WHEN DOES THE CURIAE NEED AN AMICUS?

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In an era when courts seem to need all the friends they can get, Seventh Circuit Chief Judge Richard Posner, the nation's most cited judge, has fired a warning shot at those whose friendship would take the form of an amicus brief. Let's hope other judges conclude that Chief Judge Posner picked the wrong target.

Judge Posner aimed at an amicus brief offered in *Ryan v. Commodity Futures Trading Commission*.[1] When the dispute reached the Seventh Circuit, the Chicago Board of Trade sought leave to file a 17-page amicus brief supporting Ryan and emphasizing the effectiveness of its disciplinary procedures. Chief Judge Posner denied its request on the ground that the brief failed "to inform us of a material consideration of which we might otherwise be unaware."[2]

In itself, this is not a bad test, but unfortunately Chief Judge Posner's opinion did not confine itself to this test. Instead, it launched off into a recital of the grounds listed in a motley group of precedents for denying leave to file amicus briefs.[3] Those grounds are sufficient to provide any overburdened judge with an excuse for denying leave to file almost any amicus brief, no matter how helpful some other judge on the court might find the brief.

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1. 125 F.3d 1062 (7th Cir. 1997). In *Ryan*, the Commodity Futures Trading Commission sought to sanction Mr. Ryan, an errant trader whom the Chicago Board of Trade had deemed rehabilitated.

2. *Id.* at 1064.

3. *See id.* at 1063.

For example, the *Ryan* opinion seems to suggest that leave can be denied if the amicus has too much of an interest, or to the contrary, not enough of one. Chief Judge Posner colorfully quipped that an amicus should be a "friend of the court, not [a] friend of the party."[4] He thus endorsed a bizarre First Circuit opinion that first acknowledged its indebtedness to the factual information contained in an amicus brief, but then criticized amicus counsel for giving a "highly partisan . . . account of the facts."[5] Similarly, Chief Judge Posner approved a Third Circuit opinion denying female law professors from Harvard and elsewhere leave to file an amicus brief in an abortion case on the ground that their only interest in the case was an academic one, arising from the court's interpretation of the law.[6]

Other traditional criteria in the cases *Ryan* cites are similarly at odds with each other and leave little room for maneuvering. For example, an amicus who questions the approach taken by the party's counsel may nevertheless have to obtain that counsel's consent,[7] unless the amicus is willing to engage in the distasteful and potentially counter-productive task of calling counsel incompetent.[8] Obstacle courses like these can prevent useful amicus briefs from reaching the court. It has been recognized that a partisan interest may befriend the court by providing useful information, even if it benefits only one side. For example, the 1908 "Brandeis brief" in favor of child labor regulation was written on behalf of the National Consumers

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4. *Id.*; *see also* United States v. Gotti, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (ACLU not dispassionate and neutral); David F. Herr & Michael C. McCarthy, *Amici Curiae: Not Just Friends of the Court Anymore*, PRAC. LITIGATOR, May 1998, at 11.

5. *See Ryan*, 125 F.3d at 1063 (citing New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196, 1198 n.3 (1st Cir. 1979)). The amicus was a football coach whose contract was the subject matter of the litigation between the two institutional parties.

It is not forbidden for an amicus to have an interest in the litigation, as long as that interest is disclosed. For example, the United States Supreme Court has recently amended its rule 37.6 to require identification of every "entity . . . who made a monetary contribution to the preparation or submission of the brief."

6. *Ryan*, 125 F.3d at 1063 (citing American College of Obstetricians & Gynecologists v. Thornburgh, 699 F.2d 644, 645 (3d Cir. 1983)).

7. *See* Northern Sec. Co. v. United States, 191 U.S. 555, 555-56 (1903); Fluor Corp. v. United States, 35 Fed. Cl. 284, 285 (1996).

8. *Ryan*, 125 F.3d at 1063; *see also* Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970).

League, although it was nominally filed for the state of Oregon.[9] The American Civil Liberties Union played a role in the 1963 decision adopting the Fourth Amendment exclusionary rule.[10] And on the conservative side, in 1989 the Criminal Justice Legal Foundation used an amicus brief to persuade the Supreme Court to limit retroactivity of a new constitutional ruling.[11]

Some amicus briefs collect background[12] or factual[13] references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case.[14] Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case.[15] Still others explain the impact a potential holding might have on an industry or other group.[16] Amicus briefs give a voice to persons who are not parties but who may be affected by a decision. This is justified because, as the Supreme Court has recognized,

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9. Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 708 (1963).

10. Mapp v. Ohio, 367 U.S. 643, 673 n.5 (1961) (Harlan, J., dissenting).

11. *See* Teague v. Lane, 489 U.S. 288, 300 (1989) (noting that "[t]he question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief").

12. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 830 n.34 (1988) (discussing treatment of juvenile death penalty in other nations, the Court revealed that "[a]ll information regarding foreign death penalty laws is drawn from [the Appendix to the] Brief for Amnesty International as Amicus Curiae . . . and from *Death Penalty in Various Countries*, prepared by members of the staff of the Law Library of the Library of Congress").

