NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENTS ON PROPOSED AMENDMENTS TO
COURT OF APPEALS RULES RELATING TO AMICUS CURIAE RELIEF[1]

SUMMARY

The Commercial and Federal Litigation Section (the "Section") of the New York State Bar Association ("NYSBA"), along with its Appellate Practice Committee (the "Committee"), respectfully submit these comments on the proposed amendments to the New York Court of Appeals Rules of Practice relating to amicus curiae relief. In these comments, the Section explains that this Court currently receives too few amicus briefs. The proposed new rules regarding the timing of the filing of amici briefs and, separately, recusal issues may exacerbate that problem, possibly reducing the number of amici briefs being filed. The Section therefore respectfully submits that the proposed new rules be modified to facilitate the filing of amicus briefs. Specifically, the Section suggests that any new rule should provide amici as much time as practicable to file a motion and brief and should afford the Court more flexibility in exercising its discretion when amici briefs present conflicts of interest and possible recusal issues.[2]

COMMENT

I. Introduction

The Commercial and Federal Litigation Section was established in 1988 to improve the quality of legal representation, provide a forum for improving law and procedure, and enhance the administration of justice in commercial and federal litigation. These goals are met by, among other things, sharing experiences with commercial litigators and judges, engaging in efforts to influence legislation, and establishing committees to identify issues affecting commercial litigators in New York and to research and analyze how best to address those issues. The Section's Appellate Practice Committee works to improve appellate representation in commercial litigation, in part by writing and speaking about matters of interest to appellate judges and appellate counsel and by strengthening relationships between the bench and bar.

Amicus briefs are a critical aspect of appellate practice. That is particularly true in the New York Court of Appeals, where they "can be of inestimable value" by providing a different perspective or explain the potential statewide ramifications of the Court's evolving jurisprudence. Matthew

[1] Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association's House of Delegates or Executive Committee.

[2] These comments are directed only to proposed amendments to the rules governing normal course appeals, certified questions, and motions for leave to appeal and the proposed new provision regarding recusal or disqualification. *See* March 15, 2024 Notice to the Bar, proposed amendment to Rule 500.23(a)(1)(iii), proposed amendment to Rule 500.23(a)(3), and new proposed rule regarding recusal and disqualification. The Section's comments are not directed to reviews by the alternative procedure or to amicus filings by the Attorney General.

Laroche, *Is the New York State Court of Appeals Still 'Friendless?' An Empirical Study of Amicus Curiae Participation*, 72 Alb. L. Rev. 701, 701 (2009) (quoting former Chief Judge Judith S. Kaye)). Moreover, amicus practice strengthens the Court's relationships with counsel and the development of appellate advocacy among the bar, including counsel in commercial cases.

This Court clearly values amicus briefs. "Not only have individual judges encouraged the practice, but the [Court] has expressed interest in amicus filings by amending its rules to . . . invite submissions"; "added a preamble to its weekly list of new filings, which encourages the submission of amicus briefs"; and routinely grants all but a few motions for amicus relief every year. *Id.* at 702; *see* N.Y. Ct. of App., *2023 Annual Report of the Clerk of the Court of Appeals* ("*Annual Report*") at App'x 6, https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2023.pdf.

Chief Judge Wilson recently spoke at NYSBA's 2024 Annual Meeting, where, among other ideas discussed, he "encouraged[ed] attorneys to send the court amicus briefs on issues and cases, saying it will help the judges identify and better understand the issues at the center of each case." Jennifer Andrus, *Chief Judge Rowan Wilson: By Taking on More Cases, New York's Court of Appeals Will Regain Its Former Glory* (NYSBA Jan. 17, 2024), https://nysba.org/chief-judge-rowan-wilson-by-taking-on-more-cases-new-yorks-court-of-appeals-will-regain-its-former-glory/. At the meeting, His Honor expressed a desire for "open collaboration" with the public and an interest in listening "to the people who are on the ground about what they need." *Id.* Furthermore, Chief Judge Wilson recently expressed a new "vision" for the Court, focusing not on merely determining who is right and wrong, but on "what result is best" for each case—a vision to which amicus briefs can add great value in the coming years. Chief Judge Rowan D. Wilson, *The State of the Judiciary 2024* at 4, https://www.nycourts.gov/whatsnew/pdf/24_SOJ-Remarks.pdf.

