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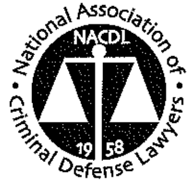

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

June 4, 2007
submitted electronically

Hon. William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Rules of the Supreme Court
Published for Comment in May 2007

Dear General Suter:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the changes in the Rules of the Supreme Court of the United States that were proposed for comment on May 14, 2007. Our organization has nearly 13,000 members; in addition, NACDL's 90 state, local and international affiliates, in all 50 states and 27 other nations, comprise a combined membership of more than 35,000 private and public defenders. These comments reflect the collective experience of our members representing hundreds of criminal defendants before this Court and in filing a dozen or more amicus briefs each Term, which we believe the Court has found to be of high quality and consistently helpful.

1. Transition to Word Limits from Page Limits

NACDL supports the regulation of the length of filings in the modern era by making a change from page limits to word-count limits. While there would inevitably be some potential small differences between the present limits and those suggested, we have no objection to the proposal. We do hope, however, that the Clerk would soon provide a "counting guide" so that we are assured that "18 U.S.C. §§ 1341, 1343, 1346-1349," for example, counts the same as "18 USC 1341 et seq.," and as "18 U.S.C. 1341-1349," and as "18 USC 1341-1349," or any other way of presenting the same information. (In other words, the favored style of the Solicitor General's office, to omit the section mark in statutory references, should not result in a citation that is word-counted differently from a citation that includes the mark.) "U.S.C." should be one word at most, even if a word-processor thinks that it's three, as should "U.S." and "F.3d," while "CA6" should count no differently from "3d Cir." or from "D.C. Cir."

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2. Electronic Filing

NACDL supports supplementing printed filings with electronic versions, on the assumption that the Court would specify a format which is difficult to alter, such as PDF. We further support the Clerk's creating, as soon as feasible, a hyperlinked docket system, similar to the District Courts' present PACER-ECF system, but preferably ensuring free and prompt public access to parties' electronic filings.

3. Timing of Amicus Briefs at the Merits Stage - Time to File Reply

The revised Rule 25 would shorten from 35 days to 25 the time allowed to file a reply. NACDL is concerned that this change would impair the ability of petitioners' counsel to respond fully to the increasing number of amicus briefs, in cases where amici appear to support the respondent. This would particularly be so if the Court were to consider our suggestion, joined we know by many other frequent amici, to permit amicus briefs to be filed a short while (such as seven days) after the merits brief of the party supported. In NACDL's experience in particular, we often support the defendant's position in merits cases where we are not able to coordinate fully with counsel of record; indeed, sometimes we receive virtually no cooperation from the party's counsel. In such cases, under the present rules, it goes without saying that we cannot truly comply with the Court's guidance for the content of amicus briefs. Moreover, being focused on criminal cases, it may be that the cases in which we appear have a higher incidence of inexperienced counsel or even counsel with little appellate expertise than on the Court's docket generally. Our briefs -- already cited in the Court's decisions with a frequency which leads us to believe that our contributions are welcome and highly valued -- would be that much more helpful if we could file seven days after the party brief, as is the case now under the Federal Rules of Appellate Procedure applicable in the Circuits. Our experience as a frequent amicus filer in the Circuits tells us that the staggering process works very well. However, if this suggestion is adopted, then out of fairness to petitioners the time to file the reply should not be shortened.

4. Timing of Amicus Briefs at the Cert Stage

Proposed revised Rule 37.2 would make any amicus brief due within 30 days of docketing the petition and disallow extensions (although it apparently would not disallow motions for leave to file out of time), while mandating that an amicus in support of the petitioner give the respondent ten days' notice of its intent to file. NACDL supports a clarification of the present timing for amicus briefs at the cert stage. However, the overall thrust of this amendment is to discourage cert-stage amicus filings to a greater extent that we would prefer. NACDL exercises our discretion to support a case at the cert stage with care and restraint, focusing solely on the importance of the issue and the nature of the record in the case. This decision is made by a committee of practicing

lawyers (and professors) with substantial Supreme Court experience, who try to make a good collective decision; this takes at least a few days from the time we receive adequate papers. When we do file, we intend our brief to provide significant assistance to the Court in deciding whether to grant review. For this reason, NACDL must oppose any shortening of the time allowed between the filing of the petition and of any amicus brief in support of granting certiorari.

