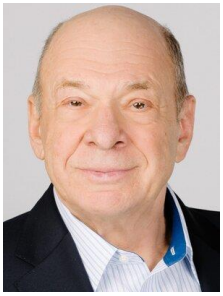
Requiring Leave To File Amicus Briefs Is A Bad Idea

By **Lawrence Ebner** (April 4, 2024)



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At its meeting on April 10, the U.S. Judicial Conference's Advisory Committee on Appellate Rules will be considering a recommendation to require leave of court for the filing of merits-stage amicus curiae briefs in federal courts of appeals.

This proposal, offered by the Advisory Committee's Amicus Subcommittee,[1] would amend Federal Rule of Appellate Procedure 29(a) by eliminating the current, widely used practice of filing an amicus brief "if all parties have consented to its filing."[2]

The amicus subcommittee's proposal is exactly the opposite of the U.S. Supreme Court's decision to amend its own rules, which as of Jan.1, 2023, allow the filing of petition-stage and merits-stage amicus briefs without either the parties' consent or the court's permission.[3]

Making the filing of an amicus brief in a federal court of appeals contingent upon obtaining leave of court is a step backward. It is a bad idea — not only from a practical viewpoint, but also because it would make participation in the appellate process less available to organizations and individuals with a significant interest in the legal issues presented by a case.[4]

The subcommittee's recommendation memo to the advisory committee rejects "[t]he Supreme Court's permissive approach to amicus filings." Its accompanying proposed committee note offers the following explanation:

> The amendment ... eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. ... Most parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter. Some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion. ... Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief.

As to whether an amicus brief is "helpful," the proposed amendment to Rule 29(a)(2) also "adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already mentioned by the parties that may be of considerable help to the court. By contrast, if an amicus curiae brief is redundant with the parties' briefs or other amicus curiae briefs, it is a burden rather than a help."

This admonition to prospective amici is essentially the same as Supreme Court Rule 37.1.

Amending Rule 29 to discourage the filing of amicus briefs that merely repeat the supported party's or other amici's arguments is commendable. But requiring a motion for leave to file an amicus brief is not.

The proposed committee note asserts that "the Advisory Committee has carefully

considered the competing interests," including "avoiding unnecessary burdens on amici." To the contrary, the proposed amendment's mandatory motion for leave is both burdensome and troubling.

Obtaining the consent of all litigating parties to file an amicus brief in a court of appeals is routine. Thus, under the current rule, a motion for leave to file is rarely needed. When a party on the other side declines to consent, it is usually because its counsel is not a seasoned appellate practitioner and erroneously equates consenting to the filing of an amicus brief with consenting to the content of the brief.

Rule 29(a)(6), which requires an amicus brief to be filed "no later than 7 days after the principal brief of the party being supported is filed," affords counsel ample time to review and respond in their own principal or reply brief, if they so choose, to whatever arguments or information an amicus brief presents. In practice, however, experienced appellate counsel usually prefer to avoid calling the court's attention to nongovernmental amicus briefs filed in support of the other side.

The proposed amendment's required motion for leave, like all motions, would have to comply with the requirements of Federal Rules of Appellate Procedure, Rule 27, and any corresponding local court rules.

Opposing counsel usually would have an opportunity to oppose the motion for leave,[5] which the clerk's office then may refer to a motions judge or to the merits panel, thereby creating — rather than eliminating — uncertainty as to whether the amicus brief will be accepted into the record.

Unlike the proposed amendment, there is little, if any, uncertainty under the current rule: Obtaining consent of all parties to the filing of a timely amicus brief that complies with the rules — e.g., required format, content, and word limit — ensures that it will be accepted unless it "would result in a judge's disqualification."[6]

Amicus briefs that trigger this disqualification exception are quite uncommon when an appeal is being heard by a three-judge panel.[7]

Rule 29(a)(3) requires a motion for leave to be "accompanied by the proposed brief." As a result, the substantial time, cost, and other resources devoted to researching and drafting an amicus brief must be invested before a motion for leave is filed.

The uncertainty that having to file a motion for leave would engender may deter the preparation of amicus briefs that would be beneficial to a court of appeals considering the merits of a case. Despite the importance of a case, nonprofit organizations that have small, if any, budgets for amicus briefs may be especially reluctant to risk expending available resources if a court's acceptance of a brief is less than 100% certain.

