"Friending" the Court
Using amicus advocacy before the Ohio Supreme Court

By Dennis D. Hirsch

The term "amicus curiae" translates literally to "friend of the court." The ancient Romans used this Latin term to refer to those who, while themselves not involved in the dispute before the court, nonetheless provided it with legal information.[2] The first amicus briefs in England, which date from the 17th Century, helped judges to avoid errors.[3] In 1823, Henry Clay filed the first amicus brief before the U.S. Supreme Court when the Court asked for his views on a Commerce Clause case.[4] In these early instances the term amicus curiae referred to a disinterested party who filed a brief in order to assist the court. This history, and the term "friend of the court," convince some that amici curiae are detached, neutral participants who seek to help the court rather than to further their own interests.

That is not the case. In the years since Clay's brief, amicus parties have become highly strategic advocates who use their briefs to achieve particular interests. Corporations, trade associations, non-profit organizations, public interest advocacy groups and others have employed the amicus brief to put their mark on the law. By the late 1990s, amicus parties were filing briefs in over 90 percent of U.S. Supreme Court cases.[5] In a 2006 survey, many state supreme court justices reported that amicus briefs influenced their decisions.[6] This article describes the principal strategic functions that amicus briefs can fulfill. Where possible, it illustrates them with examples drawn from Ohio Supreme Court decisions.

Amicus participation can begin at the very commencement of an Ohio Supreme Court case. Amicus parties are well-positioned to influence the Court's decision on whether to hear a given appeal. In exercising discretionary review, the Court looks to whether "the case involves a question of public or great general interest."[7] Where a number of amici curiae file memoranda in support of jurisdiction, this can serve as a concrete indication of "public or great general interest" and convince the Court to hear the case. The Ohio Supreme Court opens its doors to amicus participation and does not require amici curiae to obtain leave of the Court in order to file briefs at the jurisdictional or merits stage.[8] At a recent event in Columbus, each of the three featured Ohio Supreme Court Justices (French, Kennedy and O'Neill) expressed their appreciation for high-quality amicus briefs. Justice French pointed out that such briefs are especially useful at the jurisdictional stage since they show that there is more at stake than just the dispute between the parties.[9]

An amicus brief on the merits can explain how the Court's decision will affect those other than the parties themselves.[10] This is one of its most important functions. For example, the case of *Albrecht v. Treon*[11] concerned a coroner who had retained a decedent's brain for forensic examination and testing and then disposed of it. The decedent's next of kin brought suit alleging that they had a right to his body parts prior to disposal. More than seventy-five public offices and counties filed amicus briefs in support of the coroner's office. In holding that the kin did not have rights in a decedent's body parts retained by a coroner for examination and testing, the Court noted that "[t]his case could have implications far beyond simply the parties involved, as is evidenced by the number of amicus briefs that have been filed." [12]

Amicus advocacy can also complement lobbying efforts in important ways. Many organizations – from business trade associations, to non-profit advocacy groups – lobby the legislature. Those who succeed in shaping legislation frequently consider the job complete at that point. They do not focus on the fact that, after the legislature passes a statute, the courts must interpret it, and that this judicial interpretation of statutory language can profoundly affect its meaning. Amicus advocacy at this stage can shape how the courts interpret a statute and so influence the meaning of the legislation itself. It is a valuable addition to successful lobbying.

An amicus party can address aspects of a case that the merits party it favors is not able to treat in its brief.[13] For example, the amicus party could devote its brief to a more in-depth discussion of a particular argument or issue of law; to a state-by-state survey of relevant statutes or case law; to defending against a particular argument leveled by the other side; to the historical background that contextualizes the case; or to a description of the relevant facts that goes beyond that which the merits party was able to provide. Each of these contributions complements and reinforces the merits party's brief. Together, the merits and amicus briefs can prove far more compelling than either one standing alone.

For example, in *Kincaid v. Erie Insurance Co.*,[14] an insured was sued by a person whom he had injured in a car accident. His insurance company settled and dismissed the case against him. The insured then initiated a class-action on behalf of all similarly situated policyholders alleging that the insurance company had failed to compensate him for postage, travel, loss of earnings and other expenses that he had incurred during the time that the company was defending the case. Amici curiae, a group of insurance companies with a strong interest in the outcome of the case, filed a brief in which they showed that the lawsuit was one of a number of similar class actions that the same lawyers had filed seeking to recover small, litigation-related expenses.[15] This cast the case in a different light. In so doing, it may have influenced the Court's ultimate decision to reject plaintiffs' claims for the recovery of their small expenses. This amicus brief, and the insurance company's merits arguments, worked well together and strengthened one another.

This article has illustrated just a few of the ways in which a strategic amicus brief can influence matters before the Ohio Supreme Court and other appellate courts. An amicus brief can also sway appellate courts by providing technical expertise that the amicus party possesses but the merits parties do not; by putting the amicus party's good reputation at the disposal of the merits party by formally endorsing that party's position; by giving the perspective of an entire industry where the merits party presents only that of a single company; by offering the Court a more attractive advocate for a controversial position (e.g. a civil liberties organization arguing as amicus curiae for the free

speech rights of the Nazi Party); or simply by providing a higher quality brief than the merits party was able to produce.[16] In each of these ways, an amicus party can affect the outcome in a case before the Court and so further its own interests. By contributing resources and insights to the matter at hand, amici curiae may also be able to improve the overall quality of appellate advocacy and of the law. Perhaps amicus parties are "friends of the court," after all.

