Amicus Brief Writing for the Circuit Court: The Why and the How

By Jill M. Przybylski and Brock A. Swartzle – March 6, 2012

Whereas amicus participation in the U.S. Supreme Court is abundant, amicus participation in the federal circuit courts of appeal is decidedly less so. That a majority of circuit-court cases present issues that impact only the immediate parties presumably explains this difference. And while no one would encourage flooding the circuit courts with amicus briefs in those run-of-the-mill appeals, there are room and reason for increased amicus participation in the "not so ordinary" circuit-court appeals.

In those latter cases, all of the same reasons for amicus participation in the Supreme Court apply with equal force to the circuit courts. An amicus can strengthen a party's weak brief, stress the impact the court's decision may have on third parties, provide policy arguments in support of a particular decision, add a more appealing advocate, and supply helpful materials beyond a party's reach, such as technical or scientific data. *See, e.g.*, Reagan Wm. Simpson & Mary Vasaly, *The Amicus Brief: How to Write It and Use It Effectively* 7–8 (3d ed. 2010).

But, beyond these shared reasons, there are additional reasons why amicus participation in the circuit courts may make particular sense. This article explores those additional reasons, as well as some differences between amicus briefs submitted to circuit courts and amicus briefs submitted to the Supreme Court.

The Why

Sharpening the Panel's Focus

Amici participate in relatively few matters in the circuit courts. Carl Tobias, *Resolving Amicus Curiae Motions in the Third Circuit and Beyond*, 1 Drexel L. Rev. 125, 128 (2009). Indeed, in a recent survey of circuit-court judges, the overwhelming majority of the responding judges reported that amici participated in less than 5 percent of their total docket. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 686–87 (2008). Each circuit-court judge, thus, encounters relatively few amicus briefs in any given year. *Id.* at 678.

Given this background, the mere fact of amicus participation is likely to be considered significant to a circuit-court judge—perhaps even drawing the judge's attention to that matter more so than the many others waiting for review. At the very least, having an additional brief to read in the matter forces judges to pay "more" attention to that matter. And given the number of cases that each circuit-court judge hears, capturing the court's focus and energy at the outset is key.

Just as Effective, if Not More

Amicus participation in U.S. Supreme Court cases has become so commonplace that its utility—both for serving as a meaningful opportunity for amici to voice their concerns and opinions and to assist the court in its decision-making process—may be waning. *See* Simpson, *supra*,at 7–8, 17 (noting amici participation in the Supreme Court had doubled between 1965 and 1991 from 35 percent to 71 percent, and, as of the 1998 term, had risen to over 90 percent). As scores of amicus briefs pour in for nearly every matter in the Supreme Court, the justices are less likely to read the amicus briefs, instead relying on their law clerks to filter them, and cases with amicus involvement no longer carry any special weight. *Id.* at 17–18.

But given the relative infrequence of amicus briefs in the circuit courts, these types of problems are generally not present there. Circuit-court judges are more likely to review the amicus briefs and more likely to attribute the filing of an amicus brief as an indication of the importance of the case. This ensures that the position of the amicus is considered and

may even give an amicus a more meaningful opportunity to inform the decision-making process than in the Supreme Court. *See* Mayer Brown LLC, *Federal Appellate Practice* 420 (2008) (noting special significance a court-of-appeals judge may attribute to an amicus brief given its relative infrequence: "In that respect, an effective amicus brief may have even *more* influence in a court of appeals that in the Supreme Court.").

Maybe Your Last, Best Chance
It would be foolish to presume that you will have another opportunity to act as an amicus and present your input on any issue that a particular case presents. Even if another case arises that implicates the same issue, that case may not present as attractive of a vehicle in which to voice your organization's concerns and interests. The next circuit court in which the issue arises also may be less sympathetic to the types of concerns or arguments of your organization.

It would be even more foolish to presume that you can wait to act as an amicus or solicit amicus support until the issue or case is presented to the Supreme Court, because the Supreme Court denies the vast majority of certiorari petitions each year. For example, in the 2010 term, the Court granted review of only 90 of the 7,868 petitions considered. *The Supreme Court—2010 Term—The Statistics*, 125 Harv. L. Rev. 362, 369 (2011). Thus, the circuit court may very well be your last, best opportunity to speak on the particular issue or to solicit amicus support.

The How

Now that you have the circuit court's attention, do not squander your opportunity and waste that court's time. What follows are a few general pointers for drafting an effective amicus brief in the circuit courts.

