<sup>2</sup> He routinely corresponds with the editors of various patent law journals, and has attended meetings and conferences of the American Intellectual Property Law Association. Dr. Schindler also closely follows patent cases in this Court and the Federal Circuit. He has attended oral arguments in this Court and the Federal Circuit, and often asks his attorneys to send him argument transcripts, briefs, and other materials regarding such cases.

Through counsel other than Mr. Shipley, SSBG has also filed five *amicus* briefs in this Court, at both the certiorari stage and the merits stage.<sup>3</sup> Although unorthodox in style and difficult to follow at times, each of those briefs offered Dr. Schindler’s views—based on his previous research and writings—about how to improve the patent system, especially in the context of what Dr. Schindler refers to as emerging technologies (or “ETs”). For example, SSBG argued in several of its *amicus* briefs that the Federal Circuit has failed to properly implement the “refined paradigm” of

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<sup>2</sup> Many of Dr. Schindler’s articles, outlines, and monographs are published at: <http://www.FSTP-Expert-System.com>.

<sup>3</sup> See *Amicus Br. of SSBG, Ass’n for Molecular Pathology v. Myriad Genetics*, No. 12-398 (Jan. 31, 2013) (attached as Exhibit 2); *Amicus Br. of SSBG, Wildtangent v. Ultramercial*, No. 13-255 (Sept. 23, 2013) (attached as Exhibit 3); *Amicus Br. of SSBG (certiorari-stage), Alice Corp. v. CLS Bank*, No. 13-298 (Oct. 7, 2013) (attached as Exhibit 4); *Amicus Br. of SSBG (merits-stage), Alice Corp. v. CLS Bank*, No. 13-298 (Jan. 28, 2014) (attached as Exhibit 5); *Amicus Br. of SSBG, Nautilus v. Biosig Instruments*, No. 13-369 (Mar. 3, 2014) (attached as Exhibit 6). SSBG also filed two similar *amicus* brief in the Federal Circuit in *Lighting Ballast v. Philips Electronics*, No. 2012-1014 (filed May 28, 2013), and *CLS Bank Int’l v. Alice Corp.*, No. 2011-1301 (filed Dec. 6, 2012).



patent law that this Court developed in decisions such as *Mayo Collaborative Services v. Prometheus Laboratories*, 132 S. Ct. 1289 (2012). See Exhibit 3 (SSBG *Wildtangent* Amicus Br.) at 2-4, 11 (“None of both controversial CAFC decisions performed the respective claimed invention’s §101 test within the legal framework which the *Mayo* decision has clearly and absolutely unmistakably established”). This Court accepted all five of SSBG’s *amicus* briefs (which were submitted by counsel other than Mr. Shipley and Foley), and did not suggest that those briefs failed to comply with the Court’s Rules.

#### **D. Proceedings Before The Federal Circuit**

Mr. Shipley and Foley & Lardner have represented Dr. Schindler’s companies for nearly a decade. From 2006 through 2013, Shipley and Foley represented TELES in several patent infringement litigation matters. See Exhibit 1 (Shipley Decl.) ¶ 7. Beginning in December 2012, Foley also represented SSBG in four matters: (1) general advice on patent prosecution; (2) defense of an arbitration proceeding; (3) appellate litigation regarding the PTO’s re-examination of U.S. Patent No. 7,145,902 (the ‘902 Patent); and (4) appellate litigation regarding the PTO’s re-examination of U.S. Patent No. 6,945,453 (the ‘453 Patent). *Id.* In each of these matters, Dr. Schindler was the direct client contact and the principal decision-maker. *Id.*

This case involves the ‘453 Patent, which discloses an algorithm and switching apparatus for enabling voice telephone calls to be provided over low-cost “packet switched” networks. Dr. Schindler and his co-inventors filed a patent application in 1996, and TELES began producing routers embodying that technology in 1997. The

PTO issued the '453 Patent in October 2005. But, following a reexamination prompted by one of TELES's competitors, the PTO found the '453 Patent invalid as obvious in 2011. Foley & Lardner was retained during the briefing process before the Federal Circuit to prepare the reply brief and handle the oral argument. Foley was also engaged to handle a related appeal for SSBG regarding the PTO's invalidation of the '902 Patent.

From the start of the engagement, Dr. Schindler insisted on having the briefs reflect his favored locutions and acronyms, and demanded that they include entire passages of his prose. *Id.* ¶¶ 8-9. When the Foley attorneys pushed back on some of the arguments Dr. Schindler wanted to raise in the Federal Circuit reply brief, he insisted that the brief be filed to include the precise language he favored. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After an exhaustive editing process—including in-person meetings with Dr. Schindler regarding line edits—Foley & Lardner filed the Federal Circuit reply brief on February 20, 2013. That filing included a footnote stating that “Prof. Sigrum Schindler, one of the inventors of the '453 Patent, should be recognized for his

significant contributions to this Brief.” Exhibit 7 (Fed. Cir. Reply Brief) at 3 n.4. Dr. Schindler was on a plane when the brief was filed, and did not see the final version before filing. Exhibit 1 (Shipley Decl.) ¶ 12. [REDACTED]

[REDACTED]

