Federal Judge's Amici Invitation Is A Good Idea, With Caveats

By **Lawrence Ebner** (April 3, 2023)

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News reports indicate that a judge in the U.S. District Court for the Eastern District of Arkansas has issued an order on amicus briefs, to be entered in every civil case pending before him.

The newly issued order from U.S. District Judge Lee Rudofsky states:

> Anyone who is the principal drafter of an amicus brief on either a dispositive motion or a motion for preliminary relief in one of my cases will be guaranteed at least ten (10) minutes of oral argument time so long as the person has been a lawyer for fewer than seven (7) years.

Is holding out this carrot to those the order describes as "junior attorneys" a good idea?

On its face, the answer, of course, is yes. What could be better than a federal judge's open invitation that not only offers junior attorneys the incentive to be the principal authors of a brief, but also the rare opportunity to present oral argument on behalf of an amicus curiae?

Some judges, or their law clerks — even at the appellate level — consider submission of amicus briefs to be a nuisance. But Judge Rudofsky's order states that he invites and is "grateful for amicus briefs in [his] cases."

Although this unusual amicus invitation has much merit, it warrants a closer look.

As the order acknowledges, amicus briefs are "generally not filed at the district court level." Submission of amicus briefs in the U.S. Supreme Court and federal courts of appeals is a well-accepted practice governed by specific rules concerning timing, content and format.[1]

Effective Jan. 1, 2023, the U.S. Supreme Court even amended its rules by eliminating the requirement to obtain the parties' consent, or the court's permission, to file a nongovernmental amicus brief.[2]

As I've previously argued, federal courts of appeals should adopt a similar measure. In district courts, however, permission to file an amicus brief is, and should continue to be, a matter of judicial discretion.

Judge Rudofsky's order wisely preserves judicial discretion by requiring a proposed amicus brief to be attached as an exhibit to a motion for leave to file.

This is an important guardrail because amicus briefs should not be used to present adjudicatory facts or evidence in a trial court, especially at the behest of a party.

In the Supreme Court and federal courts of appeals, the evidentiary record is already set, but this is not so in district courts, especially at the preliminary relief or dispositive motion stages to which the amicus invitation order refers.

Exercise of judicial discretion to accept or reject a district court amicus brief also is consistent with the **cardinal rule** of drafting an effective amicus brief: Avoid repeating the

supported party's legal arguments; instead, say something different.

Along these lines, the Supreme Court's rule on amicus briefs begins by stating:

> An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.[3]

Relevant matter can include, for example, additional legal argument, or discussion of the likely impacts of a proposed ruling on businesses and industries.

Judge Rudofsky's order provides the example of cases involving "really serious issues of constitutional law or statutory interpretation" where "the parties often do not have the necessary time or economic resources to devote to full analyses of the text and history of the provision or provisions at issue."

The order states that Judge Rudofsky's "judicial process and ... decisions would likely benefit from amicus briefing on the original public meaning of the disputed provision or provisions."

Indeed, an amicus brief presenting such an analysis — not provided by the litigants themselves — would serve as a true "friend of the court."

Nonetheless, implementation of Judge Rudofsky's order raises some practical questions from the practitioner's point of view.

First, what exactly does it mean for an attorney with fewer than seven years of experience to be the principal drafter of an amicus brief?

Most junior litigation attorneys are engaged in the yearslong — sometimes decadeslong — process of learning and honing brief-writing skills.

As a matter of professional ethics and quality control, junior attorneys such as law firm associates typically are supervised by partners or more senior attorneys, who review and edit their draft briefs.

As part of a constructive, collaborative learning process, less-experienced attorneys' drafts almost always are edited, often heavily, by their supervisory colleagues, and sometimes by clients.

How much redlining is too much redlining to disqualify a junior attorney from being viewed as the principal drafter of a brief for purposes of the amicus invitation order?

Judge Rudofsky presumably would not want to be presented with an amicus brief that is principally drafted by a junior attorney, but at the expense of much-needed substantive, organizational or stylistic improvements.

Second, who will be the actual amicus curiae? If the amicus party is a nonprofit advocacy group, trade association or individual corporation, will it be amenable to having an amicus brief principally drafted by a junior attorney submitted in its name and on its behalf?

Will the court allow the drafting attorney to submit a pro se amicus brief if they cannot find

an amicus party?

Third, there are economic considerations that may be a deterrent. The order acknowledges that "amicus briefing is a costly and time-consuming endeavor."

Consistent with federal appellate rules, the order states that the "parties in the case may not in any way fund the amicus brief or the drafter's attendance at oral argument."

So will a law firm be willing to allow the principal author of an amicus brief to work pro bono, and also be willing to absorb travel expenses to appear in Judge Rudofksy's courtroom to present a 10-minute oral argument?

Fourth, there is the usual problem of coordinating amicus briefs so that they do not overlap with each other.

Judge Rudofsky's well-publicized order may attract the attention of numerous amici since, as the order explains,

> amicus briefing is great way for more junior attorneys at law firms, non-profits, corporations, and government entities to gain valuable experience, make a good reputation for themselves, and get some oral argument time.

Experienced appellate counsel usually coordinate amicus submissions to avoid or mitigate the problem of overlapping amicus briefs.

Rather than relying on the parties' counsel, Judge Rudofsky should consider implementing his order on a case-by-case basis by identifying the cases where amicus briefing is desired, and the specific topics that amicus briefs should address.

Doing so not only would be helpful to prospective amici and their attorneys, but also would enhance the benefits of the amicus invitation order, and perhaps serve as a model for other district courts to adopt.

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[1] See Sup. Ct. R. 37 & Fed. R. App. P. 29.

[2] See Sup. Ct. R. 37.2 & 37.3 (as amended).

[3] Sup. Ct. R. 37.1.