Federal Courts Should Follow Supreme Court's Amicus Stance

By **Lawrence Ebner** (December 12, 2022)

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On Dec. 5, the U.S. Supreme Court announced revisions to its rules, including elimination of the requirement that an amicus curiae obtain the parties' consent, or the court's permission, to file a "friend of the court" brief.[1]

The clerk's accompanying comments explain 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."[2]

This change, effective Jan. 1, 2023, may merely seem like removal of a minor inconvenience. After all, even where a party has withheld consent, the court routinely allows timely, otherwise compliant, amicus briefs to be filed. But to me, as an appellate attorney who frequently files amicus briefs in the Supreme Court, deletion of the consent requirement is significant.

In fact, I believe that Federal Rule of Appellate Procedure 29, which governs the filing of amicus briefs in the courts of appeals, should be amended the same way to allow the filing of timely amicus briefs without the need for the parties' consent or the court's permission.

Organizations or individuals with an interest in the legal issues involved in a case — and something additional or different to say — should be able to speak directly to a federal court of appeals, as well as to the Supreme Court, through the filing an amicus brief.

Courthouse doors should open automatically for true amici.

A well-crafted amicus brief serves at least three important purposes: conveying the interest and views of the amicus curiae on the legal questions presented; supporting one or more of the litigating parties — unless filed in support of neither side; and providing additional perspective, legal argument or nonadjudicative factual information that helps an appellate court decide a case.

The Supreme Court's rules expressly acknowledge this third purpose by stating that "[a]n amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."[3]

If an amicus brief functions as a true friend of the court, it should not be required to state in a court of appeals proceeding "that all parties have consented to its filing."[4] A friend of the court, with something helpful to offer, should not have to ask the litigating parties to open the courthouse doors. They should open automatically to true friends of the court.

Nonetheless, I have encountered situations in cases before courts of appeals where counsel representing the other side not only have adamantly refused to consent to the filing of an amicus brief, thereby necessitating the filing of a motion for leave, but also have actively opposed such a motion. This sort of hardball tactic has no place in a federal court of appeals, especially if an objecting counsel simply disapproves of the amicus curiae — e.g., the supported party's trade association — or hopes to block the supported party's arguments from receiving additional support.

Nor should an amicus curiae have to obtain permission from a federal court of appeals to file a brief that complies with the rules. Instead, the opportunity to file a timely amicus brief should be viewed as one of the pillars of the federal judicial system.

As in the Supreme Court — where neither the parties' consent nor the court's permission is now necessary — the filing of a motion for leave should not be required. The Advisory Committee on Appellate Rules of the Judicial Conference's Committee on Rules of Practice and Procedure should initiate the process for making this change.[5]

Amicus counsel play an important role in deciding whether to file and what to say.

Allowing amicus briefs to be filed without consent or permission will not suddenly inundate appellate dockets. The vast majority of amicus briefs already are submitted with the parties' consent, both in the Supreme Court and the federal courts of appeals.

Even more important, counsel for prospective amici curiae should exercise sound professional judgment in deciding whether an amicus brief should be filed in a particular case, and if so, what arguments or information the brief should present, either alone or with co-amici.

There are two important threshold questions that the author of a prospective amicus brief always should consider.

Is this the type of appeal in which amicus support is appropriate?

The answer is probably no if, for example, a court of appeals case involves application of well-settled legal principles to the facts of a particular case, or if an appellant is challenging a district court's sound exercise of judicial discretion on a procedural or evidentiary matter. Or in the Supreme Court, a petition-stage amicus brief probably is inappropriate if a case, or the question presented, does not appear to be worthy of certiorari.

Note, however, that a case should not be viewed as unworthy of Supreme Court review merely because it is statistically or otherwise unlikely that certiorari will be granted.

Instead, most amicus briefs should be reserved for cases that present unresolved legal issues and/or affect the interests of the amicus curiae or its members and supporters.

Does the prospective amicus curiae have something additional or different to say?

This is very important. An amicus brief that merely repeats the arguments already made by the party being supported, or by other amici, adds little if any value to a court's decision-making process.

The Supreme Court's rules state that an amicus brief which fails to provide additional relevant material "burdens the Court, and its filing is not favored."[6] At least three federal circuits' local rules or guidance convey a similar admonition to prospective amici curiae and their counsel:

- U.S. Court of Appeals for the Fifth Circuit: "The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any nonconforming brief may be stricken, on motion or sua sponte."[7]

- U.S. Court of Appeals for the Ninth Circuit: "The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties."[8]

- U.S. Court of Appeals for the D.C. Circuit: "The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." In the D.C. Circuit "[a]mici curiae on the same side must join in a single brief to the extent practicable," and "[a]ny separate brief for an amicus curiae must contain a certificate of counsel plainly stating why the separate brief is necessary."[9]

Counsel, therefore, should work hard to write an amicus brief that says something additional or different. An amicus brief is unlikely to help a court, and will be given little weight, unless it supplements the supported party's brief by providing a broader perspective on the legal issues or their potential effects, new or expanded legal argument, or relevant factual information that is not specific to the case being adjudicated. Attorneys seeking amicus support should suggest such topics to prospective amici.

There are additional guardrails that modulate the filing of amicus briefs that do not function as a true friend of the court.

For example, in the Supreme Court, only members of the Supreme Court bar can file amicus briefs.[10] Neither a reply brief for an amicus curiae, nor an amicus brief is support of a petition for rehearing, can be filed.[11]

Further, the newly revised rules state that the filing of amicus briefs in connection with emergency applications "is discouraged," and that such a brief "should be filed only if it brings to the attention of the Court relevant matter not already presented by the parties and that is of considerable help to the Court."[12]

In the courts of appeals, an amicus brief is subject to strike if it "would result in a judge's disqualification."[13]

And of course, both in the Supreme Court and the courts of appeals, there are word limits, and an amicus brief must disclose whether it has been written in whole or part, or funded, by a party or its counsel.[14]

All of these rules are intended to help ensure that amicus briefs actually function as friends of the court.

Conclusion

The Supreme Court's recent elimination of the requirement to obtain the parties' consent, or the court's permission, for filing amicus briefs is a welcome development.

Discarding the requirement for consent or permission may have been intended simply to relieve the Supreme Court and counsel of an unnecessary procedural burden. But the court's action has deeper significance in our nation's open and transparent federal judicial

system.

The federal appellate rules should be similarly revised to ensure that with the assistance of mindful amicus counsel, organizations and individuals with an interest in the legal issues involved in an appeal, and that can assist the court by providing nonduplicative legal arguments or other information, can have a voice in the appellate process.

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[1] See revisions to Sup. Ct. R. 37, available at https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf.

[2] Id.

[3] Sup. Ct. R. 37.1.

[4] Fed. R. App. P. 29(a)(2).

[5] See "How the Rulemaking Process Works," available at https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works.

[6] Sup. Ct. R. 37.1.

[7] 5th Cir. R. 29.2.

[8] Circuit Advisory Committee note to 9th Cir. R. 29-1.

[9] D.C. Cir. R. 29(a).

[10] Sup. Ct. R. 37.1.

[11] Sup. Ct. R. 37.3 [rev. as of 1/1/23].

[12] Sup. Ct. R. 37.4 [rev. as of 1/1/23].

[13] Fed. R. App. P. 29(a)(2).

[14] Sup. Ct. R. 37.6 & Fed. R. App. P. 29(a)(4)(E).