NACDL
1660 L St., NW, 12th Fl.
Washington, DC 20036

February 16, 2015

To the Members of the Advisory Committee:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 4(c), 26(c), and 29, as well as the type-volume provisions of Rules 21, 27, 28.1, 32, 35, and 40 of the Federal Rules of Appellate Procedure.

Our organization has approximately 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public criminal defense attorneys and interested academics. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. As you know, we have a long and consistent record of submitting comments. On the basis of that history, we appreciate the close and respectful attention that our comments have always received.

APPELLATE RULES 4(c) and 25(a)(2)(C) – TIMELINESS OF INMATE-FILED NOTICES OF APPEAL

NACDL supports the proposed amendments that would make more flexible the requirements for inmates to establish the timeliness of a notice of appeal or other document submitted by ordinary mail. We have one suggestion, consistent with the spirit and purpose of the Rule, as explained in the proposed Advisory Committee Note. In new paragraphs 4(c)(1)(B) and 25(a)(2)(C)(ii), the Court of Appeals should have discretion not only to accept separate and subsequent proof of timely mailing, as presently proposed, but also to excuse "for good cause" any failure by the inmate to "prepay" the postage, as otherwise required by subparagraphs 4(c)(1)(A)(i) & (ii) and 25(a)(2)(C)(i). The Rule cannot presume to anticipate all the ways that various penal institutions may handle the provision of postage for inmates.

As for the related proposed amendment to Form 1 and creation of a new Form 7, we also have a suggestion. In the Note proposed to be added to Form 1 (as well as to Form 5), we would add, after the reference to Rule 4(c)(1), a brief explanatory parenthetical, such as "(allowing timely filing by mail)." In Form 7, we would change "Insert name of court" to say "Insert name of trial-level court."

APPELLATE RULE 26(c) – COMPUTING AND EXTENDING TIME: ADDITIONAL 3 DAYS AFTER ELECTRONIC SERVICE

NACDL opposes the proposed package of amendments – including the proposed amendment to Appellate Rule 26(c) – to remove from the list of circumstances in which three days are added to otherwise stated time limits those (many) occasions when a document is due under a Rule or court order to be filed a certain number of days "after service" of another paper, and service has been made by electronic filing. Regardless of the arid logic behind the proposal, the fact is that the amendment would reduce by three days the time available to counsel to respond to an adversary's motion or brief. This small increase in the speediness of proceedings would provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners. This is particularly so as to criminal defense lawyers, whose clients may be incarcerated but who may have to be consulted before responses can be prepared. Many defense lawyers practice solo or in very small firms. Many are in court for much or all of normal working hours on most days. Many have little if any clerical or paralegal support, particularly in the digital age with its decreased demand for secretaries. For this reason, many criminal defense lawyers do not see their ECF notices – much less open and study the linked documents – immediately or even on the same day they are "received" at the attorney's email address. The burdens thus placed on defense counsel (and thus indirectly on defendants) by the proposal – as well as the increased burden on appellate courts, which will be confronted with many more motions for short extensions of time, or for leave to file documents out of time – far outweigh any perceived benefit in simplicity or abstract elegance in the rules.

Relatedly, if the 3-day addition is to be retained, as we recommend, this Rule has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by adding a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within which the party must act is determined by the date the document is deemed filed by the clerk, unless a

new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document.

APPELLATE RULES 21, 27, 28.1, 32, 35, and 40 – ACROSS-THE-BOARD 11% REDUCTION IN TYPE-VOLUME LIMITS

NACDL opposes the proposed reduction of type-volume limits and pages lengths throughout the appellate rules. The proposed reduction is based on a recalculation of the presumed type-volume per page from 280 words to 250, relative to the number of pages that was allowed for certain documents prior to 1998. We are aware that many other comments have been submitted criticizing this change for a variety of different reasons, with many of which we concur. In our view, however, the question of what was in the Committee's mind in 1998, one way or the other, when the page limit for briefs was changed to a type-volume rule, should not be given significant weight. The real question is whether there is any good reason to believe that the quality of appellate justice today would be enhanced by forcing an across-the-board 11% reduction in the maximum allowable length of briefs, motions, and other submissions from what is now permitted. We cannot imagine that it would.

