Trial Balloon

Amici Curiae: Friends of the Court or Nuisances?

by Andrew Frey

Federal and state appellate courts, including the U.S. Supreme Court, have long accepted briefs of amici curiae, "friends of the court," as helpful—and sometimes indispensable—submissions that aid the courts greatly in crafting their opinions. That, of course, is not surprising. Though amici are not parties to the litigation, their interests may be directly affected by the rules announced by the court. Those rules will affect the outcome of litigation beyond the particular case at hand and will often influence or control the primary behavior of those whose activities come within their ambit. Moreover, amici often bring a perspective to the questions presented that is different from that of the parties and is valuable to the court's understanding of the ramifications of the legal rules it considers. It is no surprise, then, that "general practice in the federal courts of appeals is to grant leave to file an amicus brief in most situations." John Harrington, Note, "Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?" 55 *Case W. Res. L. Rev.* 667, 670 (2005) (citing Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* 181 (3d ed. 1999)). Indeed, the U.S. Supreme Court, to take one example, almost never rejects timely amicus filings, even though in major cases it receives substantial numbers of friend-of-the-court briefs supporting each side.

Recently, however, a movement of marked antipathy to amicus briefs has emerged. In recent years, Judge Richard A. Posner made clear his belief that amicus submissions are in many instances uncalled for and unhelpful, and rejected them on that ground. More recently, the trend eased its way into the Illinois Supreme Court. First, that court's rules were amended to render it more difficult to file amicus briefs. Then in January 2006, the court rejected an amicus submission filed by the Chamber of Commerce and in the process seemingly endorsed Judge Posner's hostility to amici in general. *See Kinkel v. Cingular Wireless, L.L.C.*, No. 100925 (Ill. Jan. 11, 2006) (order denying leave to file brief of amicus curiae).

This approach remains the "minority view." *See In re Heath*, 331 B.R. 424, 430 n.4 (B.A.P. 9th Cir. 2005). Nevertheless, other courts of appeals have periodically rejected amicus briefs in the past, *see, e.g.*, *Am. Coll. of Obstetricians and Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983), and there is "a small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs." *Neonatology Assocs. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (citing *National Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000); *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997); *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993); and *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985)); *see also* Harrington, *supra*, at 671 n.21 (citing recent district court opinions that have explicitly adopted Judge Posner's hostile position toward amici).

The anti-amicus impulse seems to derive from an unduly narrow view of the nature of litigation and the effect of judicial decisions. Take, for example, Judge Posner's criteria, cited favorably by the Illinois Supreme Court, for granting amici leave to file a brief. Judge Posner stated that amicus filings will be accepted

> in a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.

Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003). Although these are surely legitimate considerations favoring allowance of an amicus filing, they are too narrow and grudging. Indeed, practitioners have little difficulty discerning that Judge Posner's attitude is one of hostility to amicus filings generally.

Judge Posner's criteria reflect his apparent view that only the parties to a particular case or parties to a similar pending case have a sufficient stake in the outcome of the litigation to make a claim on the court's time and attention. With respect, that view strikes me as wrong. In the American judicial system, at both the federal and state levels, appellate rulings generally carry the weight of both vertical and horizontal *stare decisis*. Accordingly, an appellate court does much more than decide a dispute between parties; rather, it sets down one general legal principle (or more) that reverberates throughout the legal system. When an appellate court establishes

Andrew Frey practices with Mayer, Brown, Rowe & Maw in New York City.

Published in Litigation, Volume 33, Number 1, Fall 2006. © 2006 by the American Bar Association.
Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

a rule of law in an opinion, that rule is binding upon all lower courts in its domain that grapple with similar legal issues in the future. What is more, the principle of horizontal *stare decisis* compels the deciding court itself to adhere in future cases to whatever rule is announced in the case in which the amicus seeks to be heard. It is quite apparent, then, that when a court of appeals sets out a principle of law that was arrived at based upon the particular facts brought to the court by the parties to that case, the legal principle nevertheless extends far beyond the rights and interests of those parties. All actors within the system that *may* be faced with issues similar to those adjudicated in the case have a legitimate interest in the outcome.

