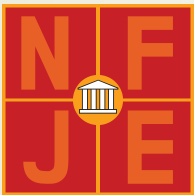

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PROMOTING EXCELLENCE AFFIRMING JUSTICE

Judicial Excellence

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Support for Our Judiciary

By Amy L. Miletich, NFJE President

For eighteen years, state appellate court judges from nearly all states have come together at the National Foundation for Judicial Excellence (NFJE) Annual Judicial Symposium to share legal knowledge and to promote the continued administration of justice. The NFJE is a 501(c)(3) organization with a stated mission to:

Address important legal policy issues affecting the law and civil justice system by providing meaningful support and education to the judiciary, by publishing scholarly works and by engaging in other efforts to continually enhance and ensure judicial excellence and fairness for all engaged in the judicial process.

Much of the NFJE's work is done through its Annual Judicial Symposium. State appellate judges from across the United States are invited as guests of the NFJE for judicial education and collegial gatherings. It is impressive to witness the enthusiasm of the judges as they participate in the program and to hear their praises concerning the quality of the programming. Last year, as is done each year, we asked for suggestions concerning presentations they would like to hear in the future and we listened. The presentations this year were developed based upon those suggestions and requests.

Since its inception, the NFJE Judicial Symposium has been held in Chicago. This year, the Symposium will be held July 28 and 29 at the historic and beautiful Willard InterContinental Hotel in Washington, D.C. Located near The White House, the Willard has played host to the world's social and political elite and has been the site of many historical moments since 1818.

Everyone is benefited when our judges are informed and have an opportunity to share their questions and concerns. Our judiciary and judicial systems are currently subject to constant partisan attacks. Moreover, given the budget restrictions imposed on many judiciaries in various states, the need and demand for judicial education and support is greater than ever. Support for the NFJE benefits the entire legal system by ensuring that critical judicial education is provided. The importance of an independent and educated judiciary cannot be overemphasized, particularly in today's world.

Amy L. Miletich is the President of the National Foundation for Judicial Excellence. She is a founding member of the Denver, Colorado firm Miletich PC. Her practice is focused on the defense of employment law matters, civil litigation and insurance law. She is a frequent speaker and published author on employment law and legal ethics. Ms. Miletich is listed in Best Lawyers in America for Litigation – Labor and Employment. She has been selected as a Colorado Super Lawyer every year in employment defense since 2007 and has also been named one of the Top 50 Women Colorado Super Lawyers. She is a former National Director of DRI and a member of the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel, and the Association of Defense Trial Attorneys, all peer reviewed and invitation only organizations. Miletich PC is a member of the National Association of Minority & Women Owned Law Firms (NAMWOLF)

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2023 NFJE Symposium Preview

By Mark Fahleson, 2023 Symposium Chair

NFJE's 19th Annual Judicial Symposium—*Pressures of the Times: Key Issues Facing State Court*—focuses on the unique challenges the judiciary faces in these extraordinary times and features a new venue—the historic Willard Hotel in Washington, D.C.

The Symposium kicks off on Friday, July 28th with the keynote address by the Honorable Goodwin H. Liu of the Supreme Court of California—one of the nation's leading scholars on state constitutional law. Justice Liu will share insights about the role of state courts and state constitutions in channeling discourse and disagreement about individual rights in our diverse democracy.

The second day of the Symposium opens with what promises to be a highlight of the 2023 Symposium—a panel discussion on the contemporary issue of improving judicial security. Threats and inappropriate communications to courts and judges have increased significantly in the past decade, which has sparked a rethinking of how best to protect judges and ensure courthouse safety. The esteemed panel includes Thomas J. Garrity, Jr., the Chief of the Judiciary Security Division of the Administrative Office of the United States Courts, as well as Nathan Hall, a registered architect and consultant for the National Center for State Courts. In addition, the Honorable Mathias W. Delort of the Illinois Appellate Court and the Honorable Richard J. Sullivan of the U.S. Court of Appeals for the Second Circuit will provide the perspective of sitting state and federal appellate judges.

Another highlight from Saturday's program is a luncheon featuring Bruce Jackson, who currently serves as Associate General Counsel for Microsoft and is the author of *Never Far From Home: My Journey from Brooklyn to Hip Hop, Microsoft and the Law.*

Jackson's journey is incredible—from growing up in public housing, being falsely accused and arrested for robbery at the age of ten, and witnessing the homicide of a close friend as a teen to being accepted and attending Georgetown Law, advising some of the biggest stars in music and working for Microsoft. Jackson will discuss the many obstacles he faced, how he overcame them and the valuable lessons he learned along the way.

