January 13, 2025

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Request for Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

I am writing as chair of the DRI Center for Law and Public Policy's Amicus Committee to comment on the proposed amendments to Federal Rule of Appellate Procedure 29, namely (1) to urge rejection of the proposed amendment that would eliminate the ability of nongovernmental amici curiae to file briefs on consent of the parties and replace it with a requirement that the filing of all nongovernmental amicus briefs require court permission requirement in all instances; and (2) to relay some concerns regarding the structure and practicality of the proposed amendments regarding disclosures in Rules 29(a)(3)–(4), 29(b), and 29(c).

The 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. DRI is committed to addressing issues germane to defense lawyers and the civil justice system and improving the civil justice system. Many of DRI's 14,000 members include attorneys who regularly practice in the federal courts of appeals.

In addition, the Center for Law and Public Policy is DRI's think tank and advocacy voice. The Center's Amicus Committee files almost a dozen amicus briefs each year in carefully selected United States Supreme Court, state supreme courts, and federal 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. DRI firmly believes amicus briefs can provide valuable information to appellate

courts regarding the ramifications of their decisions, and context that may be important but not addressed (or well addressed) by the parties.

Recommended Amendment Regarding Leave of Court for Nongovernmental Amicus Briefs

On January 6, 2023, the DRI Center for Law and Public Policy wrote to recommend *eliminating* the requirement of consent of the parties or court permission for the filing of nongovernmental amicus curiae briefs, following the Supreme Court's lead in revising Supreme Court Rule 37 to eliminate parallel requirements in that court.

In announcing its 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 the litigants and the Court."

The proposed amendments to FRAP 29(a), however, take the opposite approach—they propose to eliminate the filing of amicus briefs on consent of the parties, and to require a motion and court permission each and every time. For the reasons articulated by the Supreme Court when it revised its Rule 37, the proposed amendments to Rule 29(a) are unnecessary and will be unhelpful to the federal appellate courts.

Under current appellate practice, parties routinely consent to any and all amicus briefs as a matter of good form and professionalism. In those rare instances where party consent is withheld, motions for leave are almost never opposed and courts rule on them as routine matters. Because the proposed amendments would require a motion and court permission for every amicus brief, however, they invite a sea change in appellate practice with respect to amicus briefs. Parties may well view the motion requirement—particularly in combination with the new "disfavored" language in the proposed amendment to Rule 29(a)(2))—as an invitation to oppose amicus motions regularly on the grounds that they are not sufficiently helpful to the court. Should this occur, the courts will have to devote time and resources to deciding numerous contested motions about whether a given amicus brief meets the standard of helpfulness enough to allow it to be filed, instead of allowing the federal appellate courts to get to the heart of the matter—the merits of appeals based on the merits of the arguments before it—whether presented by the parties or amici. The proposed motion-and-permission mandate will not be beneficial to anyone: the courts, the parties, or potential amici.

Moreover, the reasons given by the Advisory Committee for requiring court permission for every amicus brief do not withstand scrutiny.

The first reason given by the Advisory Committee for rejecting the Supreme Court's no-consent/no-motion approach is that—somehow—the Supreme Court requirement that amicus briefs be filed in booklet form is a "modest filter" that justifies requiring motion practice for amicus briefs in the federal appellate courts. The Advisory Committee does not further explain this rationale, and the accuracy of this assertion most certainly is not self-evident. How is the filing of an amicus brief in a printed booklet format the equivalent of a mandatory motion-and-permission requirement in the federal appellate courts? The Advisory Committee does not say.

The second reason given by the Advisory Committee for rejecting the Supreme Court's no-consent/no-motion approach and requiring advance court permission is the stated purpose of protecting federal appellate judges from needing to recuse themselves following the filing of an amicus curiae brief that results in a conflict. But requiring advance court consent is entirely unnecessary for this purpose because Rule 29(a)(2) already authorizes a court of appeals to prohibit or strike the filing of an amicus brief that would result in a judge's disqualification.