Given this fundamental structural characteristic of our legal system, it is clear that non-parties often have, or will speak for those who have, at least as important a stake in the outcome of litigation as the parties themselves. When a court is asked to decide the constitutional limits of punitive damages awards, for example, all businesses possibly subject to punitive damages have a vested interest in the outcome. Indeed, if the defendant in the punitive damages case is not a repeat player, its own stake in the outcome may actually be less substantial than that of other potential punitive damages defendants.

This principle obviously extends far beyond the punitive damages context to any number of other issues. To pick just a few examples:

- When a court sets forth principles under which future courts will decide whether a state statute or cause of action is preempted by federal law, any business that is subject to both federal and various state regulatory authorities, as well as to common law suits, is deeply interested in the outcome. And organizations that speak for plaintiffs' lawyers likewise may legitimately seek to put their perspectives before the court.
- When a court decides the rules under which aliens will be granted asylum in the United States, organizations concerned with immigrants' rights can speak on behalf of numerous as-yet-unidentified persons who will find themselves similarly situated.
- When rules regarding access of criminal defendants to habeas corpus relief are under consideration, associations of criminal defense lawyers will reasonably wish to be heard.
- When a state court decides whether a manufacturer has a continuing post-sale duty to warn based on new information, all manufacturers may reasonably be concerned with the outcome.

And the list goes on.

Once one takes into consideration the simple fact that many appellate decisions have profound effects that far exceed the boundaries of the dispute between the parties, it becomes apparent that a reflexively negative view on the part of appellate courts toward amicus filings makes no sense. Indeed, such an attitude is affirmatively harmful to both parties that have a meaningful interest in the rules that will be announced and the courts' decisional processes. This trend—if, indeed, it is one—should end.

There are at least two important reasons why appellate courts should adopt a liberal attitude toward the acceptance of amicus submissions, one grounded in the rights of the amicus and the other in the interests of the courts and the legal system.

The first reason derives from the First Amendment's protection of "the right of the people . . . to petition the Government for a redress of grievances." The Petition Clause is most familiarly concerned with the right of the people to lobby their elected representatives in order to effect a change in the laws. But the Supreme Court has long recognized what is an obvious and logical corollary: "[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *Cal. Motor Transport Co. v. Trucking Unltd*, 404 U.S. 508, 510 (1972).

Once it is accepted—as it must be—that the Petition Clause reaches beyond the state house to the courthouse, there is no plausible principle that would limit its reach to parties to the particular case before the court. No one doubts that any interested party can petition a legislature or administrative agency, lobbying in favor of or against some pending provision that may be enacted. But appellate courts, just like legislatures or administrative agencies, set forth general and prospective rules that will bind people and organizations in the future. And because non-parties to a case who come to the courts as amici can have at least as much of an interest as the parties in the legal rule that the appellate court will adopt, there is no reason to give less weight to the right to petition the court than to the right to petition one of the "political" branches.

This, of course, is not to say that the Constitution precludes a court from imposing reasonable limits upon amicus filings. It is to say, however, that courts should recognize a general presumption in favor of accepting amicus briefs rather than follow the lead of Judge Posner and the Illinois Supreme Court in adopting the opposite viewpoint.

The second reason that courts should take a liberal view of amicus submissions is quite simply that they can often be extremely helpful to the courts themselves. Indeed, friend-of-the court briefs will often present the court with a perspective that the parties to the case either do not, cannot, or will not advocate. Although this fact seems obvious, it may be helpful to outline several ways in which amicus briefs are invaluable to a court's decision-making process.

First, amicus briefs may be extremely helpful to appellate courts when the amici have particular expertise in an area of law that the parties themselves lack. Such a situation can arise, for example, when the issue turns on a proper historical understanding of a particular legal document such as a constitution or statute. When such an historical inquiry is pertinent to the analysis of the legal rule the court will announce, it may well be useful for a court to hear from legal scholars and historians who spend their lives researching such issues, rather than to settle for the "law office history" that is often the best the parties themselves can muster. To give just one high-profile example, much of the majority opinion in the landmark case *Lawrence v. Texas*, 539 U.S. 558 (2003), was highly influenced by an amicus brief filed by a group of history professors. *See* Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs," 20 *J.L. & Pol.* 33, 34 (2004) (citing Rick Perlstein, "What Gay Studies Taught the Court," *Wash. Post*, July 13, 2003, at B3).

