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08-AP-006

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By Email: Rules_Comments@ao.uscourts.gov
Peter G. McCabe, Esq.
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544-0001

Comments on Proposed Amendment of Fed. R. App. P. 29(c)

Dear Mr. McCabe:

As Chair of the Rules Committee of the American Bar Association's Council of Appellate Lawyers, I participated in the preparation of and co-signed the Council's letter of comment on the proposed amendment of FED. R. APP. P. 29(c). While I agree with every word in the Council's letter, I write separately to express, in addition, my personal views, both on policy and draftsmanship. The views expressed in this letter do not necessarily reflect those of the members or leadership of the Council of Appellate Lawyers, and have not been reviewed or endorsed by anyone other than myself.

Policy

I join with the many appellate lawyers who believe that it is improper for a party to fund or to write any substantial part of an amicus curiae brief, with or without disclosure. The only reason for courts to entertain amicus briefs is to obtain the reasoned analysis and viewpoint of someone other than the parties. That reason disappears where the so-called amicus curiae is merely carrying water for a party.

While I am sympathetic to the position of distinguished appellate advocate Luther T. Munford, that Rule 29 "should prohibit parties from authoring or paying

for amicus briefs,"[1] prohibition by rule could provoke a legal challenge of the rule, either under the First Amendment or as exceeding the rule-making authority conferred by the Rules Enabling Act, which would be an unwelcome distraction.

As a practical matter, enacting the proposed disclosure requirements should largely eliminate the practice, to the extent it exists, of parties writing or funding amicus briefs. I doubt that there are many potential amici curiae or appellate counsel who would be willing to file a brief with that disclosure, or many parties who believe that an amicus brief with that disclosure would do them much good.

Judicial decision-making is based on principles and reasoning, not political considerations of who or how many support a particular outcome. Amicus curiae briefs, therefore, are effective and useful only where they contribute to a reasoned, principled decision. The very first subdivision of the Supreme Court's rule governing amicus curiae briefs, SUP. CT. R. 37.1, provides:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

FED. R. APP. P. 29 would benefit from expressing a similar sentiment, although not in these words, in the text of the rule.

Draftsmanship

Unlike the Standing Committee, the Advisory Committees, and the Judicial Conference, the Supreme Court does not have substantial experience or expertise in drafting rules of procedure. Several Justices have acknowledged this fact when commenting on the Court's role in the rule-making process under the Rules Enabling Act. In hindsight, the Advisory Committee on Appellate Rules, with the able assistance of the Rules Committee Support Office, might done better drafting the proposed disclosure amendments to Rule 29 on a clean slate, rather than following so closely the text of SUP. CT. R. 37.6. In my opinion, following the Supreme Court's rule too closely is the cause of the several draftsmanship issues raised in the Council of Appellate Lawyers' comment letter.

Another result is that the proposed amendments do not conform to the established style of the Federal Rules of Appellate Procedure. For example:

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[1]Letter from Luther T. Munford to Peter G. McCabe 1–2 (Dec. 9, 2008), Docket No. 08-AP-004.

- The existing Federal Rules of Appellate Procedure require that various documents "state" (or "must state") specified information. In contrast, the proposed amendments to Rule 29(c)(7)(A) and (B) would provide for a footnote that "indicates whether" specified acts occurred.
- The existing rules write of "preparing" a brief or other document, or use other forms of the verb "prepare." In contrast, the proposed amendments would refer to "authoring" a brief, a usage that irks many careful writers,[2] although it is acknowledged by today's non-prescriptive dictionaries.[3]

These departures from the existing style of the Federal Rules of Appellate Procedure are not improvements. I respectfully suggest reexamination of the language of the proposed amendments anew, without regard to the language of the Supreme Court's comparable rule.

Respectfully submitted,

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[2]*E g.*, Email from the Honorable Frank H. Easterbrook to Rules Comments (Nov. 15, 2008), Docket No. 08-AP-003.

[3]In a further debasement of the English language and the word "author," technologists use the words "authoring" or "authorship" for the purely mechanical, non-creative process of encoding (or "burning") content onto optical data storage media (CDs and DVDs).