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January 6, 2023

By Email

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Recommendation to Amend Fed. R. App. P. 29(a)

Dear Mr. Byron:

I am writing on behalf of the DRI Center for Law and Public Policy to recommend that Federal Rule of Appellate Procedure 29(a) be amended to eliminate the requirement for obtaining the parties' consent, or the court's permission, for the filing of non-governmental *amicus curiae* briefs. Under our recommended amendment, a court of appeals still would be able to prohibit or strike the filing of an amicus brief that would result in a judge's disqualification. Further, our recommended amendment would apply only to the filing of amicus briefs during a court's initial consideration of a case on the merits; it would not affect Rule 29(b). Please see the proposed markup to Rule 29(a) appended to this letter.

DRI Center for Law and Public Policy

[DRI](#) is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Many of DRI's 14,000 members include attorneys who regularly practice in the federal courts of appeals. The [Center for Law and Public Policy](#) is DRI's think tank and advocacy voice. The Center's Amicus Committee files amicus briefs in carefully selected Supreme Court, federal court of appeals, and state appellate court cases that present issues that are important to the civil justice system and to civil litigation defense attorneys and their clients.

Recommended Amendment to Fed. R. App. P. 29(a)

The Center's recommended amendment to Federal Rule of Appellate Procedure 29(a) follows the Supreme Court's lead in revising Supreme Court Rule 37 by eliminating the need for a non-governmental *amicus curiae* to obtain all parties' consent, or the Court's permission, for the filing of either a petition-stage or merits-stage amicus brief. In [announcing](#) the rules change, which became effective on January 1, 2023, the Supreme Court Clerk explained that "[w]hile the consent

requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon litigants and the Court.”

The DRI Center for Law and Public Policy believes that the same is true for the corresponding requirement in Fed. R. App. P. 29(a). Although timely consent usually can be obtained, that not always is the case, especially if the non-supported party’s counsel does not regularly practice in the federal courts of appeals or is unfamiliar with the important role that well-crafted amicus briefs play in enhancing an appellate court’s understanding of the legal issues involved in an appeal. Such counsel sometimes delay, withhold, or refuse consent, or even file oppositions to motions for leave, simply because they do not want the opposing party to benefit from amicus support, or are displeased with the organization or individuals intending to provide amicus support (e.g., a national voluntary bar organization such as DRI; the national trade association to which the supported party belongs; an ad hoc group of law professors). This type of hardball tactic is incompatible with appellate litigation. The fact that Fed. R. App. P. 29(a)(6) requires amicus briefs to be filed no later than 7 days after the supported party’s principal brief is filed can exacerbate the logistical problems encountered by amicus counsel who are confronted with an uncooperative non-supported party’s counsel who chooses to delay or withhold consent.

Facilitating the filing of amicus briefs in federal courts of appeals by eliminating the consent/permission requirement in Fed. R. App. P. 29(a) also would benefit the civil justice system. Timely, rules-compliant amicus briefs that do not replicate the supported party’s legal arguments, but instead, provide a court of appeals with additional argument or broader perspective on the legal issues involved in an appeal, enhance appellate decision-making and the judicial process. Equally important, amicus briefs give organizations such as DRI a direct voice in appeals that present legal questions important to their members. Federal courthouse doors should open automatically to true friends of the court such as DRI.

We urge the Standing Committee and its Advisory Committee on Appellate Rules to follow the Supreme Court’s lead and recommend that amicus counsel, party counsel, and federal courts of appeals be relieved of the unnecessary burdens imposed by the requirement of obtaining the parties’ consent, or the court’s permission, for filing amicus briefs. Thank you for your consideration.

Sincerely,

Lawrence S. Ebner

Lawrence S. Ebner
Chair, DRI Center for Law and Public Policy

Rule 29. Brief of an Amicus Curiae

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Prohibited Permitted. ~~The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a A court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.~~

(3) Motion for Leave to File. ~~The motion must be accompanied by the proposed brief and state:~~

~~(A) the movant's interest; and~~

~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.~~

(3) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is the United States or its officer or agency or state ~~one listed in the first sentence of Rule 29(a)(2)~~, a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) 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 each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(4) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(5) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(6) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(7) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.