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2. Allison Lucas, Friends of the Court? – The Ethics of Amicus Brief Writing in First Amendment Litigation, 26 Fordham Urban L. J. 1605, 1605 (1999); Reagan Wm. Simpson & Mary Vasaly, The Amicus Brief: How to Write It and Use It Effectively 1 (2010).
3. Simpson & Vasaly, supra note 2, at 1.
4. Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823).
5. Robert L. Stern, et al., Supreme Court Practice 663 (8th ed. 2002).
6. Victor E. Flango, et al., Amicus Curiae Briefs: the Court's Perspective, 27 Just. Sys. J. 180, 185 (2006).
7. S.Ct. Prac. R. 5.02(A)(3).
8. S.Ct. Prac. R. 7.06(A)(1).
9. Federalist Society for Law and Policy Studies, Columbus Lawyers Chapter, Meet the Newest Ohio Supreme Court Justices, Columbus, OH (October 8, 2013).
10. Simpson & Vasaly, supra note 2, at 27.
11. 118 Ohio St. 3d 348, 2008-Ohio-2617, 889 N.E.2d 120.
12. Id., ¶ 2.
13. Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 750 (2000).
14. 128 Ohio St. 3d 322, 2010-Ohio-6036, 944 N.E.2d 207.
15. Id., ¶18.
16. Simpson & Vasaly, supra note 2 at 30-31; Kearney & Merrill, supra note 13, at 750.

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The Art and Constitutional Ramifications of Plea Bargaining

By Jessica G. Fallon

Learning how to work with a prosecutor and a judge to effectively and efficiently represent your client is perhaps one of the most important aspects of being a criminal defense lawyer. While many of us would love to try all of our cases, the hard truth is that over 95% of criminal cases resolve in some sort of plea agreement. It is no secret in our criminal justice system that overcrowded jails, a judge's clogged docket, a prosecutor's overwhelming caseload, and the simple financial resources and time that a jury trial may take, naturally lead to the process of plea negotiation. Throw in that mix that some of the allegations against our clients may be true (*gasp!*) and it becomes clear that plea bargaining can benefit everyone involved when done the right way and for the right reasons.

Let's start with the basics: A plea agreement is a process whereby a criminal defendant and a prosecutor reach a mutually satisfactory disposition of a criminal case, subject to the judge's approval. Plea agreements usually result in either an amendment to a lesser charge or dismissal of some charges in exchange for a guilty plea to other charges. While a prosecutor has no legal obligation to engage in plea bargaining, a defense attorney must at least attempt to engage in plea negotiations at the client's request.

If a prosecutor is willing to discuss possible resolutions to your case, why might your client consider anything less than a dismissal or a "not guilty" verdict? The most obvious reason is the possibility of receiving a lighter sentence for a less-severe charge than gambling with the possibility of losing at trial. Often times, the certainty associated with a plea bargain and the feeling of control that can bring to a client is enough to accept a negotiated plea. There are other, perhaps more practical, incentives for defendant's to accept a plea bargain.

First, litigation can be costly. Between attorney's fees, expert witnesses, and the time that must be taken from work and home, finances are an important consideration. For those defendants who remain in custody during the pendency of a case, getting out of jail may be a main priority. Thus, accepting a plea bargain that includes a "time served" sentence would be in their best interest. Your client may also simply want to resolve a matter quickly to avoid the hassle, social stigma, and publicity related with criminal allegations.

If the prosecutor is amenable to a possible plea bargain and your client is also on board, what are your obligations? Because the Supreme Court[1] has determined that an individual's Constitutional 6th Amendment right to the effective assistance of counsel applies to all aspects of a case, including plea negotiations, you MUST present any and all plea offers the prosecutor may suggest. This is true whether or not you think it is a good offer, or one your client would accept. Before taking a plea offer to your client, you need to be sure to have a full understanding of the facts of your case, what the prosecutor wants, what the sentence recommendation would be (if any), whether the judge would be amendable to such a resolution, and what type of sentence the judge may levy upon your client based on the guilty plea. It is also important that you have a frank discussion with your clients about their options, their chances of prevailing at a trial, and the ramifications that these options could have on their lives.

As defense attorneys we deal daily with plea bargaining. Deciding whether or not to accept a plea offer can be the most important decision your client may ever make. Always try to approach each case with a solid understanding of how a plea bargain may, or may not, benefit your client. Try to convey that understanding as honestly and often as possible. If a plea bargain simply is not in your client's best interest, prep your case for trial and work for that "Not Guilty!"

1. See Missouri v. Frye, 132 S. Ct. 1399 (2012) and Layler v. Cooper, 132 S. Ct. 1376 (2012).

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