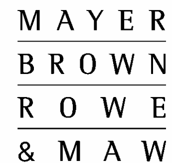

June 4, 2007

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

David M. Gossett
Direct Tel (202) 263-3384
Direct Fax (202) 263-5384
dgossett@mayerbrownrowe.com

BY E-MAIL AND HAND DELIVERY

William K. Suter
Clerk of the Court
Attn: Rules Committee
Supreme Court of the United States
Washington, DC 20543

Re: Proposed revisions to the rules of the Court

Dear General Suter:

I write in response to the Court's invitation for comments on the recently proposed revisions to the rules of the Supreme Court. These comments have been circulated to a variety of active members of the Court's Bar, and a number of other bar members have asked to join them; a list of these signatories is included as an addendum to this letter.

These comments are organized in the order of the rules to which the proposed amendments apply, though in a number of instances specific comments relate to other rules as well.

1. Revised Rule 15.3: Requirement to file *in forma pauperis* briefs in opposition.

The revision to Rule 15.3—the addition of the word "shall" in the sentence "If the petitioner is proceeding *in forma pauperis*, the respondent shall file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2."—may be ambiguous. According to the Clerk's Comment, this revision is designed to make "an 8½- by 11-inch paper response to an *in forma pauperis* petition mandatory." But arguably this revision mandates the *submission* of a brief in opposition, instead of merely requiring that such a brief, *if filed*, comply with Rule 33.2 rather than Rule 33.1. To be sure, Rule 15.1 specifies that briefs in opposition are not mandatory except in capital cases or when ordered by the Court; nonetheless, we would suggest modifying this revision to eliminate this ambiguity. One proposed revision would be:

> "If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief."

2. Revised Rules 25.2 and 25.3: Time periods for the preparation of merits briefs.

The amendments to Rule 25.2 and 25.3 change the time period for the respondent or appellee to prepare its brief on the merits—from 35 days to 30 days—and the time period for the petitioner or appellant to prepare its reply brief—from 35 days to 25 days. The clerk's comment explains that this alteration is being proposed because "the time period between the granting of a petition for a writ of certiorari and the date of oral argument has decreased in recent years," and because "technological improvements have decreased the amount of time needed to prepare booklet-format briefs."

We question the need for or desirability of this change. As the clerk's comment explains, in a number of instances a somewhat-shortened briefing schedule is necessary to accommodate the time period between a grant of certiorari and the date of oral argument. But the Court has successfully addressed this issue in the recent past by issuing accelerated briefing schedules in instances in which the normal briefing schedule would cause the Court problems in scheduling cases on the argument calendar—a relatively small percentage of cases, we believe. The effect of this rule would be to mandate accelerated briefing in all cases. We acknowledge that under the proposed rules litigants may seek extensions of the briefing time periods (from the Clerk or an individual Justice, depending on the type of brief), but we nonetheless believe that there is little reason to change the default rule governing the timing of briefs. Given the time it takes to prepare top-notch briefs, and the press of other business that counsel frequently must juggle, we would respectfully suggest that the Court reconsider these changes. Alternatively, the Court could modify the amendment to Rule 25.3 to allow the petitioner 30 days to prepare its reply brief.

3. Revised Rule 25.8 and Rule 26.1: Electronic submission of Joint Appendices.

Proposed rule 25.8 would mandate that the parties submit electronic versions of briefs on the merits to the Clerk of Court (and to opposing counsel). We have no objection to this revision, which has been reflected in the Court's "*Guide for counsel in cases to be argued before the Supreme Court of the United States*" for some time. In fact, we respectfully suggest that the Court also modify rule 26.1 to mandate that the parties submit an electronic version of the joint appendix to the Clerk. Joint appendices could thereafter be posted on the ABA's web site and elsewhere, thus increasing the public's access to relevant information about pending cases.