Over the last decade, however, the Court has received only about 100 amicus motions per year, with that number trending downward to approximately 80 in recent years. *See Annual Report* at App'x 6.[3] The Court receives amicus motions supporting civil leave motions in only a small fraction of cases annually, and the number of amicus motions at the leave stage in commercial cases is vanishingly small. *Id.* (Court received 636 leave-to-appeal motions in one year, but 79 amicus motions, including in appeals as of right and after leave was granted).

This lack of amicus briefs is unfortunate because New York has a "recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980). Its courts administer a "commercially sophisticated body of law," which is "as much an attraction to conducting business in New York as its unique financial and communications resources." *Id.* In commercial cases, no less than in other cases, amicus briefs "can be an effective complement to a party's brief and can assist the court in deciding issues that have potential ramifications beyond the present case." Thomas R. Newman & Steven J. Ahmuty Jr., *Amicus Curiae Participation in the Court of Appeals*, N.Y.L.J. (May 4, 2021), https://www.law.com/newyorklawjournal/2021/05/04/amicus-curiae-participation-in-the-court-of-appeals/. Amicus

[3] The number of amicus filings made *per case* is even smaller because amici seeking to participate at both the merits stage and the leave stage must file two separate motions. *See* 22 N.Y.C.R.R. §§ 500.23(a)(1)-(2).

briefs "can be used to augment a party's analysis of a worthwhile legal issue," explain how a ruling "will affect non-parties, including other litigants and society in general," and "highlight the practical implications of a decision" in specialized areas. In commercial cases, issues can be especially complex and technical, thereby creating a greater need for amici briefs. *Id.*

This Court, its litigants, and New York jurisprudence would all benefit from greater amicus participation and this Court's thorough consideration of amicus briefs in all areas. However, amici face numerous obstacles that hinder their ability to submit a helpful brief. Any amendments to this Court's Rules of Practice relating to amici should carefully account for these realities. But the proposed rule, we submit, appears to make it even more difficult for amici to participate in appeals before this Court, potentially leading to a further reduction of the number of amicus briefs submitted to this Court. The Section respectfully submits that this result would be contrary to the interests of this Court, its litigants, and the continuing development of New York law.

II. The Timing of Amicus Curiae Requests

Under the current rules, amici have approximately one year after an appeal is docketed to prepare and serve a proposed amicus brief. That is because an amicus motion in an ordinary-course appeal can be served at any time with notice to the parties, as long as it is noticed for a return date no later than the monthly session preceding the session of oral argument. *See* 22 N.Y.C.R.R. §§ 500.21(b), 500.23(a). In the last decade, the average period from notice of appeal or order granting leave to appeal until oral argument is approximately 14 months.[4]

That approximately one-year period can be critical for amici. This is especially true in complex commercial cases where subtle differences between cases can have a significant statewide legal and economic impact. Not only must amici identify significant cases of interest pending in the Court and determine whether amicus participation would be appropriate—a task that may require substantial discussion where the amicus is an organization that has numerous members—but they must then convince the Court that an amicus brief will be helpful in reaching its decision. *See* 22 N.Y.C.R.R. § 500.23(a)(4)(iii). "Perhaps the best evidence of the appropriateness of amicus relief from the court's standpoint is the proposed amicus brief itself, which must be filed with the motion." Newman & Ahmuty Jr., *Amicus Curiae Participation*, *supra* (citing 22 N.Y.C.R.R. § 500.23(a)(1)(i)). This "forces the amicus to assess whether the issues presented are sufficiently important to warrant the cost and effort of preparing a proposed brief with no assurance that the court will accept it." *Id.* That cost can be substantial in commercial cases, which may entail engagement of sophisticated counsel and a thorough review of the facts and law in the appeal even before work begins on drafting a brief.

