PHELPS DUNBAR LLP
COUNSELORS AT LAW

New Orleans, LA
Baton Rouge, LA
Houston, TX
London, England

111 East Capitol Street • Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
(601) 352-2300 • Fax (601) 360-9777

Jackson, MS
Tupelo, MS
Gulfport, MS
Tampa, FL

www.phelpsdunbar.com

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LUTHER T. MUNFORD
Partner
Resident in Mississippi
Direct: (601) 360-9364
munfordl@phelps.com

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Mr. Peter G. McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Fed.R.App.P. 29(a)(7)

Dear Mr. McCabe:

These changes would improve the rule:

1. Footnote location From a technical point of view, the phrase "first footnote on the first page" is ambiguous because typically briefs have a page "i" as well as a page "1." This is not a big deal in the Supreme Court rules because "i" is the page for the question presented. But in the appellate brief that page is the table of contents unless a Rule 26.1 certificate is needed. The conference might want to consider saying the statement should be "in a footnote to the Rule 29(c)(3) statement." Not only is that language clearer, but it also puts the footnote on the same page as the statement identifying the amicus' interest in the case, which is a logical place for disclosure of the interest of others.

2. Party participation. As written, the rule lacks clarity of purpose. It is apparently designed to deter parties from funding amicus briefs, but it is a mere disclosure rule, and so it implies that in some circumstances it might be acceptable for a party to contribute to an amicus brief.

In my opinion the rule should prohibit parties from authoring or paying for amicus briefs and not just treat the issue as one of disclosure.

This is not a unanimous view. Many good lawyers think it is permissible for a party to help an amicus fund or write an amicus brief so long as the position the amicus takes is sincerely held. The proposed amendment could not have a better pedigree, in that it tracks Supreme Court Rule 37.6. In fact, a new California Rule 8.200 (c)3 and an existing Minnesota Rule 129.03 contain similar language.

But, without independence, the amicus process lacks integrity. Frankly, I cannot imagine a circumstance in which a party could appropriately fund an amicus brief. The very suspicion of such funding has caused at least one judge to express opposition to the filing of any amicus brief. *Ryan v Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997)(Posner, J.). *But see* L. Munford, *When Does the Curiae Need an Amicus?*, J. App. Practice & Process 279 (1999)(criticizing *Ryan*). There should be no suspicion. Amicus briefs should always be prepared and funded by the amicus or amici and not a party.

To that end, the rule should follow the statement that the Supreme Court clerk's office has urged attorneys to put in amicus briefs to that court. See E. Gressman, K. Geller, S. Shapiro, T. Bishop and E. Hartnett, Supreme Court Practice 516 (9th ed. 2007). Subpart (7) would read as follows:

> (7) Unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement in a footnote to the Rule 29(c)(3) statement that:
>
> (A) States that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and
>
> (B) Identifies every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

This language spells out the prohibition against party funding for amicus briefs and so removes any inference that such a brief might be allowed. At the same time it retains the general requirement that the identities of other amicus brief sponsors must be disclosed.

3. Pure disclosure. Alternatively, if disclosure is the sole purpose, the rule could, like Texas Rule 11(c), simply require the disclosure of funding sources (and authorship if desired) without any special discussion of party sponsorship. Then there would be no back-handed suggestion that a party might fund an amicus brief, and a degree of redundancy in the rule as published for comment would be eliminated.

My understanding is that those who think the rules should be uniform might oppose these changes on the ground that they depart from Sup. Ct. Rule 37.6. But it is entirely possible that, if the conference adopted a better rule, the Supreme Court might conform its language to the language found in FRAP. In fact, the conference could give the Supreme Court an explicit choice by sending the Court a "preferred rule" along with one based on Rule 37.6, and allowing the Supreme Court to choose between them.

Very truly yours,

PHELPS DUNBAR LLP

Luther T. Munford

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