A possible method to effectuate this change would be to add, at the end of Rule 26.1, the following sentence:

> An electronic version of the joint appendix shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the appendix is filed in accordance with guidelines established by the Clerk. The elec-

tronic transmission requirement is in addition to the requirement that booklet-format copies of the appendix be timely filed and served.

4. Revised Rule 33.1(b): New Century Schoolbook font.

The revision to Rule 33.1(b) changes the font required for booklet-format documents. The prior rule mandated that briefs be typeset in "Roman 11-point or larger type," with footnotes in "9-point or larger" type. The revised rule specifies that booklet-format documents be typeset in "New Century Schoolbook 12-point type," with footnotes in "New Century Schoolbook 10-point type."

Some members of the bar question this proposed revision. Few dispute that a somewhat-larger typeface might be wise, and we understand that many believe that Roman—and in particular Times New Roman—is a problematic font for brief-length documents. See the Seventh Circuit's *Requirements And Suggestions For Typography In Briefs And Other Papers.* But some question whether it is wise for the Court to specify as the required font a font that comes neither with Windows nor with the Macintosh operating system. Although New Century Schoolbook is available online for around $100 (one must purchase the plain font, italicized font, bolded font, and bold-italicized font separately, each for around $25), we worry that many litigants—and in particular litigants who appear less frequently in the Court—may be confused by this requirement and may unintentionally violate it. Furthermore, although $100 is not much money in comparison to the cost of producing a booklet-format brief, a large law firm might need to purchase this font for 100 or more individuals, and thereafter keep track of which individuals were licensed to use the font.

Thus, we respectfully suggest that the Court consider modifying this revision. Three options would be (1) to encourage counsel strongly to use this specific font, but to allow other, similarly sized, fonts also to be used; (2) to specify two alternative fonts in addition to this font—one native to Windows and one native on Macintosh computers—that would also be acceptable; or (3) to include, either in the clerk's comments or on the Court's web site, more specific information about how to obtain and install this specific font.

5. Revised Rules 33.1(d) & (g): Word Limits.

The proposed revision to Rule 33.1(d) and (g) would replace the Court's current page limits for booklet-format briefs with word count limits. There is some concern that the specific word-counts proposed in Rule 33.1(g)—which seem to be based on a conversion factor of 300 words under the new rule per page under the old rule—will mandate slightly shorter briefs than before. Several members of the Court's bar have checked the lengths of briefs that comply with the current rule, and have found that the word counts for those briefs are often somewhat higher than 300 words per page—320-

330 words per page seems common, and compliant briefs can at times reach 350 words per page.

Nonetheless, members of the bar vary as to what, if anything, they would submit as a comment in response to this proposed alteration. Given that the briefs for all parties will be held to the same length limits, many believe this proposed alteration is unproblematic. Others would suggest that the Court expand these word-count limitations slightly. Thus, we are merely alerting the Court that these word-count limitations may result in slightly shorter briefs.

6. Revised Rule 33.1(g)(vii): Word-count limitation for reply briefs on the merits.

Rule 33.1(g)(vii) alters the maximum length for merits reply briefs from 20 pages to 6000 words, using the same 300-words-per-page formula that the Court used to determine the new word-count limits for all briefs.

Many members of the Bar believe that the length limitation for reply briefs under the current rules is too short, and thus that the revised rule will continue to require reply briefs to be overly short. Given the number of *amicus* briefs that petitioner's counsel frequently must address on reply, and given how critical many believe merits reply briefs are to the eventual outcome of a case, we would suggest that the Court consider expanding this length limitation. One proposal would be to allow merits reply briefs to be 50% of the length of opening briefs on the merits—that is, 7,500 words if the Court implements the remainder of its proposed alteration to Rule 33.1(g)'s length limitations. This modest expansion, which parallels the ratio of word limits for opening briefs and reply briefs in the Federal Rules of Appellate Procedure, would make it somewhat easier for counsel to respond to the arguments made by respondents and their amici.