Furthermore, drafting and reviewing an effective amicus brief takes a considerable amount of time and expense. Depending on the budget, it can take tens or hundreds of hours and, if done well, it can be more compelling than a party's brief itself. **"**Ideally, all briefs submitted in support of a particular outcome will present a united front," which means "coordination is crucial." Scott A. Chesin & Rory K. Schneider, *How to Write & File an Effective Amicus Brief* (N.Y.L.J. Aug. 24,

[4] "In 2023, the average period from filing a notice of appeal or an order granting leave to appeal to oral argument was approximately 14 months, compared to 15 months in 2021." *Annual Report* at 5. The Court maintains similar statistics in prior annual reports.

2015), https://www.law.com/newyorklawjournal/almID/1202735249202/. "A party and its amici should discuss the issues before the amici get to work, so that the party can explain what arguments it plans to make and can discuss with the amici which issues, arguments, or other points it would be useful for them to address and how." *Id.*

At the same time, "an amicus brief that simply echoes a party's arguments (the 'me too' brief) or functions as a blatant lobbying effort to achieve a particular outcome only burdens the court, and, even if accepted for filing, will probably be ignored." Newman & Ahmuty Jr., *Amicus Curiae Participation*, *supra*. Drafting such a brief may not be worth the undertaking. When a case and prospective counsel have been identified late in the appeal process, or when appeal papers are not available until shortly before an amicus brief would be due, a potential amicus may conclude that time would not permit adequate study of the issues from an amicus perspective and effective preparation of an independent brief that would aid the Court.

The proposed rule would shorten the period of time for drafting and filing amicus briefs by more than half. The proposed rule would require amicus motions to be served no later than 15 days after the conclusion of merits briefing. The average period from a notice of appeal or order granting leave to appeal to readiness of the appeal (papers served and filed) is only about *6 months*.[5] In this way, the proposed rule would make it more difficult for amici to participate in this Court and, the Section believes, would likely result in fewer amici briefs being filed.[6]

It is not readily apparent that the benefits of this proposed rule would outweigh the costs. To be sure, the rule would clarify amicus deadlines, which typically remain uncertain until the Court calendars oral argument. But while greater certainty would benefit attorneys and clients participating in pending appeals, that is no reason to impose a bright-line deadline for *all* amici. Many amici do not identify a case of interest until late in the appeal, and many amici need additional time to prepare an appropriate brief. Amici who have been able to coordinate with a party and wish to avoid an untimely filing can submit their brief as soon as practicable following merits briefing (as they do at the leave-motion stage, *see infra* Pt. III). In fact, the Court could encourage such filings "as soon as practicable" in other ways. For example, the Court could, in appropriate cases, grant oral argument to amici who have submitted helpful briefs well in advance of the case being calendared for oral argument.

Furthermore, requiring submission of amicus briefs shortly after merits briefing may facilitate this Court's review of the issues in an appeal, which is undoubtedly a worthy goal in complex commercial cases. As this Court has explained, copies of the briefs "are circulated to each member of the Court well in advance of the argument date," and each judge "becomes conversant with the issues . . . using oral argument to address any questions or concerns prompted by the briefs." *Annual Report* at 4. The parties and the Court, of course, benefit from full consideration of amicus

[5] In 2023, while the average period from docketing of an appeal to oral argument was approximately 14 months, "[t]he average period from readiness (papers served and filed) to calendaring for oral argument was approximately 8 months." *Annual Report* at 5.

[6] In contrast, the proposed amendments to Rules 500.12, 500.11, and 500.23(b)(1) regarding the timing of filing of amicus curiae relief by the Attorney General, would *increase* the time for filing, as would the proposed amendment for amicus relief in cases selected for review by the alternative procedure, making it easier to submit amicus filings in such circumstances.

briefs. We submit that the rules should advance that purpose by requiring briefs to be submitted by a date in which they may receive full consideration and analysis, taking into account the Court's needs.

