Getting Your Amicus Brief Before the Seventh Circuit and Illinois Supreme Court

Convincing the seventh circuit or the Illinois Supreme Court to grant leave to file an amicus curiae brief is hard and getting harder. This article discusses how to maximize your chances.

Imagine that a trade association asks you to represent it as an amicus curiae in an appeal pending before either the U.S. Seventh Circuit Court of Appeals or the Illinois Supreme Court. In contrast to the United States Supreme Court, which routinely allows amicus filings, the seventh circuit casts a cold eye on proposed amicus briefs: since the mid-1990s, it has granted leave to file an amicus brief in fewer and fewer decided cases – by 2010, that number had dwindled to six.

The Illinois Supreme Court likewise has accepted fewer amicus briefs of late and, unlike the seventh circuit, its rules do not permit amicus briefs to be filed by consent. So what do you do in either forum to ensure that your client’s views will be heard?

This article addresses the criteria the seventh circuit and Illinois Supreme Court apply to determine whether to permit a non-party to file an amicus brief. It then suggests approaches to help maximize your chances that the court will agree to accept your client’s amicus brief.


2. This figure is based on a Westlaw search of Seventh Circuit opinions issued in 2010 in which the words “amicus” or “amici” appear, and it includes only those cases where the court granted an amicus leave to file its brief, as opposed to those cases where the amicus was permitted to file based on the consent of the parties, court invitation, or pursuant to the governmental-entities exception of Federal Rule of Appellate Procedure 29(a). To give some perspective to the “six-case” figure, the Seventh Circuit terminated on the merits during the court’s 2009-2010 fiscal year 1,510 cases. See http://www.uscourts.gov/uscourts/statistics/JudicialBusiness2010/JudicialBusinessPdFversion.pdf

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How the courts determine whether to grant leave to file

The seventh circuit and the Illinois Supreme Court have broad discretion in deciding whether to allow a non-party to file an amicus brief. The seventh circuit need only determine that the proposed brief is “desirable,” and the Illinois Supreme Court need only find that the brief “will assist the court.” Under these malleable standards, both courts at one time granted motions for leave to file amicus briefs routinely and without much scrutiny. That was then.

The seventh circuit’s “fish-eyed” scrutiny. Beginning in the mid-1990s, the seventh circuit considerably restricted the ability of potential amici to be heard by that court. Based on then-Chief Judge Posner’s belief that “the vast majority of the amicus briefs he had read ‘have not assisted the judges,’” he concluded: “it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.”

As a result, in order for a proposed amicus to establish that its submission is “desirable” and worthy of “judicial security,” the amicus must offer something new, that is, something not found in the parties’ briefs. “[T]he overriding criterion is whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.”

The court noted that this criterion would more likely be satisfied where a party is “inadequately represented,” or where the proposed amicus is directly involved in another case “that may be materially affected” by the appellate court’s ruling.10 An amicus need not align itself with either side in a case — it may simply be attempting to ensure that its particular interests will not be adversely affected by the appellate court’s ruling.

What makes these organizations unique is their intense focus on their particular group or issue, their deep knowledge of both the history and concerns of that group/issue, and their broader vision of how the litigation could affect their constituency. That unique perspective allows an amicus to illuminate for the court a more panoramic factual context, a ruling’s potential impact on the amicus’s constituency or the public, potential conflicts with public policy, or a different angle on one or more of the arguments in play.

Flesh out the broader factual context. Your client’s unique and deep institutional knowledge may enable you to paint a detailed picture of the broader factual context in which the case fits. Appellate courts purport to focus on legal — not factual — issues. Yet facts matter, not only because the appellate judges may be unfamiliar with the particular industry or practice at issue, but because judges — as people — are naturally interested in the story behind the law. To the extent an amicus can bring the broader story and its underlying equities to life, that adds a new factual layer to the case.

The amicus must chart a course that will keep its brief within the channel of the circumscribed issues on appeal while taking a tack the parties themselves have not.