7. Rule 33.1: Transition issues.

We are concerned that there may be some unfairness caused if revised Rule 33.1 is simply implemented on August 1, 2007, regardless of the stage of briefing at which a case may be. In particular, because briefs submitted in accordance with the revised rule 33.1 may need to be somewhat shorter than briefs submitted in accordance with the current version of Rule 33.1, respondents may be allotted fewer words than petitioners for briefs in opposition or bottom-side briefs on the merits. Accordingly, we suggest that the Court alter the effective date of these proposed rules as follows:

> In any case in which the petition for certiorari has been filed before the effective date of these rules but in which the respondent has not filed its brief in opposition prior to that date, all remaining briefs submitted in that case prior to the Court's decision whether to grant certiorari may comply with the May 2, 2005 version of the *Rules of the Supreme Court of the United States* rather than with these revised rules. Similarly, in any case in which

> the petitioner has filed its brief on the merits prior to the effective date of these rules, all remaining briefs in that case may comply with the May 2, 2005 version of the *Rules of the Supreme Court of the United States* rather than with these revised rules.

8. Revised Rule 37.2(a) : Notification to parties of intent to file an *amicus* brief.

The proposed modification to this rule would mandate that *amicus* briefs in support of a petition for a writ of certiorari be filed within 30 days of the date the petition is filed (without possibility of extension), and that "[a]n *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief." There is some disagreement among the signatories to this letter as to the provision precluding extensions of time for the filing of *amicus* briefs in support of a petition for a writ of certiorari; thus, we do not address that provision in these comments. One concern that is shared, however, is that the rule does not account for instances in which more than one *amicus* joins the same *amicus* brief—a situation that occurs with some frequency but that often is not arranged until late in the day, when additional *amici* review and agree to join an *amicus* brief that another *amicus* has largely prepared. The respondent in this instance would not be burdened by such additional *amici* joining an *amicus* brief that respondent already knew was going to be filed. Thus, we suggest adding the following to the proposed revision:

> An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief.

9. Revised Rule 37.2(a) and Rule 15.5: Timing issues with respect to the filing of cert-stage *amicus* briefs.

The revision to Rule 37.2(a) addresses one of the cert-stage timing problems that exists under the current rule—the inability of respondents to respond to *amicus* briefs. However, this revision does nothing to address another timing problem that many have experienced: instances in which an *amicus* intends to submit an *amicus* brief in support of a petition for certiorari but in which the respondent either files its brief in opposition long before its due date or waives its right to file a brief in opposition. Although the parties are, of course, the primary participants before the Court, we believe that cert-stage *amicus* briefs are frequently beneficial to the Court. Thus, we would propose modifying Rule 15.5 as follows:

> If the Court receives an express waiver of the right to file a brief in opposition, the Clerk will distribute the petition to the Court for its consideration no less than 5 days thereafter, unless within that 5-day period one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief, at which point the Clerk will distribute the petition to the Court for its consideration upon the expiration of the time allowed for filing such *amicus curiae* briefs. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed, except that if the brief in opposition is filed before the due date for *amicus curiae* briefs in support of the petition, and one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief within five days after the filing of the brief in opposition, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the due date for the filing of such *amicus curiae* briefs. If no waiver or brief in opposition is filed, the Clerk will distribute the petition to the Court upon the expiration of the time allowed for filing a brief in opposition.

10. Revised Rule 37.6: Disclosure requirements for *amicus* briefs.

The proposed revision to Rule 37.6—the addition of the requirement that *amicus* briefs disclose "whether [counsel for a party] or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the [*amicus*] brief"—strikes us as highly problematic. For example, under this rule a potential *amicus* would be required to check its membership logs to determine whether any of the parties, or counsel for any of the parties, is a member—no easy task in many cases. (How many John Smiths belong to the ACLU?) Further, that information might have no bearing on a case, and might be highly personal; we can easily envision instances in which counsel for one party in a case might be a member of an *amicus* that filed on the other side of that same case. The proposal could easily discourage counsel, concerned about potential embarrassment to their clients, from joining or maintaining membership in organizations—to the detriment both of the counsel's associational interests and of the work of associations. Furthermore, many organizations consider their membership records to be highly confidential.