Reviews from recent NFJE Symposiums consistently request more presentations on legal writing. Back by popular demand, on Saturday the Honorable Robert E. Bacharach of the U.S. Court of Appeals for the Tenth Circuit, author of *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word*, will share strategies for effective opinion writing.

The second day of the Symposium also features discussions on two developing substantive issues. First, a panel of experienced litigators will discuss the practical implications of the amendments to Rule 702 of the Federal Rules of Evidence and the role of the court as a gatekeeper for the admissibility of expert opinion. Second, an esteemed panel will discuss changes in the Restatement (Third) of Torts on the

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concepts of duty and causation and the respective roles of judges and juries.

Since the Symposium will be held in our nation's capital, it only makes sense that we end the Symposium with a presentation on the upcoming term of the U.S. Supreme Court. Noted appellate attorney Thomas H. Dupree, a frequent legal commentator on CNN and Fox News Channel whose persuasive Senate Judiciary Committee testimony was recently cited by the editorial page of the *Wall Street Journal*, will discuss the Court's recent and upcoming term and share insights on the Court and the Justices.

With such an outstanding lineup of speakers and topics, the venue really shouldn't matter, right? Our planning committee decided there was no better place to host this year's Symposium than in Washington, D.C. at the Willard Hotel. Conveniently located near The White House, the historic hotel has hosted every U.S. President since Franklin Pierce and has been linked to the genesis of the title "lobbyists" thanks to President Ulysses S. Grant's habit of drinking whiskey and smoking cigars in the Willard's lobby where petitioners approached him for favors.

We are thrilled that the 2023 Symposium will provide an opportunity for state court judges to gain useful insight on important issues while connecting with colleagues from across the country. At the conclusion of each day of the programming, we will have social receptions for our attendees and speakers to see old friends and to meet new ones.

On behalf of our entire planning committee, I want to express my sincere appreciation to the speakers for sharing their time and expertise and to the financial contributors whose important donations helped underwrite the cost of the Symposium. I also want to personally thank the NFJE planning committee and NFJE staff for their hard work in organizing what we hope will be the best NFJE Judicial Symposium ever.

Mark A. Fahleson is a partner and serves as Chief Strategy Officer for Rembolt Ludtke LLP in Lincoln, Nebraska. Mr. Fahleson practice focuses on employment and labor law and he serves as an attorney and advisor to businesses, organizations, insurers, governmental bodies, officials, and individuals. When litigation becomes unavoidable, his representation has resulted in numerous successful verdicts from federal and state court judges and juries.
Mark's expertise and skill has earned him recognition, including being frequently named as one of the top employment law attorneys in Nebraska by various rating agencies.

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Reflections on the 2022 Symposium: State Courts on the Forefront

By Sara Kobak, 2022 Symposium Chair

As we emerge from the COVID-19 pandemic, state courts face both opportunities and challenges in improving the administration of justice and promoting public trust in the judicial system. With those opportunities and challenges in mind, NFJE's 18th Annual Judicial Symposium—*State Courts on the Forefront: Law at the Time of Change*—focused on some of the most critical issues for state courts in this time of tremendous changes.

To start, we were honored to have the Honorable Jeffrey S. Sutton, Chief Justice of the United States Court of Appeals for the Sixth Circuit, as our keynote speaker. Judge Sutton is a leading scholar on state constitutional law and federalism. Sharing insights from his new book, *Who Decides? States as Laboratories of Constitutional Experimentation*, Judge Sutton discussed the importance of state courts and state constitutions in our federalist system.

In addition to Judge Sutton's keynote on state constitutionalism, the symposium featured other judges and scholars exploring topics critical to the administration of justice in state courts. Addressing the importance of fostering public trust in the judiciary, the symposium started with a panel discussion on *Public Confidence in the Judiciary and the Rule of Law*. Moderated by appellate attorney Tillman Breckenridge of Washington, D.C., that panel featured four federal circuit court judges from different parts of the United States, all of whom previously served as state appellate court judges before moving the federal bench—namely, the Honorable Allison H. Eid of the Tenth Circuit, the Honorable Susan P. Graber of the Ninth Circuit, and the Honorable Leslie H. Southwick of the Fifth Circuit. Recognizing the importance of understandable judicial opinions, we also were excited to offer a presentation of legal writing by the Honorable Robert E. Bacharach of the Tenth Circuit. Judge Bacharach is the author of *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word*, and his presentation featured practical tips on how to make judicial opinions more digestible and clear.

