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Supreme Court Revises Amicus Rules

Susan J. Becker
Cleveland State University, s.becker@csuohio.edu

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RE-EXAMINING THE ROLE OF AMICUS BRIEFS

Supreme Court Revises Amicus Rules

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

Appellate courts are taking a new look at an old friend: the amicus curiae brief.

Last year the U.S. Supreme Court and the Seventh Circuit both reacted against the growing use of "friend of the court" briefs to advocate litigants' positions rather than to assist the court. Now several federal and state appellate courts are reviewing their rules on amicus submissions because of their own experiences and the Supreme Court and Seventh Circuit actions.

The Supreme Court's discomfort with the increasing advocacy aspect of amicus briefs resulted in significant amendments to the Court's amicus brief rules last year. The Court revised Sup. Ct. R. 37 to require amicus curiae to disclose in the first footnote on the first page of its brief whether counsel for a party authored the brief "in whole or in part." The premier footnote must also identify "every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief." Amicus briefs submitted for local, state, or federal governments are not subject to Rule 37's disclosure requirements.

"The Supreme Court rule requiring disclosure is probably a good idea," says Eric J. Magnuson, Co-Chair of the Section of Litigation's Appellate Practice Committee. "But self interest in amicus briefs is so readily apparent anyway. Courts spot it right away, even without express disclosures."

Seventh Circuit Judge Richard Posner's published opinion on the appropriate role of amicus briefs also showed the growing trend among jurists to re-examine amicus practice and procedure. Judge Posner denied the Chicago Board of Trade's request to file an amicus brief in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Cir. 1997).

Judge Posner observed that, like many judges, he had routinely granted motions for leave to file amicus briefs without sufficient consideration of the standards for granting leave. For example, Fed. R. App. P. 29 requires that the motion for leave "identify the interest of the applicant" in the case and "state the reasons why a brief of an amicus curiae is desirable."

"After 16 years of reading through amicus curiae briefs," Judge Posner wrote, "the vast majority of which have not assisted the judges, I decided that it would be good to scrutinize these motions in a more careful, indeed fish-eye, fashion."

Judge Posner observed that most amicus briefs are filed by "allies of the litigants" and merely serve to lengthen the litigants' briefs. Courts should not allow such amicus briefs, Judge Posner concluded. "The term 'amicus curiae' means friend of the court, not friend of a party."

The adversary role of amicus may have become an accepted part of modern practice, Judge Posner observed, but parties should still respect certain limits and guidelines. "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide," Judge Posner wrote. "Otherwise, leave to file an amicus brief should be denied."

In the *Ryan* case, Judge Posner concluded, the Board's brief fell into the "forbidden category" of advocating for the petitioner. It effectively extended the petitioner's brief by 17 pages without bringing to the court helpful information not already covered by the parties.

Echoing Judge Posner's sentiments, Magnuson explains: "The ostensible purpose of amicus brief is to help the court by providing a broader, more abstract presentation of law that is not narrowly tied to the facts of the case. The briefs should provide background and context for the court's decision.

"Unfortunately, amicus briefs are not used appropriately most of the time," opines Magnuson, who is also president-elect of the American Academy of Appellate Lawyers. "Often amicus briefs simply restate the arguments already made by a party, and it becomes clear that the amicus is acting as an advocate for that party rather than for the court's benefit.

"An amicus should not be reargueing the facts of the case as found by the trial judge. The amicus, however, can provide additional uncontested facts, such as empirical data, to provide context for the court's decision," Magnuson explains. "In the same vein, simply citing the cases already discussed by the parties in their briefs is no help to the court, but providing additional legal research can save the court a lot of time."

As an example of an appropriate amicus brief, Magnuson describes one that set forth the law governing statutes of repose in all U.S. jurisdictions. An amicus submitted this brief in a state court wrestling with issues arising from that state's statute of repose.

Suggestions for a Successful Amicus Brief

- Do not reargue the facts or debate the law the parties have already presented. The role of an amicus brief is to provide broader context for the issues before the court.
- Keep the brief as short as possible.
- Focus on just one or two issues that have broad state-wide, national, or global ramifications.
- Identify clearly the group or organization sponsoring the brief and the self-interest, if any, of the sponsoring entity in the outcome of the appeal.
- Notify potential amicus of the existence of the appeal and the key issues.
- Do not participate in the preparation of the amicus brief or take any other steps that would compromise the independence of the amicus and the integrity of the amicus brief.
- Provide information in a clear, logical manner.
- Include charts, diagrams, indexes, summaries, and other graphic presentations where appropriate.
- Identify clearly all sources of empirical, scientific, and technical data referenced in the brief so the court can assess the relative credibility of that data.
- Follow the general rules of appellate procedure governing the timing and content of a motion for leave to file and the amicus brief itself.
- Show respect for the court by observing its local rules governing the form and content of amicus and other briefs.
- Expand your thinking regarding the utility of amicus briefs. In addition to cases already posted on an appellate court's docket, amicus briefs can urge a court to: accept discretionary appeals; reconsider decisions; rehear cases en banc; and grant extraordinary writs, such as writs of mandamus and prohibition.

—*SJB*

Amicus Filings on the Rise

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

Interest groups, including the ABA and the Section of Litigation, increasingly use amicus briefs to advance their agendas. The number of amicus briefs has increased significantly in recent decades. The Supreme Court received amicus briefs in just 35 percent of the cases decided in the 1965-66 term. Thirty years later, the Court accepted one or more amicus briefs in nearly 90 percent of the cases.

There are many reasons for the increase in amicus filings. Industry organizations, unions, trade associations, governmental units and agencies, nonprofit entities, and other advocacy groups have proliferated in recent years. Filing an amicus brief in a state or federal appellate court is a relatively low-cost way for organizations and groups of like-minded people to advocate their positions and perhaps have an impact on the law affecting their respective constituencies. Participation in an important case also gives the organization or group a higher profile and possible media exposure.

The ABA has been a regular contributor of such briefs to the Supreme Court. An organization like the ABA can show the importance of an issue by filing an amicus brief when a court with discretionary jurisdiction is determining whether to take a case, notes Professor Bernard Bell, Newark, NJ, Co-Chair of the Section's Amicus Curiae Briefs Committee.

As an example, Bell cites an experience in the recent Supreme Court term: "The ABA, at the behest of the Section and other sections, filed an amicus brief requesting that the U.S. Supreme Court grant certiorari on a case involving the question of the extent to which the attorney-client privilege survives the death of the client." The Court granted certiorari.

(That case arose when independent counsel Kenneth Starr subpoenaed the notes of an attorney Vince Foster had consulted before his death. The subpoena calls for materials relating to the investigation of the firings in the White House travel office. The Court of Appeals for the D.C. Circuit has upheld the subpoena, holding that the privilege does not survive the death of the client when the subpoenaed materials may contain evidence relevant to a criminal investigation.)

The Section, in deciding whether to recommend that the ABA file an amicus brief, considers "the importance of the issue to the Section and the consistency of the proposed brief with positions the Section has [previously] taken," Bell says. If the Section's Council recommends filing the brief, the ABA Amicus Briefs Committee then decides whether to authorize the filing.