Nevertheless, the new proposed rule may inadvertently undermine this pursuit by making it significantly more difficult for amici to file briefs, resulting in fewer briefs or less helpful briefs. In crafting any new rule, we respectfully suggest that this Court should consider balancing the need to review such briefs against amici's need for time to prepare briefs that would further the Court's understanding of the issues. Presently, the average period from readiness to oral argument is about *eight months*. Because this Court receives, at most, only a handful of amicus briefs per appeal, requiring all amici to file approximately eight months in advance of oral argument may not be worth the candle and could possibly detract from, not improve, this Court's examination of the issues and understanding of a case leading up to oral argument.[7]

The same could be said for motions by amici at the leave stage. "A motion for leave to appeal presents the opportunity for counsel to convince the Court that their case is worthy of the Court's time and scarce judicial resources." *See New York Court of Appeals Civil Jurisdiction & Practice Outline* at 9 (July 2023), https://www.nycourts.gov/ctapps/forms/civiloutline.pdf. Amicus support can be "effective in showing the court that the case presents important issues beyond the interests of the immediate parties, which is a principal ground for granting permission to appeal." Newman & Ahmuty Jr., *Amicus Curiae Participation*, *supra* (citing 22 N.Y.C.R.R. § 500.22(b)(4)).[8]

Under the Court's rules, an amicus motion at the leave stage must be noticed for a return date "as soon as practicable" after the return date of the motion for leave to appeal to which it relates. 22 N.Y.C.R.R. § 500.23(a)(3). That affords a reasonable chance to get a motion filed because the average period from the return date to disposition of leave to appeal motions in the last decade has been approximately 75 days, with that period increasing to 100 days in recent years.[9]

That period can be critical for amici because the timeline for supporting a civil leave motion is short, and amici have little time to study the Appellate Division's ruling and prepare a submission. Unlike a petition for certiorari in the U.S. Supreme Court (which must be filed 90 days after judgment), a motion for leave to appeal must be served within 30 days after service of notice of entry of the Appellate Division's order and must be noticed to be heard on a Monday only 8 to 15 days thereafter. *See* C.P.L.R. 5513(b), 5516; 22 N.Y.C.R.R. § 500.21(a). If a potential amicus did

[7] While the proposed rule also may facilitate the Court's review of *responses* to amicus briefs (*see* 22 N.Y.C.R.R. § 500.12(f)), the deadline for any responses would remain 15 days under the new rule. In any event, all parties can respond to amicus briefs in their response to an amicus motion, or at oral argument, and pursue amicus support of their own.

[8] Chief Judge Wilson has recently stated that he hopes the Court "will receive even more civil motions and criminal leave applications, and that [it] will have the opportunity to decide even more appeals" in the coming years, which would allow it "better to honor [its] responsibility to resolve all issues of statewide importance that require [its] attention." *Annual Report* at Foreword.

[9] "The average period of time from return date to disposition for civil motions for leave to appeal was 99 days." *Annual Report* at 6; *supra* at 4 n.3.

not participate in the appeal before the Appellate Division, much of that period can elapse before the amicus learns of the case and determines whether to participate.

The Court's proposed rule would make it more difficult to seek amicus relief at the motion-for-leave stage because it would require amicus motions to be served within seven days of the return date of the motion for leave to appeal. That is little more than a month after the Appellate Division's ruling. *See* 22 N.Y.C.R.R. § 500.21(a). It is not clear that such a short deadline would be beneficial. While the parties and amici would benefit from this Court's thorough consideration of the pool of cases, including in the commercial context, the shortened deadline is likely to result in fewer amicus motions to help identify leave-worthy appeals.

III. Recusal or Disqualification

Similar considerations should be given to the Court's proposed recusal rule. Too stringent a rule could discourage amicus participation or preclude it entirely in some cases. That is *especially* true in the commercial context, where counsel may not have retained amici on a *pro bono* basis, and the considerable cost of preparing an effective amicus brief may be prohibitive if an amicus is uncertain whether the Court will accept the motion on its merits.