Along with those topics, the 2022 symposium also addressed current racial justice and equity issues in state courts, with a panel discussion with Oregon Court of Appeals Judge Darleen Ortega and Delaware Supreme Court Chief Justice Collin J. Seitz, Jr. Judge Ortega and Chief Justice Seitz shared insights on different initiatives for improving diversity and inclusion in the appellate bench and bar, as well as for promoting equitable and fair treatment of all litigants.

The 2022 symposium addressed important changes coming to state courts on the gatekeeping role of courts in ensuring the reliability of expert opinions and evidence. Addressing the new amendments to clarify Federal Rule of Evidence 702—the model for many state court rules on expert testimony and evidence—the panel featured Professor Daniel J. Capra of Fordham University School of Law, the Honorable Joan N. Erickson of the U.S. District Court for the District of Minnesota, the Honorable Iain D. Johnston of the U.S. District Court for the Northern District of Illinois, and the Honorable Thomas D. Schroder of the U.S. District Court for the Middle District of North Carolina.

Finally, the 2022 symposium offered opportunities for state court judges to connect with each other and share ideas and community in person again. We also were thrilled to host law students with The Appellate Project, a nonprofit organization working to empower law students of color to succeed in appellate practice.

It was an honor to serve as the chair of the 2022 symposium, and I am deeply grateful for the work and contributions of all of the speakers and committee members who contributed to its success and excellent programming.

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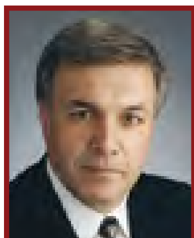
The Test of Time

By John R. Kouris and Richard T. Boyette



In the spring of 2005, the authors of this article convened in Chicago for the annual planning meeting between the DRI President-elect and the DRI Executive Director to discuss their thoughts on the forthcoming Presidential year, which would begin in October. A broad range of topics were addressed such as board and executive committee meetings, appointments, financial matters, and special projects, if any. The agenda was comprehensive; the conversation was day-long and focused. At times it included DRI senior staff, who played pivotal roles in executing the agreed upon strategies that emerged from the session. As the robust list of topics eventually transformed into notes, follow up items, assignments, and schedules, President-elect Boyette paused, leaned slightly forward, and said, "John, I want to run an idea past you."

It became quickly apparent that Richard had already spent considerable time contemplating this idea because what followed was a road map for the creation of an educational entity, whose purpose was to provide the states' appellate and supreme court judiciaries with a balanced educational program that addressed current, critical, legal issues. The emphasis was on balanced so that the pedagogy would never become a rhapsodic exultation of the righteousness of the defense cause. Instead, the founding goals were the enhancement of judicial excellence and the pursuit of fairness in the legal process.

There were questions and pronouncements: How do we ensure balanced educational offerings? The entity must have governance separate from DRI! Who will provide funding? The organization must be deemed charitable by the Internal Revenue Service in order to assure the deductibility of contributions! Would any judges attend? Other questions and hurdles emerged. All of these foundational issues were bracketed by the overriding concern that the Canons of Judicial Ethics would prevent justices from participating in a program Sponsored by a public policy organization that provided tuition – free education, and reimbursed attendees' reasonable lodging, meals, and transportation expenses.

The decision was made to consult academic experts on the topic before moving forward. The challenge of finding such experts was profound. Yet, after several consultations, the advice was synthesized into one recommendation: "The greatest care must be taken so that the educational programming is not designed to sell a point of view or conducted in a manner that could be interpreted as doing so."

Armed with this information and the enthusiastic support of DRI and the other defense bar organizations, the National Foundation for Judicial Excellence (NFJE) was founded on October 7, 2004. The question of whether any justices would attend our program was soon answered when more than one hundred justices attended the first Judicial Symposium July 15 – 16, 2005. Through the selfless dedication of far too many individuals to list, and through the imagination of the multitude of officers and directors of NFJE, and through the generosity of its financial supporters, and through the tireless efforts of the professional staff, we find ourselves on the eve of our 18th annual symposium. The "idea" mentioned earlier in this article has become a reality. The National Foundation for Judicial Excellence has withstood the test of time.

