PROPER SCOPE OF AMICUS BRIEFS

by Phillip J. DeRosier[1]

When significant issues are pending before a court, especially an appellate court, it is common for interested parties to submit amicus briefs in order to offer their own unique perspective. In fact, one of the many important roles that MDTC serves is to submit amicus briefs in cases impacting its members. And most courts welcome helpful amicus briefs. As the Michigan Supreme Court long ago remarked, "[t]his court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae." *City of Grand Rapids v Consumers' Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). But what is the appropriate role of an amicus brief? May it raise new issues or inject new facts?

The Role of Amicus Briefs

The general rule is that a good amicus brief should strive to assist the court by shedding additional light on the questions before it, and not seek to raise new issues or expand the record on appeal. While it has sometimes been criticized as offering too narrow a view, then-Chief Judge Posner's in-chambers opinion in *Ryan v Commodity Futures Trading Comm*, 125 F3d 1062 (CA 7, 1997), is often cited for its overview of the criteria for a useful amicus brief. In Judge Posner's view, amici should offer "unique information or perspective that can help th[e] court beyond the help that the lawyers for the parties are able to provide." *Id.* at 1063. They should not merely "duplicate the arguments made in the litigants' briefs." *Id.* After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Id.* See, e.g., *WildEarth Guardians v Zinke*, 368 F Supp 3d 41, 59 (DDC, 2019) (denying motion to file amicus brief because it did not offer anything beyond the parties' own briefs).

Limits on Amicus Briefs

There are also specific limits on amicus briefs that most courts recognize. Amicus briefs generally should not raise issues that haven't been raised by the parties. See *Burwell v Hobby Lobby Stores, Inc*, 573 US 682, 721 (2014) ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party."); *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007) ("'Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties.'") (citation omitted).

There is, however, an oft-cited exception for important legal issues or policy questions. See, e.g., *Teague v Lane*, 489 US 288, 300 (1989) (addressing question of retroactivity raised in an amicus brief); *People v Hermiz*, 462 Mich 71, 76; 611 NW2d 783 (2000) (opinion of Taylor, J.) (citing *Teague* and observing that the prohibition against amici raising new issues "is not a hard and fast rule" and that "exceptional circumstances" may warrant it).

One area where Michigan courts and federal courts appear to diverge is when an issue is raised by an amicus and incorporated by a party into its own brief. In *Genova v Banner Health*, 734 F3d 1095 (CA 10, 2013), the Tenth Circuit opined that it would be appropriate for a court to address an argument if "a party has done something to incorporate the argument 'by reference' in its own brief." *Id.* at 1103. Compare that to the Michigan Court of Appeals' decision in *Ile v Foremost Ins Co*, 293 Mich App 309; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012). In that case, the court was critical of an appellant's attempt to "agree [with] . . . and incorporate [] by reference" in its reply brief two arguments raised by an amicus, finding the practice to be "lazy and sloppy." *Id.* at 328. In the Michigan appellate courts, the best practice would be to file a motion seeking to incorporate an amicus brief by reference. The Michigan Supreme Court recently granted such a motion in *People v Tillman*, 504 Mich 894; 928 NW2d 702 (2019).

When it comes to the record on appeal, amicus briefs that seek to "introduce new facts at the appellate stage" are generally disfavored. *Corrie v Caterpillar, Inc*, 503 F3d 974, 978 (CA 9, 2007). However, courts do typically distinguish between adjudicative facts (i.e., case-specific facts) and so-called "legislative facts" (social or scientific studies, statistics, and the like), the latter being commonly offered by amici in support of broad policy arguments. See, e.g., *State ex rel TB v CPC Fairfax Hosp*, 129 Wash 2d 439, 453; 918 P2d 497 (1996) (permitting amicus to offer "scholarly articles and excerpts" in connection with minor's constitutional challenge to her involuntary confinement at a mental hospital).

Conclusion

Amicus briefs can be a helpful resource to courts as they decide the important issues before them, so long as amici don't simply repeat the parties' arguments, raise new issues, or inject extra-record facts.

ABOUT THE AUTHOR

Phillip J. DeRosier is Chair of the Appeals and Advocacy Practice Group and a Member in the firm's Detroit office. He can be reached at 313-223-3866 or pderosier@dickinsonwright.com.

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