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Not all judges have an affection for Amici

Whether a particular court adopts the permissive or restrictive approach should not impact your amicus filings.

BENJAMIN G. SHATZ

Partner, Manatt, Phelps & Phillips LLP

Appellate Law (Certified), Litigation

Email: bshatz@manatt.com

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office. Exceptionally Appealing appears the first Tuesday of the month.

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BENJAMIN E. STRAUSS
Litigation & Appellate Associate, Manatt, Phelps & Phillips, LLP, in Los Angeles

See more...

EXCEPTIONALLY APPEALING

Amici Curiae, or "friends of the court," often file amicus briefs to assist the court by providing expertise or insight that bears on the issues presented. Amicus briefs are rarely filed in trial courts, even though they can be just as helpful there as in any other court. To drive this point home, last month a federal district court judge in Arkansas issued an open invitation for amicus briefs in his court. See Arkansas Federal Judge Says Bring on the Amici, Law360 (March 21, 2023) (discussing the Order on Amicus Briefs by E.D. Ark. Judge Lee Rudofsky). At the other end of the spectrum of court hierarchy, amicus briefs are filed in nearly every pending merits case in the United States Supreme Court. To make amicus filings easier, the High Court recently amended its rules (effective Jan. 1, 2023) to drop the requirement that amici must seek consent to file from the parties, or file a motion for leave to file an amicus brief.

In the middle are the federal courts of appeals, where amicus briefs are governed by Federal Rule of Appellate Procedure 29. Under FRAP 29(a)(2), the United States or a state can file an amicus brief without consent of the parties or leave of court. But any

other amicus must obtain the consent of all parties (and say so in its brief) or file a motion. Consent is often obtained.

Yet sometimes, for whatever reason, consent is withheld, forcing an aspiring amicus to file a motion seeking the court's permission to file a brief. Such motions must state the proposed amicus' interest, as well as "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." The motion must also be accompanied by the proposed amicus brief itself. FRAP 29(a)(3). Courts usually grant such motions if they make a colorable showing of interest and desirability.

In the somewhat unusual case where a party withholds consent to file an amicus brief, and even files an opposition to a motion for leave to file, what does such an opposition say?

Opposition to an amicus motion may argue that the points raised in the amicus brief are duplicative of the parties' briefing or not relevant or helpful to the disposition of the case. To bolster an opposition, parties typically cite to a line of Seventh Circuit opinions by then-Chief Judge Richard Posner. In these opinions, Judge Posner set forth a restrictive view of amicus briefing and concluded that "whether to allow the filing of an amicus curiae brief is a matter of 'judicial grace.'" Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (chambers opinion) (Posner, C.J.) (quoting Nat'l Org. for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000)).

Judge Posner explained that his Circuit's policy is "not to grant rote permission to file an amicus curiae brief; [and] never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties." Scheidler, 223 F.3d at 616. In Judge Posner's experience, "[t]he 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." Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997) (chambers opinion) (Posner, C.J.). He went so far as to conclude that "[s]uch amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party." Id.

Under Judge Posner's restrictive view, amicus briefs should be allowed "only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." Scheidler, 223 F.3d at 617 (citing Ryan, 125 F.3d at 1062).

Judge Posner justified his restrictive view against amicus briefs with three reasons. First, appellate judges have heavy caseloads requiring them to read thousands of pages of briefing annually, and they wish to minimize extraneous reading. Second, the amicus

briefs are usually sponsored or encouraged by the parties and may be intended to circumvent the page limitations on the parties' briefs, to the prejudice of any party lacking an amicus ally. Third, amicus briefs are "often attempts to inject interest-group politics" into the appellate process by "flaunting the interest of a trade association or other interest group in the outcome of the appeal." Scheidler, 223 F.3d at 616–17. As Judge Posner put it, "it is very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting. Those who pay lawyers to prepare such briefs are not getting their money's worth." Voices for Choices, 339 F.3d at 545.

Judge Posner's negative view of amicus briefs may have merit in some cases, or is at least debatable. But his restrictive gatekeeping of amicus briefing is not the majority view.

Then-Judge Samuel Alito described Judge Posner's view as "a small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs." Neonatology Assocs. v. Comm'r, 293 F.3d 128, 130 (3d Cir. 2002) (Alito, J.) (citations omitted). Judge Alito explained that while the criterion of desirability in FRAP 29 is open-ended, a broad reading is prudent and preferable for practical reasons, as well as to preserve the court's appearance of impartiality. See id. at 132–33.

Judge Alito acknowledged that whether to grant leave to file an amicus brief is often made at a relatively early stage of an appeal, so it may be difficult to tell whether an amicus filing will be helpful. See id. at 132. In this regard, it may be hard to forecast whether an amicus brief adds anything useful without thoroughly analyzing the parties' briefs and other relevant materials, and, as is often the case, a motion for leave to file may be assigned to a judge or panel who will not decide the merits of the appeal. See id. In that latter circumstance, the motions panel would need to analyze not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently. See id. Thus, Judge Alito concluded that "it is preferable to err on the side of granting leave" because if an amicus brief that turns out to be unhelpful is filed, the merits panel should be able to make that determination without much trouble and then simply disregard the amicus brief. "On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance." Id. at 133. The majority approach to amicus contributions appears to follow this rule: allow amicus briefs and leave the rest to the court's discretion. See, e.g., United States v. Nunez, No. 21-50131, 2022 WL 17883604, at *4 (9th Cir. Dec. 23, 2022) (granting leave but not considering issues outside the record or not raised by the parties; citing Pres. Coal., Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982)).

In Judge Alito's view, a restrictive policy may create "at least the perception of viewpoint discrimination," and that "unless a court followed a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment

are predictable." Neonatology Assocs., 293 F.3d at 133. "A restrictive policy may also convey an unfortunate message about the openness of the court." Id.

Ultimately, however, whether a particular court adopts the permissive or restrictive approach should not impact your amicus filings. Under FRAP 29, your amicus brief should walk the fine line of not repeating the arguments raised in the parties' briefs, yet also not straying so far from those arguments as to drift into irrelevancy. Otherwise, as Judge Posner warned, your amicus clients aren't getting their money's worth.

Withholding consent for amicus participation, and going so far as to oppose such participation, is usually fruitless. Most courts welcome amicus participation, and judges know how to ignore briefs that are not helpful – from amici or parties. The Advisory Committee on Appellate Rules is considering amending the FRAP to do away with the consent and motion rule to conform with the Supreme Court's new rule. That seems like a smart move in terms of efficiency for amici (removing filing obstacles) and the courts (obviating the need to address amici motions). Besides, don't we all want more friends?