Know and Follow the Rules
Federal Rule of Appellate Procedure 29 sets forth the requirements of an amicus brief. An amicus brief must comply with Federal Rule of Appellate Procedure 32 related to the form. Fed. R. App. P. 29(c). The cover of the amicus brief, which must be green, must also identify the party or parties supported and whether the amicus supports affirmance or reversal. *Id.*

In addition, the amicus brief must contain: (1) a corporate disclosure statement if the amicus is a corporation; (2) a table of contents; (3) a table of authorities; (4) a statement of the identity, interest, and authority to file of the amicus—unless you are writing on behalf of the "United States or its officer or agency or a state"; (5) a statement as to whether the party's counsel authored the brief and whether someone other than the amicus contributed financially to the preparation of the brief; and (6) if required by Rule 32(a)(7), a certificate of compliance. *Id.* The brief, limited to one-half of the authorized length of the party's principal brief, must be filed no later than seven days after the party's brief in whose support you are writing is filed.

Amici should also pay attention to local rules and precedent, if any, relating to amicus briefs. Although Federal Rule of Appellate Procedure 29 provides that a private amicus curiae may file a brief with the consent of all parties or with leave of court, the circuits are not uniform in applying the rule. The Seventh Circuit, for example, has adopted a rather restrictive view as to when amicus briefs should be allowed. In ruling on a motion to file an amicus brief in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), Judge Posner explained: Amicus briefs "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 . . . , 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." *See also Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (same).Moreover, some circuits will prohibit a prospective amicus curiae where permitting participation would "cause one or more members of th[e] court to recuse themselves from the matter." *Hydro Resources, Inc. v. E.P.A.*, 608 F.3d 1131, 1143 (10th Cir. 2010).

Other circuits, however, have adopted a more permissive view. In *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128 (3d Cir. 2002), then-Judge Alito, ruling as a single judge on a motion to file an amicus brief, rejected a narrow reading of Rule 29. He adopted, instead, "a broad reading." *Id.* at 132. He noted that Rule 29 only requires that an amicus curiae show "(a) an adequate interest, (b) desirability, and (c) relevance." *Id.* at 131. He then explicitly rejected the position that an amicus brief should not be permitted if the party is otherwise well represented:

> Even when a party is 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 particular 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.

Id. at 132 (internal quotation marks omitted). He also noted that, by requiring an amicus curiae to "undertake the distasteful task of showing that the attorney for the party that the amicus wishes to support is incompetent," a restrictive reading of Rule 29 would "likely discourage amici in instances in which the party's brief is less than ideal and an amicus

submission would be valuable to the court." *Id*. Given these and other divergent views across the circuits, prospective amici should understand the view adopted by the particular circuit in which they seek to participate and should tailor their motion and brief accordingly.

Avoid "Me Too" Briefs
Amicus briefs that rehash a party's or another amicus curiae's argument without adding anything substantive to the analysis are viewed with disfavor. Simpson, *supra*, at 36. Instead, amici should coordinate with the party in whose favor they are writing, as well as other amici to ensure duplication is avoided. For example, amici should present the courts with alternative rationales for the suggested outcome, fill in any reasoning gaps, or present the courts with policy or industry considerations and concerns that the parties' briefs do not, or inadequately, cover. In other words, the amicus must bolster the party's arguments, not merely repeat them.

Don't Overlook the Statement of Interest
Federal Rule of Appellate Procedure 29(c) requires an amicus brief to include a statement as to the amicus curiae's interest in the matter. This requirement should not be overlooked as a mere formality. Instead, this is generally the first opportunity that the amicus has to explain the broader issues that the case presents and the unique perspective that the amicus brings to the table. It is also an opportunity to bolster the credibility of the amicus organization by, for example, including reference to other relevant amicus filings of the organization. Simpson, *supra*, at 41–42.

Be Clear, Concise, and Typo-Free
Most importantly, do not waste the court's time with a poorly written, ill-conceived amicus brief. A poorly written brief will jeopardize the credibility of the amicus (and that hit to credibility may even be extended to one of the parties), and will likely only be skimmed if not ignored entirely. Whether your objective is to provide a historical analysis of the relevant issue or case law or to inform the court of the possible negative ramifications of a particular outcome, write with your objective in mind and stop writing once you have communicated that point. Page limitations are just that, a limitation, not an objective.

