Practice Tips

Some Thoughts on Amicus Briefs

By Jonathan M. Albano and David B. Salmons

According to legal lore, the first amicus to appear in the United States Supreme Court was Henry Clay, who appeared as amicus because the Court suspected collusion between the parties to a land dispute involving Virginia and Kentucky. Today, amicus briefs filed in the Supreme Court each year far outnumber briefs of the parties. Closer to home, in the last eighteen months alone, over 100 amicus briefs were filed in appellate cases in Massachusetts state and federal courts.

Some judges have lauded the ability of "friend of the court" briefs to bring a wider perspective that assists courts in discharging their responsibility to non-litigants. Judith S. Kaye, *"One Judge's View of 'Friends of the Court'"*, (http://www.nysba.org/KayeFriendsofCourt) N.Y. St. Bar. J., Apr. 1989, at 8, 13. Others, like Judge Posner, famously have disagreed:

> 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.

Jonathan M. Albano is a partner at Bingham McCutchen, LLP in Boston and co-authored the amicus brief submitted by the BBA in *The Real Estate Bar Association For Mass., Inc. v. National Real Estate Information Services*, 608 F.3d 110 (1st Cir. 2010).

David Salmons is the chair of Bingham's Appellate Group in Washington D.C. where he previously practiced before the United States Supreme Court as a member of the United States Solicitor General's Office.

Ryan v. Commodity Futures Trading Com'n, 125 F. 3d 1062, 1063 (7th Cir. 1993) (Posner, C.J., in chambers). Despite this difference of judicial opinion, following certain guidelines can increase the prospect that a court will view an amicus brief as more of a friend than a foe to the judicial process.

1. Do More than Repeat the Arguments Already Made

If the primary purpose of an amicus brief is to show the importance of the issue at hand or to explain how a particular holding will have a broad, negative effect, a short brief saying so is generally far more persuasive — and welcome — than a brief repeating arguments already made by the parties. None of us wants to be on the receiving end of a critique like Justice Robert Jackson once leveled against the American Newspaper Publishers Association: "[The amicus brief] does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one: "[Our] membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country." *Craig v. Harney*, 331 U.S. 367, 397 (1947) (Jackson, J., dissenting).

2. Find the Gaps and Fill Them.

Amicus briefs have the luxury of addressing issues the parties are not able to tackle, either because of strategic considerations or page limits. For example, an amicus brief can:

a. Expand on arguments that a party could not make, or could make only in summary form.

Amicus briefs can place an issue in historical context, explain the practical impact of a decision, or thoroughly analyze legislative history in ways that can significantly aid the court. *See, e.g., Polaroid v. Travelers Indemnity Co.*, 414 Mass. 747, 760 n.15 (1993) ("the most comprehensive and instructive argument on behalf of [the plaintiff's] position on this issue is made in [a] brief filed as amicus curiae"). *See also The Real Estate Bar Association For Mass., Inc. v. National Real Estate Information Services*, 608 F.3d 110 (1st Cir. 2010) (adopting First Amendment argument advanced by Boston Bar Association as amicus curiae).

b. Provide reliable information beyond the record in a case.

In *Mueller v. Oregon*, 208 U.S. 412, 419 n.1 (1908), future Supreme Court Justice Louis Brandeis, then a lawyer at Nutter, McClennen & Fish in Boston, prepared an amicus brief addressing non-record evidence of social science

research on the impact of long work hours on the health of women. The "Brandeis brief," as we now know it, is an amicus brief that typically uses policy-oriented, non-record evidence of which a court may take judicial notice to support a party's position. *See Thompson v. Oklahoma,* 487 U.S. 815, 830 n.34 (1988).

Although the use of Brandeis briefs allows an amicus to expand the record before a court, there are limits. Extra-record facts are best limited to those of which the court may take judicial notice or which are established as facts typically relied upon by experts in the applicable field. *See generally U.S. v. Ortiz*, 742 F.2d 712, 713 (2d Cir. 1984) (refusing to take judicial notice of "facts" contained in newspaper articles).

c. Explain the Effect of the Court's Ruling on Individuals, Professions and Businesses

Amicus briefs are an appropriate means of explaining the effect a decision will have on individuals, professions and businesses. Although some view this as nothing more than judicial lobbying, the fact remains that judges — like all lawyers — depend upon parties (and clients) to place legal rulings in context and to better understand how the law may — or may not — serve its intended interests. Sometimes an industry or public policy group can speak to the broader impacts of a legal rule with more authority and experience than can any individual litigant. Amicus briefs that legitimately speak on behalf of broad or disproportionately affected segments of society often can have a significant impact on the resolution of a case.

3. Avoid Unnecessary Partisanship

A case involving the pre-Bill Belichick New England Patriots illustrates the dangers of an amicus who identifies too closely with a litigant. In 1978, Patriots coach Chuck Fairbanks announced that he was leaving the Patriots for greener pastures at the University of Colorado. A lawsuit followed, and Fairbanks was permitted to appear as an amicus on appeal to oppose an injunction prohibiting the University from employing him. The First Circuit made clear its disappointment with the coach's amicus brief.

> In granting permission we had assumed, wrongly, it proved, that counsel knew what an amicus is, namely, one who, "not as parties,...but, just as any stranger might," [] "for the assistance of the court gives information of some matter

of law in regard to which the court is doubtful or mistaken," [] rather than one who gives a highly partisan, ("eloquent," according to defendants) account of the facts.

New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.2 (1st Cir. 1979) (citations omitted).

In preparing amicus briefs, the balance between, on the one hand, zealous advocacy and, on the other hand, the loss of credibility by partisanship, is as critical as in all other aspects of litigation. ■

Links:

Ryan v Commodity

Craig v. Harney

Polaroid v. Travelers

The Real Estate Bar v. National Real Estate

Mueller v. Oregon

Thompson v. Oklahoma

US v. Ortiz

NE Patriots v. Colorado