From the outset, it is worth noting that potential conflicts of interest could be addressed through other means, such as disclosure of relationships with amici or a rule clarifying that they do not require recusal. In 2023, the U.S. Supreme Court promulgated a voluntary code of conduct, which encourages the filing of amicus briefs by stating that "[n]either the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification." *See* Code of Conduct for Justices of the Supreme Court of the United States Canon B(4), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf. That principle, if adopted by this Court, would obviate the need for the proposed recusal rule.

In any event, as this Court notes, certain other courts appear to have adopted rules relating to the denial of amicus curiae requests where the filing of an amicus brief would cause a judge assigned to the matter to recuse. But the wording of those rules is not uniform and could materially affect amicus practice.

For example, the Federal Rules of Appellate Procedure state that a court "*may* prohibit the filing of or *may* strike an amicus brief that *would* result in a judge's disqualification." Fed. R. App. Proc. 29(a)(2). Accepting that invitation, the Fourth Circuit "*will* prohibit the filing of or strike an amicus brief that would result" in recusal. 4th Cir. Local Rule 29(a) (emphasis added). By contrast, the Second Circuit, perhaps inconsistently, "*ordinarily* will deny leave to file an amicus brief when," due to a conflict of interest, "the filing of the brief *might* cause the recusal of the judge." 2d Cir. Local Rule 29.1(a) (emphasis added).

The Federal Rules of Appellate Procedure contemplate denial of amicus relief only where someone on the Court determines such relief *would* result in a judge's disqualification, and even then, the rules afford *discretion* to determine whether amicus relief should be granted. The Second Circuit's rule, by contrast, contemplates denial of amicus relief merely where someone on the Court determines that an amicus brief *might* (but need not necessarily) result in a judge's disqualification.

Yet the rule tempers that modification by retaining the court's ability to determine whether to accept the brief in its discretion.

This Court's proposed new rule borrows from the most stringent features of the rules discussed above. It states that amicus relief "*will* [not may] be denied where acceptance of the amicus curiae submission *may* [not will] cause the recusal or disqualification of one or more Judges of the Court." Whether the Court may or will (or ordinarily will) deny acceptance of an amicus submission due to a conflict of interest might depend on who will be expected to make that ultimate determination and the level of certainty they may be expected to have as to recusal at that time.[10] But a rule permitting denial of an amicus brief merely because an amicus filing *might* cause a conflict of interest calls for speculation about potential conflicts that could be read very broadly. In the Section's view, such a rule is therefore likely to have the detrimental effect of increasing uncertainty among amici and their counsel whether amicus briefs will even be accepted. In this way, the proposed rule would potentially deter such filings. We respectfully submit that this considerable potential cost should factor into the calculus for determining the language of any new rule.

IV. Conclusion

In sum, the Section respectfully requests that this Court consider these comments and, if the Court is inclined to revise its rules of practice, consider modifying the three proposed rules discussing herein: (i) to afford amici as much time as practicable to determine whether to file a motion and an amicus brief and to file those papers; and (ii) to provide the Court with more discretion in addressing conflicts of interest and potential recusal issues.

The Section believes these modifications would help decrease uncertainty among amici and hopefully result in the filing of more amicus briefs in this Court. That result would aid the Court and appellate counsel, provide a forum for those who are impacted by the Court's decisions, and facilitate the development of law on issues of statewide concern, including in commercial cases.

Respectfully submitted,

New York State Bar Association
Commercial and Federal Litigation Section
Anne B. Sekel, Section Chair April 19, 2024

Approved by the Commercial and Federal Litigation Section Executive Committee, April 17, 2024

Constance M. Boland,* Co-Chair, Appellate Practice Committee
Seth M. Rokosky,* Co-Chair, Appellate Practice Committee

*Denotes Principal Authors of the Comment

[10] Our understanding is that a motion for leave to appeal may be considered at various stages by staff attorneys, single judges, and the full Court. *See* TwentyEagle, *Interview with Judge Leslie Stein* (June 4, 2021), https://twentyeagle.com/interview-with-judge-leslie-stein/.