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American Bar Association
Judicial Division
Appellate Judges Conference
312 North Clark Street, 19th Floor
Chicago, Illinois 60654
312.877.5109 • Fax 312.988.1500
abanet.org/jd/ajc/cal/home.html

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VIA E-MAIL

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, D.C. 20544-0001
Email: Rules_Comments@ao.uscourts.gov

Comments on Proposed Amendment of FRAP 29(c)

The Council of Appellate Lawyers offers these comments on the proposed amendment of Rule 29(c) of the Federal Rules of Appellate Procedure, which prescribes the content of briefs by amici curiae. Our comments are technical, concerning the language and structure of the proposed amendment. We do not question the objectives that the proposed disclosure requirements are intended to achieve.

Rule 29(c)(6)

Unlike Rule 28(a) and (b), which govern the contents of the parties' main briefs, Rule 29(c) as now in force does not specify the order of the required or optional contents of a brief amicus curiae. As a result, neither the present Rule 29(c) nor the proposed new subdivision (c)(6) specifies where the "disclosure statement like that required of parties by Rule 26.1" should appear in the brief of an amicus curiae that is a corporation. The proposed Committee Note advises that the corporate disclosure statement "should be placed before the table of contents."

We believe that the placement of the corporate disclosure statement is too important to be left to a Committee Note, which is not always read with the same care as the rules themselves. Indeed, some published editions of the rules do not include the Committee Notes. Therefore, we suggest that the proposed subdivision

(c)(6) prescribe the same location for this disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party.

The Advisory Committee on Appellate Rules (the "Advisory Committee") may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.

If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

Rule 29(c)(7)

While we respect the precedent of SUP. CT. R. 37.6, we believe that there are technical improvements in draftsmanship that can be made to the proposed new subdivision (c)(7).

First, we suggest that the a more logical placement of the new disclosure statement is immediately following the statement of the amicus's identity and interest, under a prescribed heading such as "Disclosure by Amicus Curiae." We see no reason why this disclosure, unlike all other specified elements of the brief, should be in a footnote. To give the disclosure a prominent, well-defined location, we suggest amending subdivision (c)(3) to require that statement of the amicus's identity and interest to be at the top of the first page following the table of authorities, with the new disclosure statement immediately following. While we understand the Advisory Committee's desire not to disturb the numbering of the present subdivisions, subdivision (c) as now in force presents the required elements of the amicus brief in the order in which they typically appear, even though it does not prescribe the order. The proposed subdivision (c)(7) could be added to subdivision (c)(3), which would preserve the logical ordering of the brief's contents without disturbing the existing numbering of the subdivisions.

Second, we believe that "states" is clearer than "indicates" in subdivisions (c)(7)(A) and (B).

Third, we believe that the body of the rule should provide interpretive guidance on the language "a party's counsel authored the brief ... in part." Read literally, contributing a sentence, or even a word, constitutes authorship of the brief in part. The Committee Note's reference to SUPREME COURT PRACTICE shows that this is not the Advisory Committee's intent, but, again, prescribing the standard for when disclosure is required is too important to be left to a Committee Note. We appreciate the difficulty of defining authorship "in part." Perhaps the rule should include language based on the treatise's interpretation of the Supreme Court's rule, that authorship "in part" is where a party's "counsel takes an active role writing or in rewriting a substantial or important 'part' of the amicus brief, ... something more substantial than editing a few sentences." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 739 (9th ed. 2007).

Fourth, subdivision (c)(7)(A) might be broadened to read, "whether a *party or the* party's counsel *or other representative* authored the brief in whole or in part."

Fifth, subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C). Therefore, the two subdivisions can be merged to require disclosure of whether there was outside funding for the amicus curiae brief and, if so, to require identification of each person who provided funding.

Committee Note

The Committee Note on subdivision (c)(7) cites ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 662 (8th ed. 2002). The same subject is discussed and updated in the current edition of this treatise: EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 739 (9th ed. 2007).

Future Consideration of Rule 29(c)

At a future time, the Advisory Committee may wish to consider revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs: the statement prescribed by the present subdivision (c)(3) and the new disclosure requirement of subdivision (c)(7).

About the Council

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only national bench-bar organization devoted to appellate issues and advocacy. The views expressed here are solely those of the Council, and they have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

Respectfully submitted,

Bennett Evan Cooper
Chair, Council of Appellate Lawyers

Steven Finell
Chair, Rules Committee