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The Value of Mentorship

By Hon. Jesse G. Reyes[1]

Colleagues are a wonderful thing – but mentors, that's where the real work gets done." Junot Diaz

This fall around the country a new class of lawyers will be joining the ranks of the legal profession. Their formal classroom education behind them, these fresh arrivals will now have to contend with the challenges of a new career and a new way of life. Different lessons will have to be learned, but in life there are no books which contain all the right answers. In the legal profession, one solution to this quandary is to search and find a mentor. Having a person with experience to serve as a guide will alleviate going it alone. A mentor can point out where the pitfalls are and how to avoid them.

A mentor is an experienced lawyer who will pass along guidance and advice to another less experienced attorney. Through this collaborative effort, a mentee can develop new skills and abilities. The mentor can also assist the mentee in setting career goals and provide suggestions as to how to accomplish these initiatives. The ultimate goal of the mentorship partnership is to create a forum where both mentor and mentee can exchange ideas, thoughts, and suggestions in a confidential environment. The best lawyers are ones engaged in life-long learning, and one means of accomplishing this feat is by entering into a mentorship relationship.

Some of the most notable members of our profession have had the assistance of a mentor. Abraham Lincoln had John Todd Stuart; Louis Brandeis had Oliver Wendell Holmes, Jr.; and Barack Obama had Michelle Robinson. Thus, if you want to achieve a satisfactory level of success in your legal career, working with an experienced lawyer can be of an enormous benefit. The question then becomes how to find the right mentor.

Selecting the right mentor can take time, and this effort may also involve some trial and error until you discover the right one. As your career evolves, you may also find the need to have different mentors. While having a mentor from your own office may be convenient, it may be more beneficial in the long run to have a mentor who is not employed in the same office. The objectivity of someone from the outside may provide insights which may not be apparent to someone from within, particularly as to issues involving your colleagues and the inner workings of your office. In choosing a mentor, it is important to set forth your expectations. Equally important for the mentorship to be effective, both mentor and mentee need to be intentional in their participation and hold each other accountable. Ultimately, select the mentor who will best suit your needs and will be able to address the concerns you may have, whether law related or not. The mentor you select should be someone who can advise you on both legal as well as non-legal activities.

One of the lessons rarely taught in law school is how to effectively navigate between a professional and personal life. In other words, prior to practicing

1 Justice Jesse G. Reyes is the current Executive Chair of the Illinois Appellate Court, First District.

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law, we never really learn how to maintain balance between these two facets of our existence. In fact, as members of the bar, we are indoctrinated with the notion that fealty to the law requires we burn the candle at both ends. In the words of Justice Joseph Story, "[The Law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage." Upon entering the profession, we soon discover that the demands of practicing law can be overwhelming at times, with the constant pressure of having to meet deadlines. The amount of work seemingly is never ending. The long and arduous hours can leave no time for a life outside the office. We often also sense a lack of control over our choices and schedules, which seem to be directed and dictated by clients, judges, and partners. In many instances, lawyers strive to address the needs of others, yet at the same time dismiss their own. How do we achieve balance in this scenario and at the same time fulfill our ethical and legal obligations as officers of the court and counselors of the law? How do we accomplish the heroic feat of saving the day for our client without ruining our day at home? One source which can provide direction and guidance is the mentor, particularly one who has dealt with the stress, anxiety, and depression which sometimes can result from engaging in the practice of law. A mentor may not have all the answers but through their past experiences and observations can at least provide the less experienced attorney with the necessary guidance to avoid the mistakes of others who have come before them.

Lastly, there are other intangible benefits to the profession in becoming involved in a legal mentorship relationship. While the newest members of our profession can derive an advantage from participating in a mentorship relationship, note regardless of where you are in your legal career, you can always learn from someone with more experience and a different perspective from your own. Furthermore, by being involved in a mentorship, the mentor can receive a sense of satisfaction from giving back to the profession. In this ever-evolving world, the mentor can in some circumstances become the mentee. In the words of Michelle Obama, "One person might be senior and be wiser and have more experience, but I've learned a lot from the people I mentor."

