

WASHINGTON LEGAL FOUNDATION  
2009 Massachusetts Avenue, NW  
Washington, DC 20036  
202-588-0302

08-AP-002

October 9, 2009

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, DC 20544

Re: Proposed Amendment to Fed.R.App.P. 29

Dear Mr. McCabe:

The Washington Legal Foundation (WLF) appreciates the opportunity to comment on your committee's proposed amendments to the Federal Rules of Appellate Procedure. WLF is limiting its comments to the proposed amendment to Rule 29. While WLF has no objection to the objective of the proposed change, it is concerned by a potential ambiguity in its wording.

WLF is a public interest law and policy center that regularly files amicus curiae briefs in both the U.S. Supreme Court and the federal appellate courts. Accordingly, it has a keen interest in any changes in Rule 29, which governs the filing of amicus briefs in the U.S. courts of appeals.

Proposed Rule 29(c)(7)(C) requires most amicus filers to include a footnote that "identifies every person -- other than the amicus curiae, its members, or its counsel -- who contributed money that was intended to fund preparing or submitting the brief." A literal reading of this provision suggests that no statement is required if there is no person who fits the description set forth in the provision. This wording differs substantially from proposed Rules 29(c)(7)(A) and 29(c)(7)(B), which require the footnote to "indicate" whether certain events have occurred. By using the word "identifies" rather than "indicates," proposed Rule 29(c)(7)(C) makes reasonably clear that a mention of the subject matter is required only if there is someone to identify.

However, that is not the interpretation adopted by the Clerk of the U.S. Supreme Court with respect to the substantially identical language contained in Supreme Court Rule 37.6. That rule provides that the opening footnote of an amicus brief "shall identify every person other than the *amicus curiae*, its members, or its counsel, who made . . . a monetary contribution [intended to fund the preparation or submission of the brief]." As is true of proposed Fed.R.App.P. 29(c)(7)(C), the Supreme Court's language suggests that no mention of the subject must be made unless there is a person to be identified. However, the U.S. Supreme Court Clerk's Office has taken the position (in numerous oral statements, including statements to the author of this letter) that the first footnote must address the subject matter of this

provision of Rule 37.6. Thus, according to the Clerk, if no such person exists, the footnote must say so explicitly.

Compliance with Supreme Court Rule 37.6 as so interpreted presents no problem whatsoever. It is easy enough to add a sentence to the opening footnote of every Supreme Court amicus brief that "no person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of the brief." But it would be substantially more difficult for regular amicus filers to keep up with the interpretation of proposed Rule 29(c)(7)(C) adopted by each of the 13 U.S. courts of appeals. Given the precedent established by the U.S. Supreme Court Clerk's Office, it would be unsurprising if at least one of the 13 appeals courts adopted an interpretation of proposed Rule 29(c)(7)(C) that is similar to the Supreme Court's. The likely result will be that numerous unsuspecting amicus filers will have their briefs bounced (and be required to go to the not-inconsiderable expense of refiling them) because the clerk's office of the appeals court with which they filed adopted an interpretation of proposed Rule 29(c)(7)(C) that cuts against the literal meaning of the words of that rule.

WLF does not have a strong preference regarding which of the two interpretations of proposed Rule 29(c)(7)(C) the Committee intends to adopt. But whichever interpretation is adopted, WLF believes that the Committee should amend the proposed rule to make clear its preference. For example, if the Committee intends an interpretation that mirrors the interpretation of the Supreme Court Clerk's Office, it should revise the language of the proposed rule to read something like, ". . . indicates whether a person -- other than the *amicus curiae*, its members, or its counsel -- contributed money that was intended to fund preparing or submitting the brief; and, if so, identifies all such persons."

Thank you for your consideration of this matter.

Sincerely,

/s/ Richard A. Samp  
Richard A. Samp  
Chief Counsel