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> **Rule 29. Brief of an Amicus Curiae**

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 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 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.

(4) 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 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.

(5) 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.

(6) 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.

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

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

(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.

(1) Applicability. This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) When 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.

(3) Motion for Leave to File. Rule 29(a)(3) applies to a motion for leave.

(4) Contents, Form, and Length. Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) Time for Filing. An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Notes

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 28, 2016, eff. Dec 1, 2016.)

Notes of Advisory Committee on Rules—1967

Only five circuits presently regulate the filing of the brief of an amicus curiae. See D.C. Cir. Rule 18(j); 1st Cir. Rule 23(10); 6th Cir. Rule 17(4); 9th Cir. Rule 18(9); 10th Cir. Rule 20. This rule follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.

Committee Notes on Rules—1998 Amendment

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Paragraph (c)(3) requires an amicus to state the source of its authority to file. The amicus simply must identify which of the provisions in Rule 29(a) provides the basis for the amicus to file its brief.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed no later than 7 days after the appellant's or petitioner's principal brief is filed. Note that in both instances the 7-day period runs from when a brief is filed. The passive voice—"is filed"—is used deliberately. A party or amicus can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period. Although the brief is

timely if mailed within the filing period, it is not “filed” until the court receives it and file stamps it. “Filing” is done by the court, not by the party. It may be necessary for an amicus to contact the court to ascertain the filing date.

The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

A court may grant permission to file an amicus brief in a context in which the party does not file a “principal brief”; for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing a a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

Subdivision (g). The language of this subdivision stating that an amicus will be granted permission to participate in oral argument “only for extraordinary reasons” has been deleted. The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances.

Committee Notes on Rules—2010 Amendment

Subdivision (a). New Rule 1(b) defines the term “state” to include “the District of Columbia and any United States commonwealth or territory.” That definition renders subdivision (a)'s reference to a “Territory, Commonwealth, or the District of Columbia” redundant. Accordingly, subdivision (a) is amended to refer simply to “[t]he United States or its officer or agency or a state.”

Subdivision (c). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through (c)(5) are renumbered, respectively, (c)(2),

(c)(3), (c)(4), (c)(6) and (c)(7). The new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(1) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. See *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination—in the sense of sharing drafts of briefs—need not be disclosed under subdivision (c)(5). Cf. Eugene Gressman et al., *Supreme Court Practice* 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments....").

Changes Made After Publication and Comment. No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c).

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person – other than the amicus curiae, its members, or its counsel – who contributed

money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee revised this portion of the requirement to require a statement that indicates whether "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."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to add the authorship and funding disclosure provision to existing subdivision (c)(3). However, a further revision to the structure of subdivision (c) was later made in response to style guidance from Professor Kimble, as discussed below.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this requires renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Committee Notes on Rules—2016 Amendment

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court’s initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that “[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include” a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a “brief submitted under Rule[] . . . 32(a)(7)(B)” if the amicus computes Rule 29(a)(5)’s length limit by taking half of a type-volume limit in Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)’s requirement functionally, by providing that a certificate of compliance is required if an amicus brief’s length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Committee Note - 2018 Amendment

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of or permit the striking of an amicus brief if the brief would result in a judge’s disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge’s disqualification. A comparable amendment to subdivision (b) is not necessary. Subdivision (b)(1) currently authorizes local rules and orders governing filings during a court’s consideration of whether to grant panel rehearing or rehearing en banc. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge’s disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge’s disqualification.

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