On February 25, 2013, Foley filed a “motion for leave to file an amended reply brief.” That motion candidly acknowledged that “[a]lthough Appellants rely on legal counsel, *in actuality, Dr. Schindler was the primary author of [the] Reply Brief.*” Exhibit 8 (Motion To File Amended Reply Brief) at 1 (emphasis added). The Foley attorneys were “aware of their legal and ethical obligations to this Court (and to any

court) and they have assured that every paper filed by them on behalf of Appellants has met those obligations.” *Id.* But “compared to other clients, Appellant’s counsel’s role in the substantive drafting of papers has been less than typical.” *Id.* at 1-2. Counsel “certainly gave substantive suggestions and reviewed/approved all of the content, as well as correcting grammatical and spelling errors and rewording phrases into proper English.” *Id.* at 2. But “Dr. Schindler ultimately approved all of the content and was to review all content before filing,” and “exercised close control of the Reply Brief in this Appeal.” *Id.*

In a supporting declaration, Dr. Schindler candidly acknowledged that “[a]lthough I rely on legal counsel, in actuality, I was the primary author” of the reply brief. *Id.* (Schindler Decl. in support of motion to amend) ¶ 6. He further stated that “I was responsible for all of the content and was to review all content before filing, to retain complete control of the ... Reply Brief.” *Id.* Dr. Schindler emphasized that he “very strongly feel[s] that now filing the version of the ... Reply Brief that I had intended to be filed is in the best interests of my companies.” *Id.* ¶ 9. The Federal Circuit was thus well aware that the reply brief was largely the work of Dr. Schindler rather than his counsel. On March 22, 2013, the Federal Circuit issued an order granting SSBG leave to file the amended reply brief, without suggesting that there was anything improper about Dr. Schindler’s role in preparing the brief.

In November 2013, the Federal Circuit set this case (and the ‘902 Patent case) for argument on January 8, 2014. [REDACTED]

[REDACTED]

[REDACTED]

The Federal Circuit held oral argument on January 8, 2014. [REDACTED]

[REDACTED]

On April 4, 2014, the Federal Circuit issued a 21-page decision affirming the PTO's invalidation of the '453 Patent. *See* Exhibit 9 (addendum to rehearing petition). The court addressed each of SSBG's arguments on the merits—including those drafted primarily by Dr. Schindler—and did not in any way suggest that those arguments were frivolous or improper.<sup>4</sup>

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<sup>4</sup> On February 21, 2014, the Federal Circuit issued a 22-page opinion ruling against TELES and SSBG on the '902 Patent. Like the decision on the '453 Patent, that opinion did not suggest that SSBG's arguments were frivolous or improper.

On June 9, 2014, Foley & Lardner filed a petition for rehearing *en banc* that is similar to the certiorari petition at issue here. *See* Exhibit 9.<sup>5</sup> Like the Federal Circuit reply brief, the rehearing petition contained a footnote stating that “Prof. Sigram Schindler, the primary inventor of the ‘453 patent, should be recognized for his significant contributions to this Petition.” *Id.* at 9 n.12. The Federal Circuit denied the petition for rehearing on July 14, 2014, again without suggesting that any of the arguments raised therein were improper in any way.

#### **E. The Certiorari Petition Before This Court.**

Dr. Schindler always intended to seek review in this Court if he lost in the Federal Circuit, and he began inquiring about seeking certiorari while his rehearing petitions were still pending in the Federal Circuit. Exhibit 1 (Shipley Decl.) ¶ 17. Beginning in April 2014, Mr. Shipley researched the rules for filing a certiorari petition, consulted an appellate specialist at Foley & Lardner, drafted an outline of the petition, and began preparing the statement of the case and the petition appendix. *Id.* ¶ 18. Mr. Shipley also applied for admission to the Bar of this Court, and was admitted in May 2014. *Id.*

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<sup>5</sup> Federal Circuit Rule 35(b)(2) requires *counsel* to include a statement in any petition for rehearing *en banc* explaining why the petition meets the criteria for granting rehearing. Because that statement must be made by counsel, Mr. Shipley insisted on drafting it without input from the client. *See* Exhibit 1 (Shipley Decl.) ¶ 16. Mr. Shipley’s statement in the rehearing petition in the ‘453 Patent case states: “Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States: *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 132 S. Ct. 1289 (2012), and *Nautilus, Inc. v. Biosig Instruments, Inc.*, \_\_\_ U.S. \_\_\_, 2014 Lexis 3818, June 2, 2014 (2014). Furthermore, this appeal raises the question of exceptional importance, whether a claim in a granted patent can be subject to two different claim interpretations depending on whether claim construction is conducted by the USPTO during a reexamination or by a district court.” Exhibit 9 (Petition for Rehearing) at 1.

On May 27, 2014, the Federal Circuit denied rehearing in the case regarding the '902 Patent. Throughout June, July, and August, Mr. Shipley reviewed and edited numerous drafts of the certiorari petition. *Id.* ¶ 19. And he frequently provided advice to Dr. Schindler regarding word limits, filing deadlines, preparation of the appendix, framing of the questions presented, the jurisdictional statement, the certificate of interested parties, and the logistics of printing and filing the petition. *Id.* In short, Shipley took numerous steps to help ensure that the petition would comply with this Court's Rules. But, as with the briefing process before the Federal Circuit, Dr. Schindler insisted on retaining primary control over the substance of the petition. *Id.* ¶¶ 17, 19. For example, Mr. Shipley attempted to rewrite the questions presented in a more conventional style, but Dr. Schindler insisted that the questions presented reflect his favored terminology and locutions. *Id.* ¶ 19. The petition in the '902 case was filed on August 25, 2014. *See* No. 14-221.

