

Rule 5, 12A, 29 and 44 Subcommittee Report – 2/23/22

Chair: Micah Echols
Steve Silva
Jordan Smith
Colby Williams
Deborah Westbrook

Proposed Changes to NRAP 29

Our subcommittee has communicated via email since November regarding revisions to NRAP 29 and has reached agreement on most of the language in our proposed Rule. Except where expressly indicated in this memo, our subcommittee agrees with the language currently being proposed.

On November 22, 2021, Micah Echols circulated an initial draft which included the provisions of FRAP 29 into our rule that are cognates. He also added to subsection (a) the blanket consent language from U.S. Supreme Court Rule 37(3)(a) (“[a] petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party.”). Micah’s initial draft also included a 3,500-word count limit for amicus briefs at rehearing. **Those proposals remain in the current draft, and the group consensus was to adopt those proposals.**¹

Deborah Westbrook proposed reworking subsection (a) to clarify that officers of political subdivisions (not just officers of the United States or the State of Nevada) could file amicus curiae briefs without consent of the parties or leave of the Supreme Court. This change was requested because pending appellate litigation may impact political subdivisions in the same way such litigation impacts the State. With the proposed change, officers of political subdivisions (including, for instance, offices of the county public defender, county managers, county sheriffs, county surveyors, etc.) would be allowed to file amicus briefs without obtaining prior permission to do so. The group generally concurred with this recommendation. However, Steve Silva pointed out that it could create unintended consequences, for instance, if multiple local agencies and officers chose to file competing amicus briefs as a matter of right. Steve agreed with the underlying policy of the rule change, but wanted his concerns noted for the record. **This proposal should be discussed further.**

¹ The initial draft also included a prohibition against filing a duplicative brief from *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997), but the committee decided against including that language in our final draft because the consensus was that there will always be some overlap between the briefs filed by an amicus and the parties, and we worried that adding this language could encourage the filing of motions to strike and needless litigation over whether a brief was “duplicative.”

Subsection (c)(2) imports language from FRAP 29(a)(2), requiring a motion for leave to file an amicus brief to show why “the matters asserted are relevant to the disposition of the case.” Steve Silva objected to the inclusion of this language because he feels “it eats up word count as people try to comply with the standard. Our current standard of showing why the brief is desirable is better.” **This addition should be discussed further.**

Subsection (d)(1) imports a requirement from FRAP (a)(4)(A) that a brief must include a disclosure statement like that required of a party by Rule 26.1. **The group concurred.**

Subsection (d)(4) of the current draft provides that the “concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file” will “not count toward the type-volume limitation.” This language does not come from the federal rule. Steve expressed concern that excluding a statement of interest from the word-count incentivizes people to include arguments in the statement of interest to enlarge their briefs. **This addition should be discussed further.**

Subsection (d)(5) imports the requirement from FRAP (a)(4)(E) that the brief must state whether a party’s counsel authored the brief in whole or in part, contributed money to fund the preparation of the brief, and identify anyone other than amicus curiae who contributed money to fund the brief. **The group concurred.**

Subsection (f) contains new language addressing amicus briefs filed in support of extraordinary writ petitions and, at Steve Silva’s suggestion, it expressly addresses amicus briefs filed outside of the 7-day window. **The group concurred with the proposal.**

Subsection (i) addresses amicus briefs filed “During Rehearing, En Banc Reconsideration, and Review by the Supreme Court.” It is based on FRAP 29(b) (which addresses amicus “During Consideration of Whether to Grant Rehearing”) but is expanded beyond the federal rule to include petitions for en banc reconsideration and petitions for review. **The group concurred.**

RULE 29. BRIEF OF AN AMICUS CURIAE

(a) When Permitted. The United States, the State of Nevada, ~~an officer or agency of either,~~ a political subdivision thereof, ~~or~~ a state, territory or commonwealth, or an officer or agency of the foregoing entities may file an amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court granted on motion or at the court's request or if accompanied by written consent of all parties. Any party may submit to the clerk a letter granting blanket consent to the filing of amicus briefs in support of any party or parties or of neither party.

(b) Foreign Counsel. If an amicus brief is prepared in whole or in part by an attorney who is not a member of the State Bar of Nevada, that attorney must move for permission to appear before the Supreme Court or Court of Appeals under SCR 42 and comply with Rule 46(a).

(c) Motion for Leave to File. A motion for leave to file an amicus brief ~~shall~~ must be accompanied by the proposed brief and state:

- (1) the movant's interest; and
- (2) the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(d) 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 (if any) and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

- (1) If the amicus curiae is a corporation, a disclosure statement like that required of a party by Rule 26.1.
- (2) A table of contents, with page references.

(23) A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(34) A concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file, which shall not count toward the type-volume limitation.

(5) Unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(i) a party or a party's counsel authored the brief in whole or in part;

(ii) any person(s)—other than the amicus curiae, its members, or its counsel—contributed money, or other consideration, intended to fund preparing or submitting the brief and, if so, identifies each person.

(46) An argument, which may be preceded by a summary.

(57) An attorney's certificate that complies with the requirements contained in Rule 28.2.

(e) 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 brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(f) 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 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 opening brief is filed. The court may grant leave for later filing, specifying the time within which an opposing party may answer. An amicus brief in support of a petition for extraordinary writ must be filed as soon as practicable, must be supported by a motion for leave to file an untimely brief if submitted outside of the 7-day window established by this rule, and must not be filed after a respondent has

filed an responsive brief to the writ petition, unless specifically invited by the court.

(g) Reply Brief. An amicus may not file a reply brief.

(h) Oral Argument. An amicus may file a motion to participate in oral argument, but the court will grant such motions only for extraordinary reasons.

(i) During Rehearing, En Banc Reconsideration, and Review by the Supreme Court. An amicus may participate in proceedings for rehearing under Rule 40, en banc reconsideration under Rule 40A, and review by the Supreme Court under Rule 40B. Such a brief may be filed irrespective of whether an amicus brief was filed by that party in the primary briefing. The same requirements outlined in this Rule for principal briefs shall apply to such rehearing, en banc reconsideration, and review proceedings. Except by the court's permission, the length of an amicus brief in these proceedings must not exceed 3,500 words.