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June 8, 2017

Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States Administrative Office
Of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Appellate Procedure 29(b)

Dear Judge Campbell:

On behalf of the American Academy of Appellate Lawyers (the Academy) and as its current President, I write concerning the proposed change to Rule 29 of the Federal Rules of Appellate Procedure, which would authorize Courts of Appeal to refuse to accept an amicus brief, or to return one previously filed, if it would cause the recusal of a judge in the case.

A. Statement Of Interest

The Academy is an invitation-only professional association of nearly 300 fellows from across the United States. Academy membership is limited to lawyers, judges, and educators who are experienced and knowledgeable in appellate practice, and dedicated to the improvement and enhancement of the standards of appellate practice and the ethics of the profession as they relate to appellate practice. The Academy has a five-member Rules Committee, which reviews proposed changes in appellate rules in federal and state court and provides recommendations to the Academy's Board of Directors. With Board input and approval, the Academy periodically comments on the proposed adoption of or amendments to state and federal rules that may affect the quality of appellate practice and the fair and effective administration of justice. I note that the Academy's statement of position was not specifically approved by individual fellows and should not be attributed to individual fellows, their places of work, or their clients.

By letters dated September 28, 2016 and June 1, 2017, Alan B. Morrison, a former president of the Academy, provided detailed comments concerning the proposed rule. With one minor exception, we agree with his comments and the reasons he provided for his views.

B. Statement of Position

A survey of our fellows revealed that only two fellows have ever come across a situation in which an amicus brief caused the recusal of an appellate judge in the course of their careers. Since our membership is extremely active in appellate litigation, this indicates that the "problem" to be addressed by this proposed rule almost does not exist. Yet the impact of striking a brief on appellate counsel and their clients, who prepare amicus briefs without knowing who will be on a panel, is serious and expensive.

Amicus briefs often provide significant value in resolving cases. They can offer perspectives that extend beyond the parties' positions and relate real world observations that improve the quality of decision-making and reasoning and help define the reach of precedent being established. There should be a systemic preference permitting these briefs to be filed, and courts should tailor panel composition as needed to allow their filing, particularly when all sides agree.

The Academy suggests that the proposed justification for the exception — that is, that some Courts of Appeals already have a rule where an amicus brief would trigger recusal — does not outweigh the insights that come from amici, the recognition by the parties that those briefs can add value, or the contribution amici can make to decision-making. To preserve the theoretical opportunity for every appellate judge to sit on the case, the proposed change inverts the usual process of requiring full disclosure by participants in the case and their counsel, and then using judicial disqualification to resolve any perceived conflicts. Given the available pool of appellate judges and the rarity of the situation the change addresses, the Academy believes the justification for this complete change in procedural priorities is not sound. Moreover, the judges will know that the particular amicus party is interested in the outcome of the case, and striking the brief does not change that. The citizens who felt strongly enough about the issue to file a brief may question the integrity of the court and whether they have been treated justly and fairly.

As Alan Morrison noted, the United States Supreme Court occasionally has a justice recused. The Court nonetheless proceeds to decide the case. Similarly, when Courts of Appeals sit *en banc*, occasionally there is a recusal. The Courts of Appeals, nevertheless, continue to function even in important cases, such as the recent Fourth Circuit Decision involving the so-called travel ban.

The Academy would prefer that recusals be made on a case-by-case basis without a federal rule or circuit rules. That said, the Academy strongly believes that any rule should be limited to situations in which a panel has already been selected to hear the case, publicly identified, and then an amicus brief is sought to be filed which would result in the recusal of one of the three panel judges. That is where the potential mischief lies, and is a very rare occurrence. Recusal decisions can and should be made in the ordinary course before panel disclosure, with judges reviewing the identity of amici from briefs usually filed one week after the principal briefs, in conjunction with reviewing the identity of parties and their counsel. FRAP 29(e).

For these reasons, the Academy suggests that the proposed amendment to FRAP 29(b) be modified to permit refusal of an amicus brief after panel member identification. The Academy suggests that the proposed amendment language be changed as follows:

…except that a court of appeals may prohibit the filing of or strike an amicus brief filed after disclosure of the panel members that would result in a judge's disqualification.

Thank you for considering our perspective.

Very truly yours,

Susan M. Freeman
President