From: Alan Morrison
Date: Thu, Dec 10, 2020 at 9:19 AM
Subject: Proposal for Appellate Rules Committee
To: Rebecca Womeldorf

Attention Judge Jay Bybee, Chair.

Federal Rule of Appellate Procedure 29(a)(2) provides for the filing of amicus briefs on appeal as follows: **When Permitted.** The United States or its officer or agency or a state may file an amicus 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, *but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.*

Before the italicized portion was added in 2018, I submitted comments and addressed the Appellate Rules Committee orally, to explain my concerns about the proposal. My objections were not followed, and I am not moving for rehearing. However, the attached article from the National Law Journal, discussing two recent cases in which the Rule was invoked to strike previously filed amicus briefs prompted me to write to the committee to make a suggestion.

The rules on judicial disqualification in 28 USC 455 are reasonably clear when there is a potential for a conflict of interest or the appearance of one because of a relationship of some kind to a party (and in some circumstances to a party's counsel). But there is nothing in that statute that speaks to a similar problem when the relationship is to an amicus, or perhaps to a member of an amicus when the amicus is a trade association or some other entity. I am also unaware of any other rules or even guidelines to assist judges and also counsel for a potential amicus who wishes to avoid coming close to the line in Rule 29(a)(2). Indeed, it is unclear from the published article or any court order in those cases which appellate judge's connection caused the briefs to be stricken or on what basis.

To my thinking, the root of the problem is that there are no guidelines for what a judge should do when the potential basis for recusal in a case is an amicus or its counsel. My suggestion is that your committee or perhaps the AO or the FJC undertake a study with the view toward recommending guidelines that the judicial conference could adopt, after allowing for public comment as is done for the rules process generally. I am sure that all federal judges want to do "the right thing" when faced with issues of recusal, but they need guidance when the potential source of a recusal is not a party, but an amicus.

I am happy to assist the committee or others on the project if that would be helpful.

Respectfully, Alan B. Morrison

4th Circuit Scraps McDermott Amicus Brief in Rare Nod to Recusal Rule

A panel of Fourth Circuit judges in August ruled for the Trump administration—reversing a district judge's nationwide injunction—but the court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued.

By **Marcia Coyle** | December 04, 2020 at 02:23 PM

The U.S. Court of Appeals for the Fourth Circuit on Wednesday **barred** an amicus brief on behalf of more than 100 companies in a closely watched Trump administration immigration case, after concluding the filing would have caused one of the court's 15 judges to sit on the sidelines for an upcoming hearing.

The law firm McDermott Will & Emery had **filed the brief** earlier this year on behalf of 104 businesses and organizations that were backing a challenge to the Trump administration's "public charge" rule. The administration's new definition of a "public charge"—a person who receives 12 months of benefits in a three-year window—would hinder admissibility of certain immigrants, critics assert.

A panel of Fourth Circuit judges in August **ruled** for the Trump administration—reversing a district judge's nationwide injunction—but the full court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued. The brief immediately was removed from the court docket.

Scrapping the McDermott brief, the appeals court acted under **local appellate procedure rule 29(a).** The rule states that the court will strike an amicus brief if it would result in the recusal "of a member of the en banc court from a vote on whether to hear or rehear a case en banc." It also applies to potential recusal of panel members.

"We were surprised when the court struck the brief, but we understand the basis for the policy," said McDermott partner Paul Hughes, who was on the brief with partner Michael Kimberly and counsel Matthew Waring. Hughes and Kimberly are the co-leaders of the firm's Supreme Court and appellate group.

Many courts have similar local rules; the federal judiciary at large adopted a similar rule just a couple of years ago. There was some pushback over the rule, whose application appears to occur infrequently.

Gibson, Dunn & Crutcher also felt the sting of a similar local rule and the new federal rule—29(a)(2)—last year when its amicus brief in a challenge involving the Affordable Care Act was **struck** at the panel stage in the Fifth Circuit.

The Fifth Circuit, like the Fourth Circuit, did not give any reason about which judge would have had to recuse. A judge's connection to a law firm, or tie to a group or company that is participating as an amicus, might give rise to a recusal. At least one new member on the Fifth Circuit had earlier worked at Gibson Dunn, but it was not clear that the law firm connection drove the court's order.

Two of Trump's three appointees to the Fourth Circuit arrived from law firms, but not from McDermott. Allison Rushing Jones **arrived** from Williams & Connolly, and A. Marvin Quattlebaum from Nelson Mullins Riley & Scarborough. Julius Richardson was an assistant U.S. attorney prior to his arrival to the bench.

McDermott's Hughes said he did not know which Fourth Circuit judge would have faced recusal because of the firm's amicus brief. The brief was on behalf of 104 businesses and organizations, including Levi Strauss & Co., Microsoft Corp., Twitter and LinkedIn Corp.

It's possible a financial conflict arose, where a judge had a personal stake in the business of one of the amicus companies. "Many of the companies were not publicly traded but others were. Or, there may be an equity interest in one of the non-public companies," Hughes said.

Their amicus brief, which supported the district court's injunction, also was filed in at least three other circuit courts reviewing the legality of the rule, according to Hughes. It argued that the rule will impede hiring by American employers and impose onerous compliance burdens of workers and employers.

The local and federal rules allowing the strike of amicus briefs that could result in recusals were enacted mainly to prevent strategic filing of briefs. The federal rule drew some opposition at the proposal stage.

In a **2017 letter** to the Judicial Conference's Committee on Rules of Practice and Procedure, Alan Morrison of George Washington University law school expressed some of those objections.

At the panel stage, Morrison wrote, there was no evidence of any significant number of cases in which recusal had been required, or an amicus brief was filed for the strategic reason of recusing a particular judge. Those courts could almost always find a replacement for a recused judge at that stage, he added. Barring the brief denied amici an opportunity to be heard and denied judges information that could be useful.

The en banc stage was somewhat different, according to Morrison. But he thought the rule should be limited to new filings at the en banc consideration stage because there was some possibility of filing a brief in order to obtain recusal of a specific judge.

Hughes said his personal view was for a broad standard for federal judges that would require them to place their assets in a blind trust or index mutual funds. “All things being equal, avoiding recusal on the basis of financial holdings would be optimal, but we appreciate that’s not the current ethics or recusal rule,” he said