

National Association of Criminal Defense Lawyers
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Submitted online

H. Thomas Byron III, Esq., Secretary
Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2022

To the Committee and Staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed amendments to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has almost 10,000 direct members. Including NACDL's 95 state and local affiliates, in nearly every state, we speak for a combined membership of some 40,000 private and public defenders, along with many academics.

APPELLATE RULES 35 and 40 – PETITIONS FOR REHEARING

With one suggestion for improvement, NACDL supports the proposed amendments to Fed.R.App.P. 35 and 40, which would consolidate and clarify the procedures governing petitions for panel or *en banc* rehearing, as well as petitions for initial *en banc* consideration.

NACDL is aware that different Circuits have different preferences for the physical presentation of rehearing petitions. Those of us who practice as appellate counsel for criminal defendants in more than one Circuit have not found this to be a problem. There is no need for absolute uniformity, and minor local variations are not burdensome. For this reason, we support the express allowance of differing reasonable length limits in redesignated Rule 40(d)(3), and time limits in Rule 40(d)(1), and suggest that similar flexibility be written into Rule 40(d)(2). Absent this addition, the contrast between (d)(2) and (d)(1)&(3) would strongly suggest that local flexibility is strictly prohibited in this context.

In other words, instead of stating that "The petition must comply in form with Rule 32," the new (d)(2) provision should state that "Unless the court or a local rule allows or directs otherwise, the petition must comply" Some Circuits now do not require a cover, for example, and instead allow the petition to begin with a full caption, like a motion. Similarly, some Circuits do not require the printing and binding of any paper copies of a petition for rehearing, being satisfied (in the ordinary case) with electronic filing only. The amended rule should not appear to prohibit such reasonable local variations.

To: Judicial Conference Rules Committee
From: National Ass'n of Criminal Defense Lawyers

Re: Federal Appellate Rules (2022 Proposals)
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NACDL thanks the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

In Memoriam:

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