6. Ryan, 125 F.3d at 1063.
7. Id.
8. NOW, 223 F.3d at 616.
9. Voices for Choices, 339 F.3d at 545.
10. Id. (emphasis added); see also Sierra Club, Inc. v. Environmental Protection Agency, 338 F.3d 316, 318 (7th Cir. 2004) (Easterbrook, J.).
11. These figures are based on a Westlaw search of Illinois Supreme Court cases in which the words “amicus” or “amici” appeared.
12. Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997).
13. An amicus supporting an appellee has greater leeway in what arguments it may make because appellate courts typically may affirm a ruling on any ground supported by the record, even ones not relied on by the trial court. E.g., Stead v. Village of Lisle, 588 F.3d 940, 943 (7th Cir. 2009); City of Chicago v. Holland, 206 Ill.2d 480, 492, 793 N.E.2d 240, 247-48 (Ill. 2003).
14. Perhaps the most powerful and effective recent example of such an amicus brief is the Supreme Court brief filed in Grutter v. Bollinger by 29 former military officers and civilian leaders. Grutter v. Bollinger, Nos. 02-241, 02-516, 2003 WL 1787534, Brief of Amici Ltr. Gen. Julius W. Becton, Jr., et al. (U.S. Feb. 21, 2003); Grutter involved the legality of the University of Michigan’s law school’s use of race as a factor in its admissions process. The amicus brief asserted that race-conscious recruiting and admission standards in colleges and universities were “essential to the military’s ability to fulfill its principal mission to provide national security” (id. at *5), and then spent all but a few pages of that 30-page brief backing up that assertion. Id. at *5-27.
has relied on that practice, or how the practice benefits the public. To illustrate, where a plaintiff claimed that a “pre-screened offer of credit” was merely a sham and offered no real credit to the cardholder, the amici provided a detailed explanation of how those pre-screened offers of credit work, the regulatory scheme which condones and circumscribes the offers, and how those credit offers help consumers who otherwise would be shut out of the credit market.14 The broader context helped legitimize the challenged practices.

Summarizing the historical development of the conduct at issue may also bolster the conduct’s legitimacy. An amicus supporting a financial institution accused of mortgage-servicing misconduct reviewed the history of the Home Owners Loan Act, the regulatory structure that evolved from it, and the subsequent rise of the secondary mortgage industry and mortgage securitizations to establish the bona fides of the defendant’s mortgage-servicing misconduct.

The broader context helped legitimize the challenged practices. An amicus may want to show why – and on a practical level – the issue on appeal may also argue that the harm to the public is direct. Where the anticipated harm is indirect, amici may construct a domino-effect, public harm argument. The surety

Coordinate counsel with the party for whose position your amicus brief will be advocating: your brief should complement – not duplicate – that party’s arguments.

20. Id. at *15-18.
21. Id. at *17; see also Kolbe v. Med. Coll. of Wis., Inc., No. 10-2284, 2010 WL 5808725, Brief of Amici Wisconsin Ass’n of Health Underwriters at *2 (7th Cir. Aug. 27, 2010) (underwriter association argued that recovery of overpayments was critical to the health insurance industry, because the industry had “established a system of prompt payment whereby overpayments are subsequently adjusted following an investigation into coverage”).
24. Id. at 21. See also Kankakee County Bd. of Review v. Property Tax Appeal Bd., No. 102318, 2006 WL 5537028, Brief of Amici Central Ill. Public Serv., et al., at *15-16 (Ill. Nov. 6, 2006) (arguing that the ruling “would likely affect” not only each amicus, but “every public utility and regulated entity” in Illinois, and, potentially, “any person or entity that owns property.”).
27. Cooper Amicus Br. at *19-22. Of course, amici may also argue that the harm to the public is direct. E.g., Messner v. Northshore Univ. Healthsystem, No 10-2514, 2010 WL 6019688, Brief of Amici Consumer Fed. of Am., Inc., et al., at *2-9 (7th Cir. Aug. 9, 2010).
association amicus argued that requiring sureties to file indemnity claims within two years of the filing of the first suit on a performance bond would unleash a waterfall of cascading harm: the shorter limitations period would cause sureties to file their claims before knowing their ultimate obligations, which would lead to increased net losses on surety bonds, which would cause sureties to tighten their bond requirements, which would result in fewer contractors qualifying for bonds, which would reduce competition on public projects, and which ultimately would saddle the public with increased construction costs on public projects.24

