

National Association of Criminal Defense Lawyers
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Rebecca A. Womeldorf, Esq.
Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2016

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 25, 28.1, 29, 31 and 41 of the Federal Rules of Criminal Procedure and to Appellate Form 4.

Our organization has nearly 10,000 direct members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of some 40,000 private and public defenders. NACDL, founded in 1958, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

APPELLATE RULE 25 – SERVICE

NACDL is pleased to see the effective elimination, for papers filed electronically (which is to say, nearly all) of the requirement for a separate document called a "certificate of service," Prop. Rule 25(d)(1).

We are satisfied with the Committee's proposed resolution of the question of filing by unrepresented parties. Prop. Rule 25(a)(3)(B),(c). The proposed amendment overlooks, however, an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require *service* on all parties of papers filed not only by parties but also by non-parties. The First Amendment, for example, demands that the press have an efficient and effective way to seek intervention to enforce the public's right of access to most criminal-case pleadings and proceedings. Yet the Rule, even as amended, would not make clear that when the press intervenes in an appellate case all of the intervenor's or proposed intervenor's papers must be served on the defendant-appellant or -appellee, who may have grounds to object. Qualified victims, who are not parties, also have a right to file papers in certain situations, including petitions for mandamus to enforce the Victims Rights Act, making it essential that Rule 25(b) be amended to make clear that it also governs filings by non-parties and requires service of all such papers (unless properly filed *ex parte* by leave of court) on the defendant-appellant or -appellee – a practice that has heretofore been inconsistent.)

APPELLATE RULES 28.1 and 31 – TIME TO FILE REPLY BRIEF

NACDL strongly supports the proposed amendments to Rule 28.1(f)(4) and 31(a)(1) extending to 21 days the former 14-day allowance for the filing of reply briefs. The committee is correct that with the elimination of the 3-day addition for papers served electronically, not only will the ability of practitioners to manage their workloads be enhanced by this change but the quality of reply briefing will also be improved.

APPELLATE RULE 29 – AMICUS BRIEFS and JUDICIAL DISQUALIFICATION

NACDL files numerous appellate amicus briefs every year. We are not aware of any circumstance when our doing so has caused the recusal of a judge, either because of the judge's connection with our Association or because of the judge's relationship to an attorney signatory to the brief. Nevertheless, we can understand the concern that underlies the proposed amendment. That said, we recommend a slight change in wording designed to emphasize that only important institutional interests in case-processing or a substantiated concern about judge-shopping would justify rejecting an amicus brief under the amended Rule. Otherwise, the filing of proper amicus briefs should be encouraged, and amicus parties (like NACDL) should be encouraged to seek out and employ their own choice of counsel who would be best suited, in the opinion of the amicus entity itself, to advance the arguments of the amicus curiae. On that basis, we suggest changing the final phrase in the amended rule (line 9) from the presently proposed reference to an "amicus brief that would result in a judge's disqualification" to read instead, "strike or prohibit the filing of an amicus brief that would *necessitate* a judge's disqualification." This wording would better reflect the amendment's apparent intent, as the Reporter's Note refers to situations where the filing of "an amicus brief *requires* a judge's disqualification."

APPELLATE RULE 29 – ISSUANCE OF THE MANDATE

NACDL supports the deletion of the redundant subsection FRAP 41(d)(1), but otherwise opposes the proposed amended rule as presented. First, if a stay of mandate pending certiorari is granted under the criteria of Rule 41(d)(2) (which would become Rule 41(d)(1)), it is inappropriate that the stay be limited to 90 days unless a petition is timely filed within that time. *See* Prop. Rule 41(d)(2). Justices of the Supreme Court, sitting as Circuit Justice, often extend the time for filing a petition for periods of up to 60 days under the Court's own rules. Where a Justice has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert petition has been extended. This apparent gap in the present rule could be corrected by revising the subsection to provide that the stay "must not exceed 90 days, *or any longer period allowed by a Justice of the Supreme Court for filing a timely petition*, unless the part who obtained the stay files a petition for the writ and so notifies the circuit clerk" The judges of the court of appeals should not be placed in the petition of second-guessing the Circuit Justice, as the present proposal does.

We also believe that the “extraordinary circumstances” standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in – but not limited to – capital cases. The “good cause shown” standard that applies in so many other parts of the rules for extensions of other important deadlines and times limits would do just fine here. Our judges can be trusted to make sound decisions about the issuance of the mandate, as they do in so many other situations, without having their hands tied by an unduly negative formulation of the standard that looks disapprovingly over their shoulders as they try to ensure justice in individual cases.

APPELLATE FORM 4 – *IN FORMA PAUPERIS*

NACDL strongly supports the proposed amendment to form FRAP-4 to eliminate any call for any part of the applicant’s Social Security Number.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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