In the case at issue here, the Federal Circuit denied rehearing as to the '453 Patent on July 14, 2014. Dr. Schindler and Mr. Shipley began working on a certiorari petition in mid-September, and Shipley spent more than 40 hours of time on the petition. Exhibit 1 (Shipley Decl.) ¶ 20. Dr. Schindler once again insisted that the petition be filed using his preferred locutions, acronyms, and prose, and he retained close control over the substance of the petition. *Id.* Among other tasks, Shipley reviewed and edited numerous drafts of the petition; reviewed recent case law; consulted this Court's Rules and filing requirements; ensured that the petition contained all of the information required by Rule 14; and worked with the printer to

format the petition and prepare certificates of service and compliance. *Id.* Shipley also insisted upon substantive changes to the petition to remove what he believed to be unduly inflammatory criticism of one of the Federal Circuit judges. *Id.*

The petition was filed on October 6, 2014, as No. 14-424. Although it is written in an unorthodox style and can be difficult to follow at times, the core argument advanced in the petition is that the Federal Circuit and the PTO have not been faithful in applying this Court's patent-law decisions. Based on Dr. Schindler's past research and writing, the petition argues that this Court's decisions reflect a "refined claim construction framework," but that the Federal Circuit and PTO still have not fully grasped the import of those decisions, especially in the context of emerging technologies. *See* Pet.36 (arguing that decision below "grossly violat[es] this Court's *Biosig* decision"). The PTO waived its right to respond, and this Court denied the petition on December 8, 2014.<sup>6</sup> The Court issued its show-cause order to Mr. Shipley the same day.

## SUMMARY OF ARGUMENT

I. Mr. Shipley's actions in this case do not amount to sanctionable conduct unbecoming a member of this Court's Bar. From the start of Mr. Shipley's involvement in this matter, his client exercised close control over all aspects of the case. Dr. Schindler was particularly insistent upon filing briefs in *this Court* in his preferred manner for two mutually reinforcing reasons. First, Dr. Schindler

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<sup>6</sup> The Court denied the petition in the '902 Patent case—which was very similar to the '453 petition in terms of style and locutions—on October 14, 2014 without any suggestion of impropriety by counsel.



identified in this Court's precedents many of the key insights reflected in his own research and writing about the patent system. While he was frustrated by the Federal Circuit's failure to grasp and apply this Court's precedents, he felt that this Court would be uniquely receptive to his arguments if, but only if, he could convey them in his preferred manner. Second, because he had previously filed (through other counsel) five *amicus* briefs in this Court that reflected his favored locutions, acronyms, and prose, he had no reason to believe that the Court's Rules demanded a more orthodox approach.

When the case reached this Court, Mr. Shipley was thus faced with a difficult choice between: (1) filing an unorthodox petition that reflected Dr. Schindler's favored locutions, acronyms, and prose; or (2) withdrawing from the representation of his client of several years. Mr. Shipley chose to proceed with the representation while taking a number of steps to help ensure that the petition complied with the Court's Rules. Although the final product was certainly not what Mr. Shipley would have filed if he were representing a more deferential client, he and his colleagues made good-faith efforts to accommodate both their client's intense desire to control the substance of the petition and the duties they owed to this Court as members of the Bar. The petition is unquestionably written in an unconventional style and can be difficult to follow, but its core argument—which is consistent with the position Dr. Schindler advanced in his previous *amicus* briefs—is a far from unprecedented claim that the Federal Circuit and the PTO have not faithfully applied this Court's patent-law precedents.

Although Mr. Shipley could have withdrawn from the representation, that alternative to filing the petition the client demanded would have raised ethical issues of its own. Had Mr. Shipley withdrawn from the case, it likely would have prejudiced his client's ability to file a petition at all. Because the named party is a corporation, Dr. Schindler would not have been able to proceed *pro se*. And given the language barrier and the technically complex subject matter, it could have been very difficult for Dr. Schindler to retain substitute counsel in time to file a certiorari petition. And substitute counsel would have still needed to deal with Dr. Schindler's insistence, based on his experience in filing five *amicus* briefs without objection, that the briefs would prove most helpful to the Court if they used his preferred locutions, acronyms, and prose. In short, it was certainly not unreasonable for Mr. Shipley to stick with the representation rather than seek to withdraw under circumstances that could eliminate his longstanding client's last possible opportunity to salvage the '453 Patent.

To be sure, the choice between filing an unconventional petition as demanded by the client and withdrawing from the representation is not an obvious one, and other lawyers might have made a different choice. But, at the end of the day, Mr. Shipley chose to err on the side of continuing to represent his client, while ensuring that the filing was in compliance with this Court's Rules. Mr. Shipley's good-faith attempt to reconcile the duties he owed to his client and the duties he owed to this Court does not constitute sanctionable conduct unbecoming a member of the Bar.

