Perspectives

Amicus briefing influences Supreme Court rulings

"Amicus curiae: A friend of the court."
-Black's Law Dictionary (6th ed.)

By Marshall H. Tanick

Amicus briefs, filed by so-called friends of the court, have been a staple of appellate litigation for many years. They are especially prevalent at the highest echelons of the judicial process — the U.S. Supreme Court and its Minnesota counterpart.


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But the role of amici has assumed new forcefulness in recent years. Most cases before the U.S. Supreme Court are littered with amicus briefs. While some purport to be disinterested, they generally tend to advance the issues presented by one side or the other. While not filed as frequently at the state Supreme Court level, they also play a supporting role in some of those appellate dramas too.

A pair of recent rulings of the U.S. Supreme Court and the Minnesota Supreme Court underscore the growing prominence of amici in the appellate process.

Affirmative action

The high-profile University of Michigan affirmative action cases highlighted the role of amici before the U.S. Supreme Court. In *Grutter v. Bollinger*, 123 S.Ct. 2325 (June 23, 2003), and its companion case, *Gratz v. Bollinger*, 123 S.Ct. 2411 (June 23, 2003), the Supreme Court received a record number of 107 amicus briefs.

The briefs came from many quarters, including retired U.S. military officers, a collection of top-flight businesses, other colleges and universities, organizations supporting affirmative action, along with a collection of briefs from amici opposing this form of "reverse" discrimination in academia.

The high court, by a narrow 5-4 margin in *Grutter*, upheld the affirmative action admissions program for the university law school, which was based on nonspecific criteria. But, by a 6-3 margin in *Gratz*, the justices struck down the undergraduate affirmative action program, which provided specific "points" to advance minority racial and ethnic candidates, reasoning that it constituted a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

Observers noted the influence that the amici had on the prime ruling upholding the concept of affirmative action in the *Grutter* case.

The oral arguments opposing the affirmative action programs (which included a presentation by Minneapolis attorney Kirk Kolbo, of the law firm of Maslon, Edelman, Borman & Brand) included several references by the justices to the bevy of amici, especially an influential one on behalf of a group of retired high-ranking military officers.

Justices Ruth Bader Ginsburg and John Paul Stevens, both of whom voted in favor of the affirmative action protocol at the law school and for undergraduate admissions, asked about that amicus brief. Ginsburg, in particular, pointedly noted the position espoused by the former military officers that there "simply is no other way" to have an officer corps comprised of an adequate number of minority members "other than to give not an overriding preference, but a plus for race."

Not surprisingly, the arguments of amici made their way into the court's ruling as well. In her majority opinion in the law school case, Justice Sandra Day O'Connor cited liberally to the amici, including the military one, whose views seemed as influential as the caselaw. She noted that the amici briefs demonstrated that the "benefits of affirmative action are not theoretical, but real."

But so did the opponents of affirmative action. In dissenting in the law school case and in the majority opinion in the undergraduate case, the justices made occasional references to portions of the amici briefs that questioned or challenged affirmative action programs, including one filed by the Justice Department, at the urging of President Bush. For instance, Justice Clarence Thomas, dissenting in the law school case, pointed out that amici submitted by law schools "cannot seem to agree" whether a standard law school admission test (LSAT) "itself is useful" in predicting performance.

Amicus approach

The approach by amici want-to-bes to participate in appellate litigation is governed by various procedural rules. At the Supreme Court level, the process is governed by Rule 37 of the U.S. Supreme Court Rules. It encourages any amicus brief that brings to the attention of the court relevant matters not already brought to its attention, which it deems of "considerable help," while frowning on any that does not serve this purpose "and thus burdens the court ... and is not favored."

Consent of the parties or leave of court in general is required to file an amicus brief, either in connection with a petition for a writ of certiorari or in a case that the court has agreed to hear, prior to oral argument. But government entities, ranging from townships to the U.S. government, need not obtain leave to file an amicus brief.

Amici also are permitted at the lower levels of the appellate process. Rule 29 of the Federal Rules of Appellate Procedure governs the process. Except for government bodies, who may file without consent or leave, other amici are required to more clearly identify their "interest" in the case and explain "why an amicus brief is desirable" and the relevance of its views as a condition of leave.