13. *See* RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 274 (1988) (argument in Supreme Court about cartoon found in brief of Association of American Editorial Cartoonists that portrayed George Washington as an ass). The Supreme Court subsequently referred to the cartoon in its opinion in *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988).

14. For example, in *Wilson v. Denver*, 1998 NMSC 016, ¶ 18 & n.2, 961 P.2d 153, 159-60 & n.2 (N.M. 1998), the court considered arguments made in an amicus brief by the New Mexico State Engineer concerning proportional voting rights for owners of interests in a ditch, an important issue in a state having pressing water resource allocation problems.

15. In *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 838 (5th Cir. 1989), the Fifth Circuit held that *Soldier of Fortune* was not liable under Texas tort law for publishing an advertisement used to find a contract killer. The court reasoned that the advertisement did not on its face propose a criminal transaction. *Id.* at 836. In holding that there was no liability, the court avoided the First Amendment issues raised in the brief of amici curiae the American Newspaper Publishers Association et al. (brief on file with author).

16. *See* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 606-08 (1984).

decisions do not just belong to the parties but are "valuable to the legal community as a whole."[17] Some judges resent the fact that amicus briefs represent a form of lobbying, but judges who legislate should not be heard to complain about that.

Occasionally, the briefs fit squarely within their "friend of the court" label. The Supreme Court, for example, invited William F. Coleman, Jr. to argue as amicus curiae against tax-exemptions for segregated schools in the *Bob Jones* case after the parties had aligned themselves together in favor of the exemptions.[18]

The danger of Chief Judge Posner's opinion is that federal judges justly concerned with their workloads will rely on any one of the arbitrary criteria discussed in *Ryan*, and in the cases it cites, to deny leave to file amicus briefs. From the practitioner's point of view, the inability to predict when leave will be granted can be the source of acute embarrassment. It is awkward, to say the least, to bill a client for a brief the court refuses to accept.

Historically, the role of amicus briefs has been to provide help to the court that the parties do not provide. As Chief Judge Posner put it, they provide "unique information or perspective" not supplied by the parties.[19] Prior to their amendment in December 1998, appellate rules required simultaneous filing of amicus and party briefs.[20] That means either that the amicus did

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17. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994).

18. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *see also* Ennis, supra note 16, at 609 n.4.

19. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

20. FED. R. APP. P. 29 (as amended through Dec. 1, 1996). Effective December 1, 1998, amended rule 29 provides:

BRIEF OF AN AMICUS CURIAE

(A) WHEN PERMITTED. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(B) MOTION FOR LEAVE TO FILE. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(C) CONTENTS AND FORM. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or

not know in advance what the party would say, or that the amicus would coordinate its briefing strategy with the party in a manner that validated Chief Judge Posner's suspicion that the purpose of the amicus enterprise was to circumvent the court rules limiting the length of briefs.[21]

Fortunately, the recent amendment to rule 29 of the Federal Rules of Appellate Procedure may help both the courts and their amici focus on what the Advisory Committee's Note describes as the "most compelling reason for granting leave," i.e., bringing "relevant matter to the attention of the Court that has not already been brought to its attention by the parties."[22] The rule allows an amicus to wait up to seven days after the principal

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parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities-cases (alphabetically arranged), statutes and other authorities-with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 32(a)(7).

(D) LENGTH. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(E) TIME FOR FILING. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(F) REPLY BRIEF. Except by the court's permission, an amicus curiae may not file a reply brief.

(G) ORAL ARGUMENT. An amicus curiae may participate in oral argument only with the court's permission.

FED. R. APP. P. 29 (as amended Apr. 24, 1998, effective Dec. 1, 1998). See *infra* this issue, at 427, Warren Harris's article discussing the amendments to the Federal Rules of Appellate Procedure.

21. *Ryan*, 125 F.3d at 1064 (effectively extending the length of the petitioner's brief from 45 to 62 pages, and, in Posner's words, "add[ing] nothing to the already amply proportioned brief of the petitioner").

22. FED. R. APP. P. 29 committee note.

brief is filed to file the amicus motion with the brief attached.[23] The amicus brief need not contain all the elements of a party's brief, and it must not exceed half the length of a principal brief.[24] These changes will help amici avoid the repetition that is justifiably the "bane" of Chief Judge Posner and other judges.

In construing the new rule 29, however, the courts should abandon the hodge-podge litany of reasons *Ryan* and its ancestors gave for denying leave. *Ryan* should mark the end of an old era, not the beginning of a new one. Leave to file should not depend on how partisan or interested an amicus is, nor should leave to file depend on how good the parties' lawyers are, nor on whether the parties grant or refuse consent. If the brief otherwise satisfies the rules, leave should be freely granted if the brief might in any way be helpful to any member of the court. Even some repetition should be tolerated on the ground it is easily disregarded. After all, sometimes the most important thing a friend can do is remind you to do what is right.

23. FED. R. APP. P. 29(e).

24. FED. R. APP. P. 29(c), (d).