If the proposed amendment were adopted, motions for leave may not be routinely granted, as they are now even when a party's counsel refuses or delays consent. Eliminating consent would automatically produce uncertainty because according to the amicus subcommittee, the newly required motion for leave would function as "a filter on the filing of unhelpful briefs."

What is an unhelpful amicus brief? If, as the proposed amendment indicates, a "redundant" amicus brief is unhelpful, what exactly does redundancy mean in this context? Does it merely mean that an amicus brief should not repeat the arguments already made in the

supported party's or other proposed amici's briefs?

Or does redundancy mean something more, such as where an amicus brief makes the same substantive points as other briefs, but in a differently structured or expanded way? And how are multiple proposed amicus briefs supposed to be coordinated — in advance of filing motions for leave — to ensure that they are not redundant with each other?

Given this lack of clarity, a party against whom one or more amicus briefs are proposed to be filed very well may oppose the motions for leave. The party's attorney, having had the opportunity to review the proposed briefs, may contend that they are redundant or otherwise unhelpful.

Such an objection might be bolstered, indeed encouraged, by the subcommittee's concern that "the consent process does not provide a meaningful screen [because] [c]ounsel for a party does not see the proposed amicus brief before consenting, so is not in a good position to evaluate the usefulness of a brief before consenting."

This statement essentially is an invitation to oppose a motion for leave on the ground that a proposed amicus brief is not "useful." It is not difficult to imagine the "lack of usefulness" arguments that counsel on the receiving end of a proposed amicus brief might devise.

In contrast, under the current rule, when amicus counsel request the parties' consent, they are not required to share their proposed brief in advance of its submission to the court.

Besides seeking to squelch amici by contending that their proposed briefs are redundant or not useful, there is additional mischief in which a party opposing one or more motions for leave could engage.

For example, the subcommittee's less-than-convincing proposed committee note expresses concern about an amicus curiae acting as a "mouthpiece for a party." This is a classic argument employed by an opposing party when an amicus curiae is a trade association or other nonprofit organization to which the party supported by the amicus brief belongs.

Such an amicus is not acting as a "mouthpiece" merely because the supported party is one of its members.

For example, trade associations often submit amicus briefs that discuss the potential industrywide impact of a legal issue or ruling. By providing a broader perspective on the legal issues involved in an appeal, this type of amicus brief may be of considerable help to an appellate court — the type of amicus brief that the proposed amendments indicate are favored.

The potential obstacles to filing amicus briefs that requiring a motion for leave would interpose not only may deprive federal circuit courts of helpful legal arguments or information, but also undermine an additional important function that they serve: providing organizations and individuals a voice — a direct line of communication — in appeals involving legal issues that are important to them.

The well-accepted and common practice of filing amicus briefs makes the appellate process more open, transparent and democratic.

The Supreme Court's recent decision to eliminate the requirement for obtaining the parties' consent or the court's permission serves this important public interest. So should the

Federal Rules of Appellate Procedure.

At the very least, the opportunity to file an amicus brief with the parties' consent in federal courts of appeals should be preserved so that courthouse doors remain open to friends of the court.

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[1] The Amicus Subcommittee's recommendation is contained in the Advisory Committee's Agenda Book, beginning with the memo at page 152. See https://tinyurl.com/mva95szx.

[2] Rule 29(a)(2) as amended would state as follows:

Purpose; When Permitted. An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may be of considerable help to the court. An amicus brief that does not serve this purpose — or that is redundant with another amicus brief — is disfavored. The United States, its officer or agency, or a state may file an amicus brief without leave of court. Any other amicus curiae may file a brief only with leave of court. The court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

[3] See Sup. Ct. R. 37.2 & 37.3.

[4] The Amicus Subcommittee also has recommended expansion of Rule 29's disclosure requirements concerning the funding of amicus briefs. This article expresses no view on those proposed amendments.

[5] See Rule 27(b).

[6] See Rule 29(a)(2). The fact that Rule 29(b) currently requires a motion for leave to file an amicus brief during consideration of whether to grant rehearing reflects the concerns expressed and admonitions conveyed by many circuit courts of appeals that they are burdened by the filing of too many unwarranted petitions for rehearing en banc by parties that simply disagree with a three-judge panel's holding. These practical concerns do not apply to a panel's initial consideration of the merits of an appeal.

[7] The Amicus Subcommittee's proposed amendments to Rule 29 would make the "judge's disqualification" exception applicable to amicus briefs file at the rehearing stage as well as the merits stage.