Almost never do we receive adequate pre-filing notice from counsel for the petitioner to allow us to take our self-imposed responsibility seriously within the 30 days contemplated. Under the present system, if the respondent obtains an extension of time to answer, which is not at all uncommon, the amicus receives a de facto extension. There will be many meritorious cases where we would not be able to meet the 10-day notice requirement at all. We infer from the nature of the proposal that the Court does not wish to encourage such filings, presumably indicating its experience that many are unhelpful. We regret that situation, if it is true, and hope the Court will not throw out the baby with the bath water by adopting his proposal.

Although the proposed amendment does not change the due date for an amicus brief in support of a respondent at the cert stage, nor does it bar extensions of time to file such briefs, we are concerned that such filings may become even more difficult than at present. Again, in unusual cases we have found it important to file such briefs, but generally only after learning that the criminal-defendant respondent (in opposition to a State's petition or the Solicitor General's) has failed to bring to the Court's attention some important consideration counseling against certiorari in that case. We hope that the Court contemplates keeping open a reasonable window of time to file such briefs when appropriate. To our minds, this necessarily means an opportunity to file after the brief in opposition has been filed or waived.

5. Mandatory Use of a Particular Typeface

Revised Rule 33.1 would require the use of "New Century Schoolbook" as the font in all printed documents. NACDL opposes this change, which would give a monopoly to one typeface designer which maintains that font as its private property. New Century Schoolbook is a propriety typeface of the Linotype Company. Professional printers may all have and use it under a license, but many printed briefs are now produced in-house by lawyers ranging from sole practitioners to big firms. (As a result, the cost of producing a perfectly acceptable printed petition for certiorari can be reduced from around $2000 to under $300 in many cases.) New Century Schoolbook is not licensed to or included with standard word processors. Instead, it would have to be separately purchased (for around $100 for all four needed faces, according to our informal inquiries) -- adding, in effect 50% or more to the cost of the word processing software in the first place. Counsel would then have to integrate the new software with their word processors, a technical step that many lawyers would find daunting. This process would give an unfair competi-

tive advantage to one corporation while placing a burden to our members and amicus volunteers.

NACDL respects the Court's concern with legibility. We support an increase in the required point size for the print in documents. With this in mind, we would support instead a narrowing of the range of typeface options, with perhaps a list of acceptable and unacceptable faces -- the list being open-ended, to allow additions at any time -- to be prepared and made available by the Clerk. That list should include typefaces (all more readable than Times New Roman) such as "Century," "Century Schoolbook," "Bookman Old Style" and other similar book-printing font styles.

6. Disclosure of Amicus-Party Connections

In the proposed revised Rule 37.6, a more extensive disclosure would be required, not only of whether "counsel for the party authored the [amicus] brief, in whole or in part," but also whether "such counsel or a party is a member of the amicus curiae ...." (We have no problem with the "monetary contribution" disclosure. It does not affect us and never has, and we therefore offer no comment on it.) First, it is not clear whether the phrase "such counsel" is meant to refer only to counsel for a party who has contributed to the authorship of the amicus brief, or to all counsel for any party. Assuming the latter, we reiterate that NACDL is an organization of about 13,000 national members, with another 35,000 criminal defense lawyers in our local affiliates. We do not keep our membership secret or confidential, like some more political or more controversial organizations, but we occasionally have members who are parties (e.g., Gentile v. Nevada State Bar, 501 U.S. 1030 (1991)), and our members very often represent parties. The NACDL membership vel non of counsel for a party is not a factor in our committee's judgments as to whether to file a brief and what position to take. After discussion, we can see little value to the Court in this proposed addition to the rule, and some additional burden to our volunteer amicus authors, in researching and making the disclosure proposed. NACDL therefore asks the Court to re-think this idea.

We have looked at all the other proposed changes and find them to be helpful clarifications or simplifications of existing rules. We appreciate the Court's continuing effort to make its practices accessible and effective for all concerned.

Very truly yours,

s/Peter Goldberger

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