dri™ The Brief Case: DRI Committee News
May 2022 | Volume 1 Issue 3

Welcome News! The Supreme Court Proposes to Ditch the Amicus Brief Consent Requirement

By Lawrence S. Ebner

Writing *amicus curiae* briefs, particularly for the benefit of the Supreme Court, is one of my favorite activities as an appellate lawyer. Supreme Court amicus briefs give industry trade associations, professional organizations such as DRI (where I am a past Amicus Committee chair), non-profit public interest law firms such as the Atlantic Legal Foundation (where I serve as Executive Vice President & General Counsel), and ad hoc groups of individuals such as legal scholars, scientists, and former government officials, a direct line of communication to the nation's highest court on the most important legal issues confronting American jurisprudence and society.

As the author of numerous amicus briefs during my half-century legal career, I know from personal experience that when an *amicus curiae* is truly a "friend of the court," the brief will provide additional—not duplicative—legal arguments, information, and/or perspective that may benefit the Justices in their decision-making. My article, "**Learning the High Art of Amicus Brief Writing**" (For The Defense, Feb. 2017), provides some practical tips for making amicus briefs effective. And in my view, when an attorney is relieved of the psychological burden of billing by the hour, researching and writing an amicus brief can be a truly pleasurable and creative, as well as intellectually stimulating, experience (see my article, "**Flat-Fee Billing Can Liberate Attorneys**," For The Defense, Feb. 2020).

Of course, there are some potential procedural pitfalls. At the certiorari petition stage, these include the 10-day advance notification requirement and the non-extendable 30-day deadline for filing petition-stage briefs. See Sup. Ct. R. 37.2(a). And at both the petition and merits stages, there is Rule 37.6, which as a practical matter, requires amicus counsel to assure the Court (in the first footnote on the first page of the brief) that the brief has not been authored or financed, in whole or part, by a party or its counsel.

What about consent? The Supreme Court's longstanding rule has been that non-governmental *amici* must obtain the litigating parties' consent, or the Court's permission, for the filing of an amicus brief. See Sup. Ct. R. 37.2(a), 37.3(a). (Under Rule 37.4, federal, state, and local government *amici* do not require consent or leave.) Requesting and granting consent for non-governmental amicus briefs not only is the nearly universal practice in the Supreme Court, but also is expressly encouraged by the Rules, which state that the filing of a motion for leave to file an amicus brief "is not favored." Id. § 37.2(b).

Surprisingly, on March 30, 2022, the Supreme Court **announced** proposed **rules changes**—including *elimination* of the requirement to obtain consent for the filing of an amicus brief! The Clerk's explanatory comment accompanying the proposed revision

states 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.”

Comments that I prepared and submitted to the Court’s Rules Committee on behalf of the Atlantic Legal Foundation applaud this long-overdue proposal. Our comments discuss why, as a practical matter, the need to obtain consent serves no useful purpose and sometimes can impede preparation or submission of amicus briefs.

If the proposed rule change is adopted, opposing counsel who lack Supreme Court experience no longer will be able to engage in the bush-league, and always futile, practice of withholding or delaying consent for the filing of a timely, Rules-compliant amicus brief. Nor will inexperienced opposing counsel be able to try to hold an amicus brief hostage, making consent contingent on their prior review of a draft of the brief. Although experienced appellate attorneys do not engage in practices like these, only a small fraction of the hundreds of thousands of attorneys who have paid the fee to join the Supreme Court Bar are appellate litigation specialists.

This leads to a more fundamental point: Since the purpose of an amicus brief is to benefit *the Court* (as well as the supported party), its submission should not be dependent, even in theory, on the other side’s consent. Elimination of the consent requirement implies that the Court *welcomes* amicus briefs. The Court grants review in cases involving important legal issues that often transcend the immediate interests of the litigating parties. It makes sense, therefore, to afford all interested organizations and individuals a voice on such issues.

Let’s hope that the Supreme Court acts promptly to adopt the revised amicus brief rule and eliminate the consent requirement, and that federal courts of appeals and state appellate courts do the same.

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