The undercurrent of Advisory Committee's mandatory court permission amendment is that amicus briefs are bad or that there are too many of them, and thus barriers should be erected and costs imposed to solve this problem. But timely, rules-compliant amicus briefs that do not replicate party legal arguments enhance appellate decision-making and the judicial process by providing federal appellate courts with additional arguments and broader perspectives on the legal questions presented. Amicus briefs give organizations such as DRI a direct voice in appeals that present legal questions that affect, or are important to, their members. Federal courthouse doors should readily open to true friends of the court such as DRI. Accordingly, the proposed amendments that would delete the filing-by-consent rule and mandate motion practice should be rejected, and DRI urges the Advisory Committee to revisit the idea of adopting the Supreme Court's no-consent/no-motion approach.

Recommended Amendments Regarding Disclosures

As a national voluntary bar organization, DRI, through its DRI Center for Law and Public Policy, files amicus briefs on issues important to its members (civil litigation defense attorneys) and the civil justice system. DRI does not solicit nor accept funds for the preparation of any amicus brief. DRI members support the organization through yearly dues and, from those dues, its Amicus Committee is given a small, yearly budget allotment that it must then manage by carefully evaluating requests for amicus support and choosing only to file amicus briefs that it believes will be most helpful to the courts and supportive of the interests of its membership.

Accordingly, to the extent certain of the proposed amendments add to Rule 29's disclosure requirements in the hope of ferreting out possible undisclosed financial support earmarked for particular amicus briefs or presumed hidden identities behind organizations filing amicus briefs, the DRI Center for Law and Public Policy has no position about the relative merits of the substance of the proposed amended disclosure requirements.

The DRI Center for Law and Public Policy's Amicus Committee, however, does have an interest in ensuring that any disclosure requirements in Rule 29 are practical, straightforward, efficient, and easy to comply with, so that its limited budget is not dissipated by needlessly complex and impractical rules.

At present, Rule 29's disclosure rules are indeed practical, straightforward, efficient, and easy to comply with. Fed. R. App. P. 29(a)(4)(E) currently requires nongovernmental amici to provide:

> [A] statement that indicates whether:
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> (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;

In other words, at present, those interested in filing an amicus curiae brief can quickly find, in one place, a short list of information that must be disclosed, and one set of easy instructions about how to comply with the disclosure requirement.

The proposed amendments, by contrast, have multiple duplicative and additive disclosure requirements spread across several subsections:

- A proposed amendment that would make the newly mandatory motion for permission to file an amicus brief also proposed a new motion disclosure requirement (proposed Rule 29(a)(3)(C)), but to determine the content of the required disclosures, that provision cross-references proposed Rules 29(a)(4)(A), (b), (c), and (e);
- The amicus brief that must accompany the motion also must have disclosures as specified in proposed Rule 29(a)(4)(F), but that provision again cross-references proposed Rules 29(b), (c), and (e);
- Turning to proposed Rule 29(b), (c), and (e) these require an amicus brief to include a statement with the traditional disclosures (such as whether a party or its counsel authored the brief in whole or in part), but also additional somewhat duplicative and overlapping disclosures about financial support earmarked for the brief; influence over the entity submitting the brief; and relationships to certain parties and nonparties;
- Then, swinging back to Rule 29(a)(4) (D) and (E), these proposed amendments contain yet more disclosure requirements that must go in the amicus brief, such as statements about the history, experience, and interests of the amicus curiae, and the date the amicus entity was created if in existence for less than 12 months.

There is no discernable reason for amendments that disperse all these new disclosure requirements throughout Rule 29. As a practical matter, all disclosure requirements should be straightforward, better organized, and centrally located within Rule 29 so that those interested in participating as amici can readily comply with the requirements and provide the information the Advisory Committee believes should be disclosed.

Respectfully submitted,

/s/ *Lisa M. Baird*
Lisa M. Baird, Chair
DRI Center for Law and Public Policy Amicus Committee