Focus on the policies underlying the law. The amicus may also offer a fresh or more expansive look at the public policy arguments. A group of manufacturing associations connected its “policy” and “harm” arguments in arguing that a change of brand constitutes “good cause” to justify termination of a franchise.25

The amicus first argued that the purpose of state “good cause” termination requirements – ensuring that a franchisor not take unfair advantage of a franchisee’s efforts to develop goodwill toward the franchisor’s brand – is not violated where a franchise purchaser substitutes a different brand and trademark, because any goodwill developed applies only to the old brand.26 The amicus then changed tack, arguing that reading the “good cause” requirement to preclude termination in a brand-substitution situation would prevent an industry undergoing consolidation from being able to respond to changing market conditions.27

The American Association of Retired Persons similarly tied its policy arguments to the interests of its constituency. The association argued that it was necessary to apply the collateral source rule to payments made under Medicare to ensure that (a) the rule’s deterrent purpose is achieved, given that personal injury awards for older victims “are usually low,” and (b) Medicare recipients – who, by definition, are over 65 – are treated the same as victims who have private health insurance, given that a Medicare recipient’s recovery is subject to a set-off by the government.28

Conversely, an amicus may want to tie its policy argument to a different group or more abstract policy. In arguing that settling parties should be included in apportioning fault under Illinois’ equitable apportionment of fault statute, a group of large corporations and businesses associations sought to align itself with the overarching policy of “fairness of the civil justice system” rather than focus solely on the unfairness to the deep-pocketed entities they represented.29 A “protect-the-system” policy argument is also apropos where the result the amicus supports appears contrary to the statute’s overarching policy.30

Offer a unique approach to an issue. Harm and policy aside, an amicus may convince a court to accept its brief simply by offering a unique slant on one of the issues on appeal.

On rare occasions, an amicus may make an entirely new argument. A utilities association in an insurance policy declaratory judgment suit thus argued that “the proper scope of coverage rule is dramatically impacted by a [policy] provision that both parties to the appeal fail to discuss.”31

More typically, amicus seeks to stand out by offering a different or more expansive take on an issue which the parties also are addressing. A car manufacturer amicus that sought to reverse an Illinois Appellate Court ruling that applied a California consumer protection statute to an Illinois resident’s claim in a purported multi-state class action chose to ignore Illinois’ choice of law principles and to argue instead that the ruling violated “fundamental, constitutional principles of federalism [ ] embodied in the Commerce Clause, the Due Process Clause, and the Full Faith and Credit Clause.”32

Media groups challenging a dismissal of an appeal of a defamation case on mootness grounds homed in on the critical importance of fee-shifting provisions to effectuate the purposes of an anti-SLAPP statute.33 And amici representing investment companies and large private employers, respectively, argued in an ERISA case challenging the types of mutual funds offered in a defined contribution plan that plaintiffs were improperly focusing “exclusively on the character of the chosen investments, not on the process that led to their selection as options.”34

An amicus may request the court to read a statute more broadly (or narrowly) than either party proposes.35 To bolster its credibility, the amicus may want to include a less extreme, back-up position.

A lawyer’s society did this in arguing that the Fair Housing Act precluded a condominium association from applying a rule which prohibited residents from placing objects in the hallway to bar mezuzahs attached to the residents’ doorframes.36 The amicus first argued that the Act “must be read broadly” to apply “to current homeowners,” not just purchasers.37 The amicus then hedged its bets: “even under a narrow interpretation of the Act which focuses only on sales, the association’s conduct was illegal because it discouraged Jewish families from buying

