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13-AP-A

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544
(202) 502-1820

March 15, 2013

Dear Committee:

My name is Roger Roots and I am an attorney in private practice and an Assistant Professor of Criminal Justice at Jarvis Christian College in Hawkins, Texas. I would like to propose a rule change to Rule 29(a) of the Federal Rules of Appellate Procedure. At present the Rule reads as follows:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia 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 or if the brief states that all parties have consented to its filing.

I propose that the Rule be changed to require that any party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to its filing. Thus, my proposal would read:

Rule 29. Brief of an Amicus Curiae

(b) When Permitted. Any amicus curiae may file an amicus-curiae brief only by leave of court or if the brief states that all parties have consented to its filing.

This change is needed to make the Federal Rules of Appellate Procedure more fair, equitable and consistent with a true adversarial system of justice. The present rule favors the government and signals to users of the federal courts that government is treated as a favored interest in federal litigation.

We know from empirical evidence that the filing of *amicus curiae* briefs on behalf of the

government is associated with successful case outcomes for the government, at least in the Supreme Court. Over most of the past century, *amicus* filers in the Supreme Court have had a success rate of around .550, "that is, they filed briefs supporting the winning side 55% of the time."[1] And the Solicitor General—the Justice Department official who represents the United States before the Supreme Court—is by far the most consistently successful *amicus* brief filer of all time.[2]

I urge the Committee overseeing the Federal Rules of Appellate Procedure to consider, discuss and adopt my proposed rule change in order to eliminate the lopsidedness of current Rule 29(a). I will assist in any way. Thanks in advance for your consideration.

Sincerely,

Roger I. Roots
Roger I. Roots

[1] Joseph D. Kearney and Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 769-70 (2000).
[2] See id. at 751.