An Efficient and Elegant Public Policy Tool

The Amicus Brief

By Richik Sarkar

The amicus brief that takes a unique position attracts more of a court's attention than those echoing the common talking points, making the unique brief an opportune tool for shaping policy.

The use of amicus briefs to spur public policy changes has historically made good sense. Rather than navigate the complicated process of legislative change, when an appropriate opportunity presents itself, parties can also advocate for change before the appropriate appellate court. Convincing the majority of an appellate panel of the virtue of a particular public policy solution is, perhaps, a more elegant path than attempting to coerce and cajole a federal or state legislature. Of course, that is easier said than done. First, an appropriate case with a good set of facts must present itself. Next, the right amici must have its own voice. Most importantly, the amicus brief must clearly and simply explain to the court the potential ramifications of a potentially myopic decision that focuses solely on the parties before the court and ignores other stakeholders by adding or supplementing, not duplicating, information or arguments.

When done properly before a receptive audience, amici may be able to change the law. For example, in *Mapp v. Ohio,* 367 U.S. 643 (1961), it was an amicus—not the parties—who suggested that the exclusionary rule was the proper remedy for unconstitutional searches; the position the United States Supreme Court adopted. Similarly, in *Knox v. SEIU*, 567 U.S. 298 (2012), the Supreme Court ultimately resolved the matter by adopting an amicus's suggestion that public employee unions should be prohibited from deducting mid-year assessments from employee paychecks for political activities without the affirmative consent of each employee

Amici as Lobbyists

When most think of lobbying, they typically picture the use of information and influence to shape favorable policy before legislatures and agencies. However, if properly targeted and implicated, the strategic use of amicus briefs before controlling state and federal courts can more efficiently and effectively achieve the same goal. This idea is not new. In fact, it was observed in 1953 that

> The *amicus curiae* has had a long and respected role in our own legal system and before that, in the Roman law. To be sure, participants are often a friend of one of the parties as well as the Court

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but the primary function of the *amicus* is to help the court arrive at a just decision. Admittedly, the Supreme Court has a problem on its hands with which it must come to grips. Briefs *amici* are often valuable. They may be particularly valuable in connection with petitions for certiorari where the Court has to make a preliminary decision on the importance of the issues raised. Its task is to devise some way to preserve the advantages of briefs *amici* without first having to examine all such briefs to select those of merit. It is the absence of such a rule that has led the Court to exclude practically all by-standers who wish to lend their aid in the interest of justice. There is nothing wrong with lobbying, as such, if everything is aboveboard and on a level of decency, morally and intellectually. The Court might well assume some responsibility in making important distinctions.

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Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court, 101 U. Pa. L. Rev. 1172, 1172 (1953).*

And, more recently:

> The idea is that "the emergence of the public law model and its maturation over the latter half of the twentieth century created a ripe environment for interested non-parties to weigh in on the development of policy through the courts; the *amicus* brief provided the tool to accomplish this goal." Many political scientists have explicitly made the analogy between *amici curiae* and interest-group lobbyists. "When law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible." Because *amici* engage in "partisan advocacy," they "allow[] the Court to weigh 'political' information in a judicial way." *Amicus* briefs, the story goes, are one mechanism—and a growing one—that motivated interest groups increasingly use to "further their economic, political, and social agendas."

Allison Orr Larsen & Neal Devins, *The Amicus Machine, 102 Va. L. Rev. 1901, 1910*–1911 (2016).

Every appellate decision is a stone thrown in a pond. And, sometimes the size of ripples created are larger than the size of the stone: while a specific decision will certainly affect the parties before the court, the ripples often set the course to shore for future decisions and in certain areas of public policy, sometimes with unforeseen and unintended consequences. Yet, while the immediate parties of interest must consider the issues specific to their case, amici can properly use their information and influence to direct the ripples created by a decision's stone to best shape the shore. This can be done by explaining the legal and practical effects of a particular decision to the court or answering a hypothetical question before a judge asks, or more correctly, knew he or she should ask.

The Role of, and Rules for, Amici

The United States Supreme Court makes plain that

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

USCS Supreme Ct R 37.

Other appellate courts, and most significantly then-Chief Judge of the United States Court of Appeals for the Seventh Circuit, Richard Posner, have further observed that

> The tendency of many judges of this court, including myself, has been to grant motions for leave to file *amicus curiae* briefs without careful consideration of "the reasons why a brief of an *amicus curiae* is desirable," although the rule makes this a required part of the motion. After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.

The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term *"amicus curiae"* means friend of the court, not friend of a party. *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991). We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted. Id. at 165. But there are, or at least there should be, limits. *Cf. New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n. 3 (1st Cir. 1979). 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. *See, e.g., Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir. 1982) (per curiam). Otherwise, leave to file an *amicus curiae* brief should be denied. *Northern Securities Co. v. United States*, 191 U.S. 555, 556, 48 L. Ed. 299, 24 S. Ct. 119 (1903) (Chief Justice Fuller, in chambers); *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983) (per curiam); *Rucker v. Great Scott Supermarkets*, 528 F.2d 393 n. 2 (6th Cir. 1976); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991); *Fluor Corp. v. United States*, 35 Fed. Cl. 284 (1996).

Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997).

Thus, the court's desire is clear, they prefer, and essentially invite, amicus briefs that present positions not already represented—not "me too" briefs—and solutions to questions they may not know they

should be asking. Smart attorneys should accept this very specific invitation and, when appropriate, advance the policy interests of their clients.

The Mechanics of Selecting Amici and the Amicus Brief

The amicus's path to the court takes many forms. Sometimes a client comes directly to counsel, seeking a voice in a pending piece of litigation. Other times, counsel or organizations parse intermediate level opinions for directly relevant decisions and circuit splits and reach out to parties on behalf of their clients to volunteer to play an amicus role. In many cases, these efforts are done in concert with an organization's government affairs group. In addition, some organizations, trade associations, chambers of commerce, etc., devote themselves to inserting their specific views when asked or when they deem it important.

In my view, interested individual parties or a small group of parties are more influential. First, the fact that an individual organization, or a small group of organizations, is expending its own funds can be persuasive. Second, it avoids the need to address too many views within the same document, while still offering a view that considers diverse points of view. Finally, if the amicus is going to seek argument time, which is a rare occurrence, it will be granted to the party with the unique view; as opposed to the well-established view of many more traditional organizations.

With respect to the actual brief, better lawyers and scholars than I, for this and other publications, have written articles about writing amicus briefs. I cannot do better than they; instead, I distill their knowledge into the following bullet points:

- A good amicus brief follows the court's rules and guidance and does not simply repeat the chosen party's arguments.
- As the amicus is presenting a position that applies to an industry or legal area broadly, there is no need to get stuck in the quagmire of specific facts.
- The stage of the case is critical.
  - At certiorari, the focus of the brief is likely the importance of the issue being presented and the need for providing immediate guidance to the groups well beyond the parties already before the court.
  - Once the matter is properly before the court, merits stage, the brief follows one of a few paths
    - Expanding on a specific issue presented by explaining potential policy ramifications of a particular course of action.
    - Addressing a fundamental issue in the case and placing it into a broader context to demonstrate the need to follow a broader regulatory agenda, deviate from a broken system, or create a new approach to an immediate problem or avoid unforeseen problems.
    - Demonstrating the practical, and sometimes unintended, consequences of the legal assertions of the parties, so the court can fine tune the depth and breadth of its eventual decision and address hypothetical situations raised by the amicus.

Bringing It All Together: Changing Ohio Law

My introduction to the proper role of amicus briefs came during a visit from then-Chief Justice of the Ohio Supreme Court the late Thomas J. Moyer to my first firm. The chief justice explained how attorneys properly practice before the Ohio Supreme Court and provided insight into the practical realities of how the court made its decisions. My appellate experience at that point was as the third author on briefs and arguments before moot courts; however, the concept of an amicus affecting policy intrigued me. When I asked the chief justice about the role that amicus briefs played in the Ohio Supreme Court's decision making, he said amici were most helpful when they explained to the court the broad effect a seemingly narrow decision might have. He explained that amicus briefs that merely parroted party positions had no real bearing on a decision because the court did not operate by popular vote. Rather, targeted, practical guidance regarding the immediate and long-term effect of a decision was always useful.

A few years before his visit, the Ohio Supreme Court made a controversial decision, finding certain language in standard auto insurance policies issued to business entities to be ambiguous regarding who was covered by uninsured/underinsured motorist provisions and construed that ambiguity to mean that such language in corporate insurance policies covered all company employees and applied regardless of whether employees' accident injuries were incurred in the course of their employment. This decision created a cottage industry of coverage litigation. The chief justice admitted that had amici explained how the court's contact interpretation decision would affect the overall industry, they may have come to a different conclusion or at least have narrowed their decision to the specific facts before it. The frankness of the chief justice stayed with me and caused me to view the amici in a new, proactive way.

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Years later, I was approached by a client who wanted to play the amici role and address a specific gap with respect to utility pole placement and premises liability. In that case, a lower court used the prevailing, but subjective, reasonableness standard in deciding that a utility pole owner could not be held liable for improper pole placement when a driver struck the pole off the right-of-way. On appeal, however, the intermediate appellate court used an even more subjective, multipronged reasonableness test to determine pole owner liability for purported improper placement.

As the Ohio Supreme Court summarized:

> The trial court granted the motions for summary judgment, stating "the record demonstrates that the pole was neither placed on the traveled and improved portion of the road nor in such close proximity as to constitute an obstruction dangerous to anyone properly using the highway." It concluded that Turner could not demonstrate a breach of the duty of care. The court also ruled against appellee on the remaining nuisance claims.
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> On appeal, the Eighth District reversed on the negligence and qualified nuisance claims, finding that a jury should decide the reasonableness of the pole placement based upon the facts of the case. The court of appeals stated that "liability may be imposed where the placement of a pole in close proximity to the edge of a roadway constitutes a foreseeable and unreasonable risk of harm to users of the roadway." *Turner v. Ohio Bell Tel. Co.*, 8th Dist. No. 87541, 2006 Ohio 6168, at P 17. The court, however, affirmed the entry of summary judgment for appellants on the claims of negligence per se and absolute nuisance.