More commonly, a generalist court may be asked to decide a case involving a highly specialized substantive area such as patent, tax, or copyright law. In such situations, courts may find it particularly

Published in Litigation, Volume 33, Number 1, Fall 2006. © 2006 by the American Bar Association.
Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

helpful to have available the views of experts in the field—views that the parties themselves may not be able to present with the same competence—and of institutions that will be affected by the court's settled-upon rule. Indeed, a recent survey of U.S. Supreme Court law clerks reveals that they found amicus filings most helpful in cases "involving highly technical and specialized areas of law," such as "those involving tax, patent, and trademark law, as well as cases relating to the Employment Retirement Income Security Act ('ERISA')." *Id.* at 41. The reason is not surprising: Appellate judges and their law clerks are generalists, yet they realize that their decisions in highly technical fields will have a tremendous impact on people and institutions in the real world. For example, the survey quoted one former clerk as stating, "We didn't know anything about [the issue in the case] and there were billions of dollars at stake. It was helpful to know where people in industries like insurance and annuities line up on the issue." *Id.* Indeed, it may be that amici can have the most impact in these types of complicated yet extremely important cases, and surely courts should be willing, at a minimum, to accept them here.

A second situation in which amicus briefs may be particularly helpful is where they bring a perspective to a particular case that the parties themselves are not in a position to bring. Such situations are not uncommon because many appellate decisions adopt rules of law that have the potential to affect the interests of a variety of somewhat differently situated actors.

A recent example of such a situation is *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Michigan affirmative action case. The Supreme Court was presented with the question whether racial preferences could ever be used in college admissions consistent with the Equal Protection Clause of the Fourteenth Amendment. Although it was plain that the rule of law the Court would announce would reverberate far beyond the confines of public university admissions offices, the only credible perspective that the respondent could provide was that of a public university. If not for the amicus submissions, the Court's analysis would have suffered from a serious blind spot: the perspective of other major institutions that would ultimately be affected by the Court's constitutional rule.

Consistent with its traditional willingness to hear from amici, the Supreme Court accepted briefs from numerous persons and organizations in positions to address those reverberations. Indeed, the perspectives provided in several of those briefs were clearly crucial to the Court's decision-making process. The majority opinion highlighted two amicus briefs, one filed by major American businesses and the other by retired military officers, as being particularly helpful in assessing the real-world impact of the complete prohibition on all racial preferences in admission that the petitioner asked the Court to adopt. Indeed, these two groups of amici were able to impress upon the Court that the benefits of a diverse student body "are not theoretical but real," and that fact seemed crucial to the Court's eventual decision to allow racial preferences in some instances. *See Grutter*, 539 U.S. at 330.

Grutter presents a particularly high-profile example of how amici can be especially helpful in fleshing out the consequences of an appellate court's decision, but the irreplaceable nature of friend-of-the-court briefs is by no means limited to constitutional questions that seize the public's attention. Cases that address matters ranging from the most controversial social issues to more mundane questions of commercial law often have the potential to generate legal rules that could have consequences either unforeseen by the parties or upon which the parties cannot offer informed and cogent argument. Yet those consequences are no less real. And a court's refusal even to consider the views of interested amici will quite obviously result in an injury to not only those people or institutions themselves but also the courts and the law they exist to expound.

A third important situation in which amicus briefs may be of particular value arises when a party is simply unwilling to make a legal argument that would allow the court to dispose of the case on a narrow ground, because the party is looking for a symbolic win—the proverbial "home run." In such instances, amicus filings may turn out to be particularly valuable to a court's decision-making process. These situations are not typical of litigation generally, and they are made less so by rules of procedure that, in most instances, preclude a court from deciding a case based on an argument not raised by the parties themselves. Yet when such cases do arise—for example, when a party looks to achieve a big, symbolic victory by having a statute declared unconstitutional and therefore refuses to make an argument that it should win on the best reading of the statute—amici who have no less of an interest than the parties in the outcome of the case may be able to present a way to resolve the case in their favor but on a narrower ground.