Through participation as a mentor, an attorney can lend their voice to future generations of lawyers. Given the current concern regarding the increase of incivility and lack of professionalism in the legal profession, the value and impact of a mentorship is indeed priceless.

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Amendment to FRE 702 Clarifies Burdens and Duties Related to Expert Testimony

By Jim McCrystal

According to an amendment to Federal Evidence Rule 702, the proponent of expert testimony must demonstrate by the preponderance of the evidence that the expert's qualifications, the sufficiency of the basis of the expert's opinions, and the application of the expert's methodology warrant admission. The amendment makes it clear these are questions of weight, to be determined by the judge. This important amendment has been approved by the U.S. Supreme Court and sent to Congress. Unless both houses of Congress vote to reject the amendment, it will take effect on December 1, 2023.

The DRI Center for Law and Public Policy has testified and actively supported amendments to this rule seeking clarification of how courts should address the issue of whether an expert is qualified to offer opinions and whether the basis for the opinion is sufficient to allow the opinion and data to be admitted.

The amendment sent to Congress states that expert testimony cannot be admitted unless the proponent "demonstrates to the court that it is more likely than not" that all four of the conditions governing expert testimony have been met. Those conditions are a) the expert's scientific, technical, or other
specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; b) the testimony is based on sufficient facts or data; c) the testimony is the product of reliable
principles and methods; and d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. The new language in this rule makes it clear that the admissibility of expert testimony is governed by Evid. R. 104(a). That rule requires the judge to try and decide the question of whether the expert is qualified and whether the expert evidence is admissible using the preponderance of

evidence standard: more likely than not.

Further, the amendment to part (d) of the rule now emphasizes the importance of the judge's role as a gatekeeper, using the preponderance of evidence standard, to determine if an "expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

Among the submissions to the Advisory Committee on the Civil Rules was a study done by Lawyers for Civil Justice of 1,000 federal opinions issued in 2020, showing that in 61 percent of the federal districts issuing opinions on admissibility of expert testimony, judges were split as to whether to apply the preponderance standard when assessing admissibility.

The Advisory Committee on the Rules of Evidence Note makes the importance of this standard explicit. Stating that "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility." These rulings are

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an incorrect application of Rules 702 and 104(a)" (emphasis added). The Committee Note concludes by observing that "[n]othing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702."

In other words, because this is a clarification of the rule experts and their evidence should be measured by these standards, even now. In fact, there is at least one case from the Fourth Circuit that has already used this understanding to reverse a decision allowing a plaintiff's expert opinion to be introduced, Sardis v. Overhead Door Corp., 10 F.4th 268.

The Center is planning a webinar for this summer to brief members on this amendment and how it should be used in federal court and how this clarification of Rule 702 can also be used to control expert testimony in state courts.

Jim McCrystal, Chair of the Center's Legislation and Rules Committee, is Of Counsel with Sutter O'Connell in Cleveland, Ohio, He has spent four decades handling product liability cases and now has a national practice in that field. Jim has represented the manufacturers of tires, automobiles, trucks, farm equipment, industrial products, and power systems as well as handling construction litigation and commercial disputes. In addition to his work with clients, Jim has been an active DRI member including service on the Board of Directors and as Ohio State Representative. He is also a past member of the Board of Directors of the Product Liability Advisory Council and is a Past President of the Ohio Association of Civil Trial Attorneys and the Cleveland Association of Civil Trial Attorneys.

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Federal Courts Should Follow Supreme Court's Amicus Stance

By Lawrence Ebner

On December 5, 2022, 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, which went into effect on January 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.

Supporting the idea that organizations or individuals with an interest in the legal issues involved in a case — and with 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, the DRI Center for Law and Public Policy (the Center) submitted a letter to the Judicial Conference's Committee on Rules of Practice and Procedure. The letter, proposing that Federal Rule of Appellate Procedure 29(a) be amended, was referred to the Advisory Panel on Appellate Rules, who referred an expanded version of the proposal back to the Committee to publish for public comments.

State and local defense organizations that would like to see similar changes for state appellate court amicus filings are encouraged to reach out to The Center for information and assistance.

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

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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.

Lawrence S. Ebner is the executive vice president and general counsel at the Atlantic Legal Foundation and founding member at Capital Appellate Advocacy PLLC. He also currently serves as chair of the DRI Center for Law and Public Policy and is a member of the Center's Amicus Committee.

Endnotes

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).

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