A separate and more discrete problem we see under the proposed revision is that there is a latent ambiguity in the requirement that an *amicus* disclose whether a party (or counsel for a party) "made a monetary contribution to the preparation or submission of the brief"; although we doubt this is the intent of the proposed revision, argua-

bly a party's general membership dues in an organization that submitted an *amicus* brief helps fund the preparation or submission of the brief.

Thus, we would propose reworking this revised rule as follows:

> Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part **and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief**, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made **such** a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

We would also suggest that the Clerk's Comment be amended to add at the end the following sentence:

> Such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed.

In conclusion, we again thank the Court for its consideration of these comments.

Sincerely,

David M. Gossett

Signatories

The following people have asked to join these comments. Affiliations are included solely for identification purposes.

Donald B. Ayer
Jones Day

Kenneth C. Bass III
Sterne, Kessler, Goldstein & Fox P.L.L.C.

Timothy S. Bishop
Mayer, Brown, Rowe & Maw LLP

J. Brett Busby
Mayer, Brown, Rowe & Maw LLP

Gregory A. Castanias
Jones Day

Charles G. Cole
Steptoe & Johnson LLP

Jacqueline G. Cooper
Sidley Austin LLP

Mark S. Davies
O'Melveny & Myers LLP

Walter Dellinger
O'Melveny & Myers

Roy T. Englert, Jr.
Robbins, Russell, Englert, Orseck & Untereiner LLP

Donald M. Falk
Mayer, Brown, Rowe & Maw LLP

Jonathan S. Franklin
Fulbright & Jaworski L.L.P.

Andrew L. Frey
Mayer, Brown, Rowe & Maw LLP

Laurence Gold
Bredhoff & Kaiser P.L.L.C.

David M. Gossett
Mayer, Brown, Rowe & Maw LLP

Mark E. Haddad
Sidley Austin LLP

Pamela Harris
O'Melveny & Myers LLP

Richard B. Katskee
Americans United for Separation of Church and State

Ayesha N. Khan
Americans United for Separation of Church and State

Stephen B. Kinnaird
Sidley Austin LLP

Philip Allen Lacovara
Mayer, Brown, Rowe & Maw LLP

Richard J. Lazarus
Georgetown University

Mark I. Levy
Kilpatrick Stockton LLP

Edward McNicholas
Sidley Austin LLP

Timothy P. O'Toole
Public Defender Service for the District of Columbia

George T. Patton, Jr.
Bose McKinney & Evans LLP

Carter G. Philips
Sidley Austin LLP

Andrew J. Pincus
Mayer, Brown, Rowe & Maw LLP

Charles A. Rothfeld
Mayer, Brown, Rowe & Maw LLP

Kevin K. Russell
Howe & Russell, P.C.

Jeffrey W. Sarles
Mayer, Brown, Rowe & Maw LLP

Andrew H. Schapiro
Mayer, Brown, Rowe & Maw LLP

Jay Alan Sekulow
American Center for Law & Justice

Stephen M. Shapiro
Mayer, Brown, Rowe & Maw LLP

Arthur B. Spitzer
ACLU of the National Capital Area

Evan M. Tager
Mayer, Brown, Rowe & Maw LLP

Richard Taranto
Farr & Taranto

Andrew E. Tauber
Mayer, Brown, Rowe & Maw LLP

Paul R. Q. Wolfson
Wilmer Cutler Pickering Hale and Dorr LLP

Rebecca K. Wood
Sidley Austin LLP

Christopher J. Wright
Harris, Wiltshire & Grannis LLP