Even if this Court concludes that Mr. Shipley's actions did not meet its standards of professional conduct, Mr. Shipley respectfully submits that he should not be subject to a sanction that could have serious repercussions for his career (including reciprocal discipline in the other jurisdictions where he practices far more frequently). In light of the infrequency of this Court's direct disciplinary actions under Rule 8.2 and the Court's prior acceptance of comparable *amicus* briefs filed by other lawyers on behalf of this same client, Mr. Shipley lacked both clear notice of a potential ethical violation and a clear basis for resisting the client's demand that the petition reflect the client's preferred terminology and prose. There is also not the slightest indication that Mr. Shipley acted in bad faith or for some improper purpose; the sole purpose of the petition was to make one final attempt to establish the validity of Dr. Schindler's patent. And the Respondent waived its brief in opposition, which means that the filing of this petition imposed nothing more than *de minimis* costs or burdens on the other side.

II. Mr. Shipley also respectfully submits that he should not be disciplined for including in the petition a footnote acknowledging Dr. Schindler's contributions to the brief. He had included a similar footnote in the Federal Circuit briefs as a *mitigating* measure, to truthfully explain to the court why the briefs were written in a somewhat unusual style. The Federal Circuit did not take issue with either the footnote or with Dr. Schindler's role in the brief's drafting, which was fully disclosed not only in the footnote, but also in the course of the extraordinary motion to file an amended reply brief.

At the time Mr. Shipley filed the petition in this Court, he was unaware of the statement in this Court's Guide for Counsel noting that attribution footnotes are not permissible. He readily acknowledges that the footnote should have been omitted, but respectfully submits that this mistake should not be grounds for discipline. The Guide for Counsel addresses "common mistakes" regarding issues such as formatting, typeface, and other non-substantive matters, rather than ethical obligations. The proper remedy for a failure to comply with one of these items is to require the re-filing of a compliant petition or the submission of an *erratum* to the brief, not to discipline the attorney.

## ARGUMENT

### **I. Mr. Shipley Should Not Be Sanctioned For Conduct Unbecoming A Member Of The Bar.**

A. From the start of Foley & Lardner's involvement in this matter, Dr. Schindler insisted upon retaining near-total control over the content of filings, and that insistence only intensified when it came to filings before this Court. Exhibit 1 (Shipley Decl.) ¶¶ 8-9, 17-20. That unique dynamic resulted from the confluence of several factors. Dr. Schindler was the primary inventor on the '453 Patent and was intimately familiar with the underlying technology. He also had a longstanding scholarly interest in patent law that led him to publish articles, speak at conferences, closely follow leading court cases, and to develop specific theories about the proper interpretation of patents, particular locutions and acronyms that captured those theories, and patent system technology designed to embody those theories and improve the operation of the patent system.

Moreover, both this Court and the Federal Circuit had previously accepted briefs that used Dr. Schindler's distinct terminology and reflected his very specific input. *See* Exhibits 2-6; *supra* n.3. Indeed, the *sole* reason for filing an amended reply brief in the Federal Circuit was that Dr. Schindler believed Foley & Lardner had edited his work too heavily. *See* Exhibit 7 (Schindler Decl. in support of motion to amend) ¶ 6 (Dr. Schindler "was the primary author" of the reply brief and "was to review all content before filing, to retain complete control"). The Federal Circuit accepted the amended reply brief in spite of—and presumably *because of*—these representations by Dr. Schindler that, as the client, he insisted that his argument be conveyed in his preferred manner.

After the Federal Circuit proceedings concluded, Dr. Schindler's interest in articulating his theories in his terms only intensified. Dr. Schindler's theories of patent law were grounded in this Court's precedents, and he viewed the Federal Circuit's rejection of his theories as a rejection of this Court's binding precedents. He thus felt this Court would be particularly receptive to his arguments if only he could present these arguments using his own elaborately developed terminology. *See* Exhibit 1 (Shipley Decl.) ¶ 17. Dr. Schindler also viewed his desire to file a petition in this manner as fully compatible with this Court's Rules, as he had filed multiple *amicus* briefs through other counsel without objection.

As a result of this unique set of circumstances, Mr. Shipley was faced with a difficult choice between two alternatives, each of which raised potential ethical issues: (1) submit an unorthodox certiorari petition as directed by Dr. Schindler,

while taking steps to ensure the petition complied with this Court's Rules; or (2) withdraw from the representation. Mr. Shipley's choice between these two alternatives must be viewed against the backdrop of ethical rules that speak primarily in terms of an attorney's duty of loyalty to the client and duty to zealously advocate for the client's interests. The phrase "conduct unbecoming a member of the bar" is construed in light of the "complex code of behavior" to which attorneys are subject, and encompasses conduct "contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice." *In re Snyder*, 472 U.S. 634, 643-45 (1985). Conduct unbecoming a member of the bar involves more than just "the taking of unreasonable positions in a litigation." *In re Lightfoot*, 217 F.3d 914, 916 (7th Cir. 2000) (Posner, J.). Courts have typically disciplined attorneys for "unbecoming" conduct only in cases involving "significant elements of aggravation, such as deliberately misleading the court or displaying egregious misjudgment." *Id.*<sup>7</sup>

The relevant professional standards also make clear that an attorney's foremost obligation is to serve the interests of the client. Lawyers are agents, not principals, and courts have repeatedly recognized "the fundamental principle that the attorney owes a fiduciary duty to his client and must serve the client's interests with the utmost loyalty and devotion." *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001). "Once a lawyer undertakes to represent a client, Rule 1.3 of the Rules of Professional

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<sup>7</sup> See also *Braley v. Campbell*, 832 F.2d 1504, 1510 & n.5 (5th Cir. 1987) (conduct unbecoming a member of the bar generally means "attorney behavior that is an affront to the express authority of the court, or that shows an unfitness to discharge the attorney's continuing obligations to the court or to clients").