Different Court, Different Brief
As with any brief, the amicus-brief writer should tailor the brief to the judicial audience. As there are differences between the circuit courts and the Supreme Court, there should be differences in the amicus brief submitted to those respective courts.

Precedent and Stare Decisis
As an amicus brief writer, you must first contend with the different roles of precedent and stare decisis. The Supreme Court is not bound by lower-court decisions, and it is bound by its own prior decisions only to the extent that it respects stare decisis. A circuit-court panel, however, is bound not only by Supreme Court precedent, but also by prior published decisions of a panel or en banc court. *See, e.g.*, 6 Cir. R. 206(c). When a circuit court sits en banc, only Supreme Court precedent binds the court. *See, e.g.*, *id*. This provides you, as the amicus-brief writer, both less and more freedom. On one hand, you have less freedom in that circuit-court precedent cannot be ignored. On the other hand, you have more freedom in that decisions from that circuit as well as other circuits can be given a more prominent stage, with less need to focus solely on Supreme Court jurisprudence. A three-judge panel in the Sixth Circuit, for example, may be particularly interested in what other circuits have said on a particular issue to determine whether the issue is one of first impression, whether there is a clear direction in the law, or whether there is a circuit split.

To a Court Unknown
Unlike with the Supreme Court, you will usually not know the makeup of the circuit-court panel before submitting your amicus brief. In the Supreme Court, you will know, prior to submission, the identity of the nine justices in all cases excepting death, retirement, or recusal of a justice. In the circuit court, however, the identities of the three judges who will make up the panel will not be known to the public until a few weeks before oral argument. Therefore, you will have to keep in mind that you are writing to a largely unknown audience.

This may require subtle changes in your writing style. For example, when writing an amicus brief to the Supreme Court, it may make sense to spend several paragraphs directed to a particular justice and that justice's predilections. When the panel is unknown, however, crafting several paragraphs or pages for a particular judge may result in wasted space or, even worse, it may turn off the judges who are assigned to the panel. This consideration will fall to the side, of course, if the en banc court ultimately decides to hear the appeal.

Less Academic Style
Whether by inclination or by environment, the justices of the Supreme Court often write in a rather academic style. This is not always the case in the circuit courts. It will not be unusual, for example, for a circuit-court panel to consist of a prior U.S. Attorney, a prior managing partner of a midsize law firm, and a district-court judge sitting by designation. Judges with these and other diverse backgrounds may be more inclined to focus on the practical realities of the court's decision rather than more academic or theoretical considerations.

Outside the Beltway
Finally, there may also be cultural or geographic considerations that should be taken into account, even if only in the back of your mind. Other than the D.C. and Federal Circuit Courts, all of the other circuit courts are located outside the Beltway. As the judges of a particular "geographic" circuit court will generally be drawn from the states covered by that

circuit, those judges will reflect the specific cultural and geographic characteristics of their state and region. This may subtly, or not so subtly, affect how they view particular issues. Panels in the Fifth and Ninth Circuits, for example, may be particularly concerned about the practical concerns surrounding immigration, given the large number of immigration petitions that flow through those courts. As another example, a brief touching on an environmental issue may have to be crafted differently when the audience is a panel in the Ninth or Tenth Circuits, where water rights are so important, versus a panel in the First Circuit, where water rights are less contentious.

Difference in Degree, Not in Kind

As shown above, amicus participation in circuit courts can make a tremendous amount of sense under certain circumstances. As with drafting any brief, you, the amicus-brief writer, should be aware of the particular characteristics of the reviewing court. The differences between the Supreme Court and the circuit courts should not be over-emphasized, because, after all, judicial officers are judicial officers. Yet, while recognizing the many similarities between the Supreme Court and the circuit courts, you should recognize the subtle and not-so-subtle differences and, more importantly, how those differences should affect your craft. The differences may amount only to degrees, not to kinds, but those degrees could be the difference between an effective amicus brief and one that is tossed in a pile of misfit briefs.

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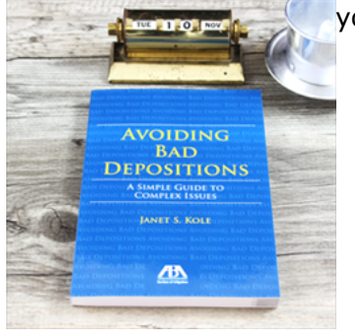

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