28. Travelers Amicus Brief at *17-18. See also Kanka-kee Amicus Brief at *17-18 (arguing that higher taxes on pipelines – which natural gas companies cannot avoid due to the pipelines’ inherent lack of mobility – will lead to less investment in new pipelines, a consequent decrease in consumer access to natural gas, and a resulting increase in the cost of natural gas).
30. Id.
31. Id. at p. 10; see also In re River Road Hotel Partners, L.L.C., No. 10-3597, 10-3598, Dkt. No. 28, Brief of Amici Loan Syndications and Trade Assn’s, at pp. 16-24 (7th Cir. Feb. 28, 2011) (corporate lender industry group emphasized Bankruptcy Code’s core purpose of protecting secured creditor’s property interests in arguing against interpretation of cramdown provision that would permit sale of property without “credit bidding”).
34. See, e.g., Marshall Jr. Sch. Dist. No. 2 v. CDN, No. 09-1319, 09-2499, 2009 WL 318473, Brief of Amici Nat’l Sch. Bds. Ass’n, et ano (7th Cir. Sept. 31, 2009) (arguing that withdrawing a previously-covered student’s special educational services for gym class did not violate the Individuals with Disabilities Act, the amicis contended that the withdrawal was consistent with certain “fundamental principles” derived from the Act: avoiding the over-identification of children as needing special education; mainstreaming students identified as needing special education in the least restrictive environment; periodically re-evaluating a student’s need for special education; and affirming the critical role educators play in each arena).
40. Id. at *6-13.
As with the other approaches, a unique perspective on an argument gains traction if the amicus can link that perspective to the circle of interests it seeks to support.

**Additional considerations**

Standing out as a non-party voice worth being heard requires analyzing not only what the parties have said in the briefs below, but the distinctive knowledge and perspective your client can offer. To do this, you must

- work closely with your client to tease out its unique knowledge and perspective and to align your arguments with your client’s goals; and
- coordinate with counsel for the party for whose position your amicus brief will be advocating; your amicus brief should complement—not duplicate—that party’s arguments.

In choosing which issues to address, pick those that have the broadest impact on your client’s interests and goals. Leave for the parties the lesser lights as well as any procedural issues, and give the issue(s) you address a fresh perspective, different spin, or deeper analysis.

It bears repeating: do not merely repeat the arguments of the party your amicus is supporting. The “policy” of the seventh circuit (and likely the Illinois Supreme Court) is “never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties....”

As for tone, strive for the air of an independently minded, albeit passionately interested, friend, not a contentious combatant beholden to one side.

Do read carefully and adhere closely to the court’s local rules as well as Federal Rule of Appellate Procedure 29 or Illinois Supreme Court Rule 345. The seventh circuit is especially scrupulous about both the timing and format of the brief. Filing your brief and motion for leave to file even one day late may mean that all of your hard work will be for naught.

Finally, keep it short. As Judge Posner dryly admonished: “Clarity, simplicity, and brevity are underrated qualities in legal advocacy.” Especially in amicus briefs in the seventh circuit and the Illinois Supreme Court, less truly is more likely to earn a “yes.”

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42. Id. at *13-15.
43. NOW, 223 F.3d at 617.
44. Because these rules continue to evolve, it is important to check the most recent version of the applicable rules. Since December 1, 2010, for example, non-governmental amici in the federal Courts of Appeal must disclose whether “a party’s counsel authored the [amicus] brief in whole or in part,” whether a party or party’s counsel “contributed money” towards the preparation or submission of the amicus brief, and whether anyone other than the amicus, its members or its counsel contributed money to fund the brief’s preparation or submission and, if so, the identity of each such person. Fed. R. App. P. 29(c)(5).
45. The strictness applies with even greater force to amicus briefs filed in support of petitions for rehearing. Since August 2009, an amicus must file its proposed brief in support of a rehearing petition on the “same schedule” as the petitioners (as opposed to seven days after the filing of the petition). Fry v. Exelon Corp. Cash Balance Pension Plan, 576 F.3d 723, 725 (7th Cir. 2009).
46. Illinois Bell Tel. Co. v. Box, 548 F.3d 607, 609 (7th Cir. 2008).

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Vol. 100 #7, July 2012.
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