Conduct ... requires the lawyer to represent the client 'zealously,' and prohibits the lawyer from failing to 'seek the lawful objectives of [the] client.'" *In re Stanton*, 757 A.2d 87, 90 (D.C. 2000).

And it is the client who gets to define his or her interests and objectives. Lawyers must "abide by a client's decisions concerning the objectives of representation." D.C. Rule of Prof. Conduct 1.2(a). The client "has ultimate authority to determine the purposes to be served by legal representation" and "has a right to consult with the lawyer about the means to be used in pursuing those objectives." D.C. Rule of Prof. Conduct 1.2 cmt.1. To be sure, "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule of Prof. Conduct 1.2 cmt.2. But "[a] clear distinction between objectives and means sometimes cannot be drawn, and in many cases *the client-lawyer relationship partakes of a joint undertaking*." D.C. Rule of Prof. Conduct 1.2 cmt.1 (emphasis added).

In light of these principles, lawyers do not have free rein to litigate cases as they wish. A client "need not follow all of his lawyer's advice," and "may choose instead to ignore the advice and suffer the consequences." *Blackman v. Kaufman*, No. 88-796, 1991 WL 156237, at \*1 (S.D.N.Y. Aug. 7, 1991).<sup>8</sup> Indeed, clients routinely

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<sup>8</sup> See also, e.g., *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) ("[W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship."); *Olson v. Fraase*, 421 N.W.2d 820, 829-30 (N.D. 1988) (lawyer must follow client's reasonable instructions in preparing documents despite lawyer's belief that instructions "were not in

insist that their lawyers take certain actions that might be viewed by outside observers as unreasonable. Some clients may insist on a jury trial even though the lawyer believes a bench trial would yield a better result. Some clients may choose to testify at trial even though the lawyer recommends “taking the Fifth.” And, as pertinent here, many clients will insist on taking their case “all the way to the Supreme Court” despite the very low odds of a grant of certiorari. The lawyer’s role is to offer advice, expertise, and guidance, but ultimately to respect the client’s interests—as defined by the client—and pursue those interests vigorously and zealously.

In short, as Judge Leval has explained, “[a] client’s failure to follow his attorney’s advice may seriously damage his prospects in the litigation, but it does not discharge the attorney from the obligation to continue to act in the client’s behalf.” *Blackman*, 1991 WL 156237, \*1 (denying law firm’s motion to withdraw). An attorney may face an “intolerable dilemma when the needs or instructions of his client would force him to argue a position which he personally may feel to lack merit,” and “[s]ensitivity to these considerations require that [courts] indulge every presumption in favor of the attorney who presents or defends a position which is found to lack support.” *In re Bithoney*, 486 F.2d 319, 322 (1st Cir. 1973). Courts must accordingly “insure that there is breathing room for the fullest possible exercise of the advocacy function.” *Id.*; see also *id.* (“The mere finding that a position advanced was frivolous

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the best interests of the client”); *Olfe v. Gordon*, 286 N.W.2d 573, 577-79 (Wis. 1980) (attorney is an agent for the client and thus cannot act “inconsistent with [the client’s] specific instructions”).



must not be cause for discipline of the attorney because of the danger that such action might inhibit the bar from the most vigorous advocacy of clients' positions and thus restrict meaningful access to the court.”).

Here, Mr. Shipley followed his client's explicit and unambiguous instructions by filing a certiorari petition that was admittedly unconventional, but was *precisely* what his client insisted on filing. Although Dr. Schindler's writing style can be difficult to follow, the core argument articulated in the petition—that the Federal Circuit and the PTO have not faithfully applied this Court's patent-law precedents—is certainly one that can be made in good faith. *See* Pet.26 (arguing that Federal Circuit and PTO have “only made a tiny move towards the framework underlying” this Court's precedents); *id.* at 36 (“it is questionable, whether the *Mayo/Biosig/Alice* decisions are really accepted by the [Federal Circuit] and the PTO”). And, drawing on his previous research and writing—as well as this Court's precedents—Dr. Schindler explains why this Court's decisions regarding interpretation of patent claims provides a framework that allows for a rational and pragmatic approach to determining whether a claim is directed to patentable subject matter (*i.e.*, “patent eligibility”). *See id.* at 14-25 (explaining when inventions should be patent-ineligible as “abstract ideas”).<sup>9</sup>

Even though Dr. Schindler insisted that the petition be filed using his favored arguments and prose, Mr. Shipley took numerous steps to help ensure that this

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<sup>9</sup> The petition's heavy use of acronyms, abbreviations, and scientific terminology may also make it more difficult to understand, but that is not remotely the type of issue that rises to the level of sanctionable misconduct.