We speak from the perspective of criminal defense lawyers who handle appeals for accused or convicted persons. The indictments our clients face often contain numerous counts brought under a variety of federal criminal statutes. These statutes continue to proliferate in number and in complexity. Federal criminal trials can last for weeks, generating potentially more, not fewer errors plausibly providing grounds for appeal. Moreover, error will not result in reversal if it is harmless, but we cannot candidly address harmlessness in our briefs without confronting and discussing all the significant evidence presented at trial. This requires more, not less space in even the best-written briefs. Federal sentencing law has also become increasingly complex since 1998, both under the Guidelines and under developing constitutional rules, as well as post-*Booker,* judge-made jurisprudence. The same is true of the law governing federal habeas corpus. Moreover, the number of potentially-applicable judicial precedents grows endlessly, multiplying each year the number of cases that might reasonably be cited, either as supportive precedent or as necessary to be distinguished. All the federal court decisions from our Nation's first hundred years (including many opinions from the bench) were published in 30 volumes of the Federal Cases. The first series of the Federal Reporter, which began approximately when the federal appellate courts were established in 1891, covered the next 44 years in 300 volumes. The Second Series ("F.2d") covered 70 years in 999 volumes. The Third Series ("F.3d") is now in its 774th volume (containing many more pages per volume, as well) after less than another 22 years. About 615 of those volumes

have appeared since 1998. Indeed, the number of precedential opinions *required* by rules of professional responsibility to be cited is ever-growing.

In this context of a burgeoning body of statutes and case law, defense lawyers are sworn to protect our clients' constitutionally-guaranteed right to effective assistance on appeal. We are committed to fulfilling this duty, but we cannot do so with one hand tied behind our back by pressure to drop potentially viable issues or to develop issues less fully. When we file amicus briefs (as NACDL often does) and are limited to one half the allowable party maximum, the significance of the proposed reduction becomes even more acute, as our opportunity to provide helpful information to the court would be severely hampered. For these particular reasons, as well as those proffered by other commenters, NACDL strongly opposes the suggested changes.

Based on the 280-words formula (and without regard to its typographical accuracy), the allowable maximum type-volume under Rule 21 for a mandamus petition should be 8400 words. For a motion under Rule 27, it should be 5600 words. For briefs under Rules 28.1 and 32(a)(7) the volume should remain at 14,000. For a rehearing petition under Rules 35 and/or 40, the maximum should be 4200.

To the listing of excluded portions under Rule 32(f), the Committee should add any required statement of related cases in a brief. For similar reasons, the required statement justifying en banc review under Rule 35(b) should be excluded from the word-count in a rehearing petition.

APPELLATE RULE 29(b) – TIME FOR FILING AN AMICUS BRIEF IN CONNECTION WITH A PETITION FOR REHARING

NACDL applauds the Committee for addressing this long-overlooked issue. We have two points of difference with the proposal, however. First, for the reasons discussed in the preceding section of these comments, the allowable type-volume for an amicus submission in connection with a petition for rehearing should be 2250 words under proposed Rule 29(b)(4), not 2000. Also, we strongly urge the Committee to consider allowing a more realistic five days, not just three, under proposed Rule 29(b)(5), to file a memorandum of amicus curiae in support of a petition for rehearing. This is still less than the seven days allowed for an amicus brief on the merits. But based on our experience in filing such memoranda, a five-day rule would allow the volunteer private counsel who typically author such documents a better chance to communicate with party counsel, obtain copies of needed record documents, and then fit this *pro bono* work into their schedules, all while producing the most useful and informative submission for the Court's consideration.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

William J. Genego
Santa Monica, CA

Co-Chairs, Committee on Rules of Procedure

Please respond to:
Peter Goldberger, Esq.
50 Rittenhouse Place
Ardmore, PA 19003
E: peter.goldberger@verizon.net