The 8th U.S. Circuit Court of Appeals follows this rule in its own practice. It is one of two federal circuits (the 7th U.S. Circuit Court of Appeals is the other) that publishes all briefs filed since 2000 on the Internet, accessible at www.ca8.uscourts.gov/brfs/brfram.html. A private entity, BriefServe, sells all Supreme Court and Circuit Court briefs dating back to the early 1980s, as does Brief Reporter. They are available at www.briefserve.com and www.briefreporter.com, respectively.

At the state court level, Rule 129 of the Minnesota Rules of Civil Appellate Procedures allows the filing of an amicus brief within 15 days of commencement of the appellate process. It also requires stating "why a brief of an amicus curiae is desirable." Emulating the old saying that "children should be seen and not heard," none of the rules permit oral argument by amici except in the rare instances of court approval.

Amicus briefs also may be tolerated, but are not encouraged, at trial court levels. There are no specific rules of federal or state courts regarding amicus, although they may, on rare occasions be permitted in the discretion of the trial court judge.

Those wishing to participate in trial court proceedings may be better off asking to intervene. Under Rule 24 of the federal and Minnesota rules of procedure, individuals or organizations with an interest in pending cases may be entitled to intervene as a matter of right or with permission of the court. Once they have successfully intervened, the individual or organization is clothed with all rights of a party in litigation. *See Muirhead v. Johnson*, 46 N.W.2d 502 (1951); *Erickson v. Bennett*, 409 N.W.2d 884 (Minn. Ct. App. 1987).

Decisive document

Four days before the affirmative action decisions were issued, a document submitted by an amicus played a decisive role in a ruling of the Minnesota Supreme Court. In *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003), the state Supreme Court relied exclusively upon an amicus brief submitted by the Minnesota Trial Lawyers Association (MTLA).

The case concerned a dispute of coverage under a homeowner's insurance policy. The insured, a daycare provider, was convicted in a bench trial of first-degree assault and malicious injury to a 1-year-old child in the provider's care. The parents then brought a civil lawsuit seeking damages against the daycare provider.

The provider's insurance carrier initiated a declaratory judgment action in Anoka County District Court seeking a ruling that it had no duty to defend or provide coverage under the standard "intentional act" exclusion contained in the policy.

The insurer contended that the exclusion, which exempts from coverage any "occurrence caused by an intentional act of any insured where the results are not reasonably foreseeable," barred recovery of proceeds from the carrier. The Court of Appeals agreed, holding that coverage was barred under that clause.

But the Supreme Court reversed, unanimously holding that the doctrine of collateral estoppel did not bar the civil lawsuit, notwithstanding the criminal conviction. The parents had difficult hurdles to overcome, including the reliance by the carrier upon a comment to section 85 of the Restatement (Second) of Judgments. But the high court brushed aside the Restatement, noting that its provision "does not address the circumstances present here, where the rights of a victim against the wrongdoer's insurance company are concerned."

Instead, the court relied upon two Massachusetts cases, which it found "persuasive." Under the reasoning of those cases, collateral estoppel did not bar the parents from proceeding with their lawsuit because they were not parties to the criminal prosecution. Since they were not parties, or in privity with the state, one of the four requirements for collateral estoppel was not established as a matter of law. Other elements of collateral estoppel, including the identity of issues and the opportunity for "full and fair" hearing also were deemed lacking, although the final element, a final adjudication on the merits, was present.

The court expressly pointed to an amicus brief submitted by the MTLA in support of its ruling. The court, relying on the brief, stated that a "different portion of F85 of the restatement informs our decision." The basis was comment F, which dispenses with collateral estoppel in circumstances involving insurance brought by victims of intentional crimes, as in the *Reed* case. This provision was called to the court's attention by the claimant as well as the MTLA, which was credited by the court for

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rights of a party in litigation. *See Muir-* Perspectives ➢ Page 16

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"direct[ing] our attention" to this position.

The *Reed* case is likely to be significant in future Minnesota tort litigation. removes collateral estoppel as a means by which insurance carriers ca exclude coverage under their policies following a criminal sanction.

Similarly, the Michigan affirmative action litigation, especially in the la school case, is likely to have broad implications. The decision already has le endorsement to affirmative action programs, cutting across a wide swath society, including the private sector businesses, as well as academia.

The role of amici was instrumental in the decisions reached in both ruling The outcome of these cases is likely to encourage even more amici particip tion in future appellate litigation, particularly by institutional and organize interest groups. While normally cast as supporting characters, amici can poi to these two examples of starring roles in cases that probably will be cited the future as stare decisis.

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