petition—and the earlier petition regarding the ‘902 Patent—were filed in accordance with this Court’s Rules. Exhibit 1 (Shipley Decl.) ¶¶ 18-20. Mr. Shipley conveyed to Dr. Schindler the criteria for granting certiorari and Rule 14’s requirements for a certiorari petition. *Id.* ¶¶ 19-20. He ensured that the petition included each of the required sections (*i.e.*, questions presented, statement of interested parties, opinions below, statutory provisions, etc.). *Id.* He ensured compliance with the relevant time limits and word limits. *Id.* He ensured that the appropriate documents were included in the appendix, and that unnecessary documents were excluded. *Id.* He worked closely with the printer to handle the printing, filing, and service of the petition. *Id.* And he insisted that Dr. Schindler remove language about a Federal Circuit judge that could have been viewed as unfair or inflammatory. *Id.* ¶ 20.

In sum, Mr. Shipley’s actions in this case involved a good-faith effort to strike a reasonable balance between his overarching duty of loyalty to his client and his obligations as a member of the Bar of this Court. Mr. Shipley followed his client’s explicit instructions about the arguments to raise in the certiorari petition, while also taking numerous steps to help ensure that the petition complied with the Court’s rules. The end result was a petition that was admittedly unorthodox, and was certainly not the petition Mr. Shipley would have filed for a more deferential client. But Mr. Shipley respectfully submits that his good-faith efforts to accommodate both his client’s interests and his duties as an officer of the Court should not be grounds for a sanction.

B. Mr. Shipley's decision to file this petition cannot be viewed in a vacuum, and must of course be assessed in light of the practical alternatives. Given that Dr. Schindler unequivocally insisted upon filing legal briefs including his preferred locutions, acronyms, and prose, the only realistic alternative to filing this unorthodox petition would have been for Mr. Shipley to withdraw from the representation. But that course of action would have raised ethical issues in its own right.

At the time Mr. Shipley filed the petition at issue here, he and his partners had been representing SSBG in this case for nearly two years, and had represented TELES in various matters since 2006. *Id.* ¶ 7. Foley & Lardner had developed substantial expertise regarding SSBG, TELES, the patents at issue, the materials in the record, the course of proceedings before the Federal Circuit, and the challenges of working with a hands-on client who insisted on using a distinct lexicon. Both Mr. Shipley and Dr. Schindler expected that their relationship would continue in the future.

It is a "fundamental premise" of the attorney-client relationship that "counsel is under an obligation to see the work through to completion when he agrees to undertake the representation of his client." *Byrd v. District of Columbia*, 271 F. Supp. 2d 174, 176 (D.D.C. 2003). Withdrawal from a client relationship is accordingly a serious step that cannot be taken lightly. That decision turns on a number of often-conflicting considerations, such as ethical rules, business concerns, and reputational concerns for both the lawyer and the client. Many clients would view it as a serious breach of trust—as well as a personal insult—to be "fired" by their lawyer. The

dramatic step of a withdrawal is thus typically seen as a last resort that is only invoked when absolutely necessary. And it is well-established that an attorney generally may not withdraw from a case in a manner that would have a “material adverse effect on the interests of the client.” D.C. Rule of Prof. Conduct 1.16(b); *see also Blackman*, 1991 WL 156237, at \*1 (denying law firm’s motion to withdraw based on client’s failure to follow attorney’s advice).

Had Mr. Shipley withdrawn rather than file the certiorari petition, there was a substantial risk of prejudice to SSBG’s interests. Having lost on the merits before the Federal Circuit, a certiorari petition was SSBG’s last chance to reverse the PTO’s invalidation of the ‘453 Patent. Mr. Shipley’s withdrawal could have effectively forfeited SSBG’s ability to file a certiorari petition. Because SSBG is a corporation, Dr. Schindler would not have been allowed to file a certiorari petition *pro se*. *See Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 201-02 (1993) (“It has been the law for the better part of two centuries ... that a corporation may appear in the federal courts only through licensed counsel.”).

At the very least, withdrawal would have forced SSBG to incur significant expense to retain new Supreme Court counsel and bring them up to speed. And that undertaking would have been especially difficult given the language barrier, the technical subject matter, and Dr. Schindler’s insistence on the use of his own terminology and close control over all court filings. Had Mr. Shipley withdrawn, it is far from clear whether Dr. Schindler would have been able to engage substitute counsel in time to file a certiorari petition. And even if Mr. Shipley had withdrawn

and substitute counsel were engaged, the difficult balance between the wishes of a demanding client that had made multiple similar filings in this Court without incident and the obligations to this Court would simply have been transferred to another lawyer.

Sanctioning Mr. Shipley for his decision to continue representing SSBG would effectively constitute a rule of *mandatory withdrawal* for lawyers facing this set of circumstances, which in turn would make it impossible for a corporate client to have a petition filed under these admittedly unusual circumstances. The Court should be extremely hesitant to adopt a rule of ethics or practice that would make lawyers skittish about representing clients who insist on somewhat unconventional courses of action. Difficult clients are the ones that are often most in need of the advice and guidance of experienced counsel, and many of them may ultimately be persuaded to file more conventional pleadings. But if lawyers are chilled from undertaking the representations in the first place, the result will be *pro se* filings that do not comply with the Court's Rules or, in the case of corporate entities, parties that are effectively barred from filing a petition.