A notable example of such a situation arose in the recent constitutional challenge to the Solomon Amendment in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006). An association of law schools and law faculty argued that the Solomon Amendment—which forces law schools whose universities receive federal funding to give military recruiters the same access they give any other recruiters, despite the schools' policies against recruiting by employers that discriminate against homosexuals—violated the First Amendment rights of the university. The respondents in the case very much wanted to win. But they wanted to win in a certain way—by having the Solomon Amendment declared unconstitutional. A group of professors from Harvard and Columbia, which also wanted to continue to exclude military recruiters from campus, presented the Court with a narrower ground for the decision: The law schools were not violating the terms of the statute as written. The parties to the case rejected this argument. Yet the professors filed amicus briefs advocating their point, and the Court grappled with their argument in the opinion. *See id.* at 1304-06. Although the Court eventually rejected the amici's statutory argument, the Solomon Amendment case serves as a good example of a situation in which the parties were not willing to provide the reviewing court with all arguments relevant to the disposition of the case, and in which the amici took up the slack.

As then Judge Samuel Alito wrote in an opinion expressly critical of Judge Posner's hostile approach to amicus briefs:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with partic-

Published in Litigation, Volume 33, Number 1, Fall 2006. © 2006 by the American Bar Association.
Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

> ular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group."

Neonatology Assocs., P.A. v. C.I.R., 293 F.3d 128, 133 (3d Cir. 2002) (quoting Luther T. Munford, "When Does the Curiae Need an Amicus?" 1 *J. App. Prac. & Process* 279 (1999)).

Moreover, it is unquestionably true that even in cases with frontier legal issues, the parties often are not "well represented" by capable appellate counsel. In such cases, as even Judge Posner recognizes, the courts need the help of more insightful and lucidly articulated arguments. This is often a result of the fact that the legal issue, though important, happens to arise in a case in which the stakes for the particular parties are not great. For example, a 1987 Alabama tort reform statute that capped punitive damages was struck down by the Alabama Supreme Court in a case in which the total judgment was only $18,625. *See Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 415 (Ala. 1991). In such a case, no rational party will expend great sums to secure the best legal representation, the most thorough and diligent research, and the most carefully written and edited brief.

For all these reasons, in addition to the constitutional issues at stake, courts should take a permissive view toward friends of the court.

Despite the clear benefits to both the parties and the legal system of a liberal judicial attitude toward amicus filings, arguments against presumptive acceptance of friend-of-the-court briefs persist. There seem to be three primary arguments against liberal acceptance of amicus briefs: (1) voluminous amicus submissions overburden the courts, *see Kinkel*, No. 100925 at 2; (2) amici should be "friend[s] of the court, not of the parties," *id.* (under the facile formulation that amici often have an interest in the outcome of the case congruent with those of the party whose position they support, which somehow cuts against accepting their submissions); (3) a party with amici backing up its argument can use the amicus filings as an unfair end run around the court's page limits, *id.* at 2-3. The first two of these arguments seem weak and can be disposed of quickly; the third, although not entirely unreasonable, is in the end outweighed by considerations favoring liberal acceptance of amicus briefs.

There seems little force to the argument that courts should be wary of amicus briefs because they put an additional burden on the judiciary. First, that is part of the reason why judges have law clerks and other support staff. It is a law clerk's job to go through the various amicus filings and highlight those that would be helpful to the judges. Even Judge Posner and the Illinois Supreme Court do not believe that amici should *never* be allowed to file briefs. Their view still requires them to assess the adequacy of the advocacy presented by party's counsel and to determine whether the amicus offers anything new that would make its brief useful. At the conclusion of that process, much of the judicial work will already have been done. It is unclear why rejection of the amicus brief at that juncture would save the courts any significant time and effort.

