



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on a proposal to add a new Rule 23 to the Rules of the Commercial Division regarding the filing of amicus briefs

Date: December 20, 2024

=====

The Administrative Board of the Courts is seeking public comment on a proposal recommended by the Commercial Division Advisory Council (CDAC) to amend 22 NYCRR § 202.70 to add a new Rule 23 to the Rules of the Commercial Division regarding the filing of amicus briefs.

The proposed amendment is attached as Exhibit 1.

Attached as Exhibit 2 is a memorandum from CDAC providing background on this issue and the reasons for the proposed amendment. As noted in that memorandum, although the Rules of the United States Supreme Court, the Federal Rules of Appellate Procedure and the Rules of the New York Court of Appeals all include procedures governing the submission of amicus briefs, there are no similar rules relating to the New York trial courts. The CDAC believes it is particularly important to create such rules for the Commercial Division, given its docket of sophisticated and often far-reaching commercial and business litigation. The proposed Commercial Division rule is modeled on New York Court of Appeals Rule 500.23(a), which largely tracks the criteria for amici participation in the United States Supreme Court.

=====

Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court

Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than Friday, February 7, 2025.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT 1

Proposed Amendment

The Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70) are amended by adding a new Rule 23 to read as follows (new language is underscored):

Rule 23 *Amicus curiae* relief. Any non-party seeking to file an *amicus* brief in the Commercial Division must first obtain permission by motion.

(a) Motions for *amicus curiae* relief.

(i) Motion papers. Movant shall file a copy of its motion papers accompanied by the proposed *amicus* brief, along with proof of service of same on each party, in the manner required for such filings in the county in which the case is pending. The motion shall be noticed for a return date as soon as practicable so as not to delay the proceedings to which it relates. If the motion is granted, counsel for *amici* must file a copy of the *amicus* brief, along with proof of service of same on each party, within the time set by the court's order and in the manner required for filing papers in the county in which the case is pending.

(ii) Criteria. Movant shall:

(1) demonstrate that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; movant could identify law or arguments that might otherwise escape the court's consideration; or the proposed *amicus* brief otherwise would be of assistance to the court;

(2) include a statement of the identity of the movant and its interest in the matter; and

(3) include a statement indicating whether:

(a) a party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner;

(b) a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

(c) a person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief and, if so, identifying each such person or entity.

(iii) Opposing papers. Any party may file papers in opposition to the motion to file an *amicus* brief, along with proof of service of same, in the

manner required for such filings in the county in which the case is pending.

(iv) An *amicus* brief will be rejected where its acceptance would cause
recusal of the assigned justice.

(b) All material submitted under this rule shall comply with the technical
specifications and instructions for submission available from the clerk's office.

EXHIBIT 2

MEMORANDUM

TO: Administrative Board of the Courts

FROM: Commercial Division Advisory Council

DATE: November 20, 2024

RE: Proposal to add Commercial Division Rule 23 (now blank) to provide for filing of *amicus curiae* briefs

The opportunity for non-parties to submit “friend of the court” *amicus curiae* briefs is widely recognized in appellate courts, with specific rules in place to permit such filings. See Supreme Court of the United States Rule 37¹; Federal Rules of Appellate Procedure Rule 29; New York Court of Appeals Rule 500.23. In contrast, in trial courts, *amicus* filings generally are not guided by rule. For example, the Federal Rules of Civil Procedure do not expressly permit such filings. Rather, such filings are left to individual judge’s rules or practices. See generally “Tips for District Court Amicus Brief Success” N.Y. Law Journal (December 24, 2020). The absence of a specific rule permitting trial court *amicus* briefs appears to reflect the relative rarity of such filings. See *id.* (noting that federal district courts received *amicus* briefs in 0.1% of civil cases). But that does not mean cases of great importance, impacting non-parties, are that rare, or that it makes sense for trial courts to not provide guidance to non-parties wishing to submit an amicus brief. This appears to be especially true in the Commercial Division given its docket of sophisticated and often far-reaching commercial and business litigation. Having a specific rule that authorizes such filings will distinguish the Commercial Division from other trial courts and build upon its reputation as a leading and innovative court for resolving significant litigation.

Accordingly, we attach proposed Rule 23 that expressly authorizes the filing of *amicus* briefs in the Commercial Division. It is modeled after New York Court of Appeals Rule 500.23(a), which in turn largely tracks the criteria for *amici* participation in the Supreme Court of the United States.

¹ Given the especially heavy *amicus* docket in the Supreme Court, the high court in 2023 published an amicus guide. See <https://www.supremecourt.gov/casehand/AmicusGuide2023.pdf>

Rule 23 *Amicus curiae* relief.

Any non-party seeking to file an *amicus* brief in the Commercial Division must first obtain permission by motion.

(a) Motions for *amicus curiae* relief.

(i) Motion papers. Movant shall file a copy of its motion papers accompanied by the proposed *amicus* brief, along with proof of service of same on each party, in the manner required for such filings in the county in which the case is pending. The motion shall be noticed for a return date as soon as practicable so as not to delay the proceedings to which it relates. If the motion is granted, counsel for *amici* must file a copy of the *amicus* brief, along with proof of service of same on each party, within the time set by the court's order and in the manner required for filing papers in the county in which the case is pending.

(ii) Criteria. Movant shall:

(1) demonstrate that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; movant could identify law or arguments that might otherwise escape the court's consideration; or the proposed *amicus* brief otherwise would be of assistance to the court;

(2) include a statement of the identity of the movant and its interest in the matter; and

(3) include a statement indicating whether:

(a) a party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner;

(b) a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

(c) a person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief and, if so, identifying each such person or entity.

(iii) Opposing papers. Any party may file papers in opposition to the motion to file an *amicus* brief, along with proof of service of same, in the manner required for such filings in the county in which the case is pending.

(iv) An *amicus* brief will be rejected where its acceptance would cause recusal of the assigned justice.

(b) All material submitted under this rule shall comply with the technical specifications and instructions for submission available from the clerk's office.