The Court should err on the side of protecting the attorney-client relationship. The system as a whole would be no better off—and quite possibly would be much worse off—if lawyers in Mr. Shipley's situation faced a mandatory obligation to withdraw rather than pursue the course dictated by the client while continuing to offer advice and guidance.

C. For all the reasons set forth above, Mr. Shipley's actions in this case should be understood as a good-faith effort to balance the duties he owed to his client and to this Court, and not as sanctionable conduct unbecoming a member of the Bar. But even if the Court concludes that this petition did not comport with its standards of advocacy, Mr. Shipley respectfully submits that the Court should not impose a sanction that could have severe repercussions for his career and broader practice outside this Court.<sup>10</sup>

First, in determining whether to sanction an attorney for an improper filing, courts have often looked to factors such as whether the filing was submitted in bad faith and whether it imposed unnecessary costs on the other side. *See, e.g., In re Shieh*, 738 A.2d 814, 819 (D.C. 1999) (imposing sanction where attorney "filed suit after suit, motion after frivolous motion, and appeal after frivolous appeal ... solely 'to harass his opponents'"). Here, Dr. Schindler and Mr. Shipley were unquestionably pursuing this case in good faith to achieve the legitimate objective of restoring SSBG's invalidated patent claims. And, given that the respondent waived its right to file an opposition to the certiorari petition, any costs or burdens incurred by the other side as a result of the petition were likely *de minimis*. *Compare, e.g., In re Spikes*, 881 A.2d 1118, 1126 (D.C. 2005) (counsel's actions necessitated "extensive briefing of the various positions over the course of 12 months"); *In re Disciplinary Action against Ulanowski*, 800 N.W.2d 785, 801 (Minn. 2011) (sanctioning attorney in part because

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<sup>10</sup> A sanction from this Court would likely result in reciprocal discipline from the other jurisdictions in which Mr. Shipley is authorized to practice, including the Patent and Trademark Office. *See* 37 C.F.R. §11.24 (any "censure" or "public reprimand" would likely result in similar sanction from the PTO).

“frivolous claims cost opposing parties about \$46,000 in legal fees, as well as time, to settle the matters”).

Moreover, the lack of notice to Mr. Shipley is surely a mitigating factor. This Court previously accepted multiple filings by other lawyers on behalf of Dr. Schindler and his associated corporate entities without comment, despite the briefs’ use of comparable terminology and prose. *See* Exhibits 2-6. That past practice not only deprived Mr. Shipley of notice of a potential ethical violation, but also conditioned Dr. Schindler’s understanding of his ability to insist on the use of his preferred style.

More generally, this Court has never before suggested that it would use its disciplinary power to regulate filings that were made in good faith but were unconventional or difficult to follow. As noted above, this Court generally imposes only reciprocal discipline, in which the more extensively developed precedents and procedures of the court imposing the primary discipline provide notice and an opportunity to be heard.

The Court’s use of its disciplinary power under Rule 8.2, by contrast, has been exceedingly rare. In the last several decades, there appears to have been only one instance in which the Court publicly disciplined an attorney based on the content of a filing. *See Moore*, 529 U.S. at 1127 (ordering attorney disbarred by 5-4 vote). That case involved the use of highly abusive language and accusations that the lower court was a “corrupt enterprise,” a “den of racketeers,” and a “cancer in the legal system.”

*Moore*, 177 F. Supp. 2d at 199.<sup>11</sup> Moreover, Rule 42.2 expressly authorizes the imposition of “just damages, and single or double costs” as a remedy for a “frivolous” certiorari petition or other application for relief. But, even with respect to that lesser sanction, the Court has imposed damages or double costs as a remedy for a frivolous filing “fewer than a dozen” times throughout its history, most recently in 1985. See *Supreme Court Practice* 850-51; *Hyde v. Van Wormer*, 474 U.S. 992 (1985) (awarding \$500 in damages by a 6-3 vote).

Instead of sanctioning the attorney, the Court’s usual response to filings that are compliant with the Court’s deadlines and Rules but unorthodox or difficult to follow is to deny the relief sought or, one supposes, to essentially ignore the filings as unpersuasive. See Rule 14.4 (“The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.”). And in the case of filings that fail to comply with the Court’s Rules, the Court’s usual response is to refuse to accept the filing. But there do not appear to have been any instances in the last several decades in which the Court publicly sanctioned an attorney solely for submitting a petition or other filing that was unorthodox in style, difficult to understand, or unlikely to succeed. For example, to our knowledge, the Court has never sanctioned an attorney for filing a jurisdictionally out-of-time certiorari petition in a civil case (or a motion for leave to file an out-of-time petition),

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<sup>11</sup> Here, as noted, Mr. Shipley insisted upon the removal of language about one of the Federal Circuit judges that could have been seen as unfair or inflammatory. See Exhibit 1 (Shipley Decl.) ¶ 20.



even though such filings have historically had a 0% chance of succeeding. See *Supreme Court Practice* 387-88 (“No such motion has as yet been granted.”).