Judge Alito may have put it best in *Neonatology Associates*:

> [A] restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load. For one thing, the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted. In addition, because private amicus briefs are not submitted in the vast majority of court of appeals cases, and because poor quality briefs are usually easy to spot, unhelpful amicus briefs surely do not claim more than a very small part of a court's time.

293 F.3d at 133. Whether an amicus brief will influence a court's decisions depends entirely on the merits of the arguments presented by the amicus, but the tax on a court's time should not alter significantly whether the court institutes a hostile or liberal approach to amicus submissions.

The second argument against amicus briefs—that amici generally have a vested interest in the outcome of the case congruent with that of the party they support—is even more unpersuasive. *Of course* the people and institutions that file amicus briefs are interested in the legal rule that will be announced by the court. But it is very difficult to see why that is a bad thing. Indeed, as Judge Alito noted in his *Neonatology Associates* opinion, the suggestion that amici are true "friends" of the court only if they are impartial or unaligned "is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." 293 F.3d at 131. The judiciary benefits, not suffers, when interested actors other than the parties to the particular case provide the court with the best legal arguments in support of their favored position. Society expects neutrality only from the courts themselves—everyone else who has the incentive to get involved in litigation does so for a reason; and the benefit to the courts of being exposed to the best legal arguments possible, no matter who makes them, is only enhanced, not diminished, by the interested nature of the proponents of those arguments. "Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id.*

The third objection, that amicus briefs can be used unfairly by the parties "as a means of circumventing page limitations in their own briefs," *id.* at 3 (citing *Voices for Choices*, 339 F.3d at 544; *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)), has a patina of plausibility that the first two objections lack. Note at the outset that it is far from always the case that amici are enlisted by the parties to accentuate arguments that the parties themselves do not have room to make. As I have described, amici often present the courts with arguments and perspectives that the parties are either unable or unwilling to give. Further, there are very strong incentives for both amici and the parties *not* to make strategic use of amicus briefs. Amici, for example, are often reluctant to spend funds on amicus briefs in courts of appeals because these courts have only regional influence. *Cf. Neonatology Assocs.*, 293 F.3d at 133 ("amicus briefs are not submitted in the vast majority of court of appeals cases"). Further, it is quite costly to retain and educate amicus counsel about a case arising on appeal. Perhaps most importantly, every sophisticated prospective amicus is well aware

Published in Litigation, Volume 33, Number 1, Fall 2006. © 2006 by the American Bar Association.
Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

that mere repetition or extension of technical legal argument is likely to prove a fruitless enterprise. The amicus brief must add something new and significant to the debate, or it is not worthwhile.

It may be true that parties will sometimes enlist amici to concentrate on points that they themselves cannot make in their own briefs because of page limitations or other procedural issues. Is that unfair? Possibly, although remember that both parties are at liberty to make use of amici for similar ends. Certainly the Supreme Court, which embraces amicus briefs with open arms, has manifested no concern of this sort.

Even if the practice does carry some potential for imbalance in the presentation of arguments, that concern must obviously be weighed against the strong arguments in favor of acceptance of the amicus brief. First, it is crucial to remember that there is a constitutional issue at stake: Any interested actor, whether a party to the litigation or not, has some First Amendment right to petition for consideration of its views in the decision-making process. Beyond that, allowing amici to augment the arguments of the parties—perhaps by focusing on particular arguments that amici find to be strong but upon which the parties themselves do not focus—simply aids the courts in their role as administrators of justice. If a certain legal argument ends up being the right one, it would seem odd to prevent adequate consideration of that argument because the wrong brief happened to focus on it. The courts, after all, have the responsibility to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and if amici rather than the litigants aid the courts in that endeavor, so be it.

Most people and institutions affected by the legal rules announced by appellate courts are not parties to the litigation in which those rules are laid down. To prevent those affected from having their day in court deprives them of their right to petition the government and also deprives the courts of the benefit of their views on the legal question at hand. It is no wonder, then, that courts have traditionally welcomed friends of the court to file briefs arguing in favor or against a particular result. And that is how it should be. If there is indeed a trend to the contrary, it is misguided and should be abandoned. ◻

Published in Litigation, Volume 33, Number 1, Fall 2006. © 2006 by the American Bar Association.
Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.