Turner v. Ohio Bell Tel. Co., 118 Ohio St. 3d 215, 217.

My client was a utility that owned over two million utility poles in the state of Ohio, so any test coming from the court would have immediate, and significant, ramifications. Initially, I was asked to write an amicus brief that simply supported the appellant's position that the trial court's decision be affirmed. I counseled a different course. I explained that this case provided the opportunity to argue for a change in public policy and move away from a subjective "reasonableness test" to an objective test that would provide them more certainty in similar situations. This was especially salient since utility poles, as a matter of statute, could only be placed pursuant to government issued permits. Recalling the chief justice's advice, I explained that this amicus brief's optimal purpose was to get protections for my client and other utility companies that would take much longer to obtain through the traditional lobbying process.

Once I convinced the client that this was the best course of action, I needed to take a tack that would simply explain to the court how difficult a multilayered test for utility pole liability would be to implement. Accordingly, we argued that the Ohio Supreme Court should make clear that once a utility pole was properly placed pursuant to a permit, the pole owner would be insulated from liability. Using that simple premise, and introducing the ramifications of a contrary ruling, we argued in our brief that

> Ohio law has established a comprehensive statutory scheme governing the proper placement of poles in public right-of-ways. Based upon these laws, for over 70 years Ohio courts have found that pole owners are not liable to motorists who strike poles that are properly placed in right-of-ways that are not intended or used for travel. The Eighth District Court of Appeals' decision in *Turner v. Ohio Bell Telephone Co.*, 2006-Ohio-6168 (Cuyahoga County App. No. CA-05-087541), ignores Ohio's statutes and directly contradicts established precedent. Worse still, the Turner decision will convert simple liability suits into complex multiparty litigation, clogging the dockets of Ohio courts and creating confusion state-wide. Accordingly, the FirstEnergy Companies ask this Court to strike down Turner and, consistent with several other Ohio courts of appeals—in decisions spanning decades—formally recognize that pole owners owe no duty to motorists who—for whatever reason—strike poles which are properly placed under Ohio law off the road, but in public right-of-ways.

Turner v. Ohio Bell Tel. Co., 2007 OH S. CT. BRIEFS LEXIS 2187 *1.

Critically, this specific position had not been directly advanced by the pertinent parties in the lower courts.

The remainder of the brief expanded upon this specific issue and placed the underlying case into the broader context of existing case law and Ohio regulation—especially the comprehensive and regimented process to obtain a permit to place a utility pole in a right-of-way—and the need to coordinate the court's decision with the broader regulatory agenda. More importantly, the brief demonstrated practical consequences of following the intermediate court's decision and attempted to address a hypothetical that the Ohio Supreme Court may not have considered:

> Should the appellate court's decision in *Turner* be upheld, it would create and expand liability for utility companies for acts beyond its control—the actions of the driver and the conditions of the roadway. Furthermore, if the reasoning of *Turner* is adopted, a Pandora's Box of liability will be opened. For all of these reasons, the FirstEnergy Companies ask that this Court: (1) hold that pole owners have no further duty to protect the motoring public after it has obeyed Ohio law and properly placed its pole off of the road and in a public right-of-way place; (2) find for the appellants; and, (3) reverse the decision of the Eighth District Court of Appeals.

Turner v. Ohio Bell Tel. Co., 2007 OH S. CT. BRIEFS LEXIS 2187 *24.

Ultimately, the Ohio Supreme Court decision used the reasoning that had only been expressed in the amicus brief, as it ultimately ruled:

> Therefore, we hold that when a vehicle collides with a utility pole located off the improved portion of the roadway but within the right-of-way, a public utility is not liable, as a matter of law, if the utility has obtained any necessary permission to install the pole and the pole does not interfere with the usual and ordinary course of travel.

Turner v. Ohio Bell Tel. Co., 118 Ohio St. 3d 215, 220 (2008).

Conclusion

The proactive use of amicus briefs to change public policy is underused. The appropriate use of amicus briefs can streamline the policy process by focusing on a specific audience. While the process is not easy, it can be systematized. First, a party must scrutinize lower and intermediate court decisions to find the appropriate opportunity. Next, amici must avoid parroting the arguments advanced by its preferred party in the underlying matter. Finally, the brief must plainly advance the amicus position and the benefits of following that position, while providing a cautionary tale to warn the court about the dangers of doing the opposite. When properly employed, an amicus brief can be the most efficient and elegant tool to effect lasting change for the benefit of the amicus and similar parties, industries, and legal interests.