There are good reasons for this Court’s longstanding reluctance to impose sanctions based solely on the unconventional content of a filing. First, there is a simple matter of resources. The amount of time needed to mete out primary discipline in a manner that provides notice and an opportunity to be heard is enormous. While reciprocal discipline can be handled expeditiously knowing that the primary court has afforded the necessary protections, primary discipline is different. When filings are abusive, as in *Moore*, 529 U.S. 1127, or when there are “aggravating factors” such as bad faith or deliberate misrepresentations, see *Lightfoot*, 217 F.3d at 916, the investment of resources is both necessary and justified. But it is far less clear that the game is worth the candle when it comes to filings that are merely unorthodox or difficult to follow, especially given the tradition of an open Bar and the reality that many Bar members will file only a petition or two in their entire careers. In those cases, a simple “certiorari denied” provides a sufficient disincentive for replicating unorthodox filings, without requiring this Court to expend any additional resources.<sup>12</sup>

Moreover, the collateral consequences of this Court sanctioning lawyers for poor-quality filings cannot be ignored. Litigants in the lower courts rarely hesitate to file motions seeking Rule 11 sanctions against the opposing party for what they believe to be improper filings. See Fed. R. Civ. P. 11(c). If this Court opens the door

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<sup>12</sup> The petition at issue here was filed *before* this Court denied Dr. Schindler’s similar petition concerning the ‘902 Patent.

to sanctioning lawyers based on the content of a petition, it risks inviting affirmative requests from lawyers asking that sanctions be imposed on their opponents. This would not only increase the Court's workload but would also allow attorneys to use the mere *threat* of a sanction request to deter their opponents from seeking review before this Court. The better course is for this Court to continue its longstanding practice of simply denying petitions that are unorthodox in style or difficult to follow, rather than sanctioning the attorneys that filed them.

**II. Mr. Shipley Should Not Be Sanctioned For Including A Footnote Regarding Dr. Schindler's Involvement In Drafting The Petition.**

In both the reply brief and the rehearing petition in the Federal Circuit, Foley & Lardner included a footnote acknowledging Dr. Schindler's "significant contributions" to the briefs. *See* Exhibit 7 (Fed. Cir. reply brief) at 3 n.4; Exhibit 9 (Rehearing petition) at 9 n.12. This footnote was designed to be a *mitigating* measure, to explain to the Federal Circuit in a transparent and truthful manner why the briefs were written in an unconventional style. Indeed, Dr. Schindler insisted upon filing an amended reply brief precisely because he believed that Foley & Lardner had made too many edits to the version he had drafted. *See* Exhibit 8 (Schindler Decl.). The Federal Circuit was well aware of this issue in light of the motion for leave to file an amended reply brief and Dr. Schindler's supporting declaration. Yet the Federal Circuit did not remotely suggest that anything was amiss with either Dr. Schindler's

extensive involvement in the writing of the brief or with the footnote that acknowledged this fact.

When Mr. Shipley filed the certiorari petition in this Court, he simply carried over the same footnote that had been included in the Federal Circuit briefs. At the time, Mr. Shipley was unaware of the statement in this Court's Guide for Filing Paid Cases that such "attribution" footnotes are not permitted. *See* Exhibit 1 (Shipley Decl.) ¶ 21. Mr. Shipley readily acknowledges this oversight and recognizes that this footnote should not have been included in the brief.

But Mr. Shipley respectfully submits that this oversight should not result in a sanction. The Guide for Filing Paid Cases is not part of the Court's Rules and does not purport to establish ethical standards for attorneys. It instead "highlights the most common mistakes observed by the Clerk's Office" and is designed to "help to expedite the processing of your petition." As such, the Guide primarily addresses non-substantive matters, such as font and type size, page numbering, certificates of service and compliance, and contents of the appendix.

Although these matters are unquestionably important, the obvious remedy for a failure to comply is to require counsel to re-file a compliant petition or submit an erratum. *See* Rule 14.5 ("If the Clerk determines that a petition submitted timely and in good faith is of a form that does not comply with this Rule ... the Clerk will return it with a letter indicating the deficiency."). Just as a lawyer would not be sanctioned for using the wrong typeface or including the wrong documents in the appendix, Mr. Shipley respectfully submits that a sanction is not warranted for his

inadvertent inclusion of a footnote acknowledging Dr. Schindler's contribution to the brief.

## CONCLUSION

In a perfect world, lawyers and their clients would always be on the same page in terms of both the goals of the representation and the means of pursuing those goals. In the world in which we actually live, lawyers will inevitably face competing demands to their clients and to the tribunals in which they practice. Here, Mr. Shipley chose to hew closely to his client's explicit instructions, while working in good faith to help ensure compliance with this Court's rules, even though the result was an unconventional filing. In doing so, Mr. Shipley elected to file the petition rather than withdraw from the representation of a longstanding client in a manner that likely would have prejudiced the client's ability to seek Supreme Court review at all.

Reasonable lawyers can differ over whether they would have filed this petition under their signature. But Mr. Shipley respectfully submits that his good-faith efforts to accommodate the competing ethical interests at stake do not reflect conduct unbecoming a member of this Court's Bar, and should not result in a sanction that would have very serious consequences for his career.

Respectfully submitted,



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