BY ROSS GREENE, SR/WA

The parties to an appeal are normally limited to the factual record and arguments coming from the lower court case under appeal, and the parties' attorneys focus on the facts and arguments most favorable to their clients. However, there are instances in which people and entities who are not parties to the case will sometimes file briefs with appellate courts, setting out the third party's position and arguments in the case. This kind of third-party legal brief is referred to as an *amicus curiae* brief (or an *amicus* brief, for short). *Amicus curiae* is Latin for "friend of the court."

Historically, there was a legal fiction that the amicus acts as a neutral source of information and not as an advocate. *Amicus curiae* briefs were apparently known in Roman law and were in use early in the history of common law, with their early role being described as "[a] friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge, makes suggestion on a point of law or of fact for the information of the presiding judge." (See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 YALE L.J. 694, FN.2 (1963)). However, in modern usage, this legal fiction has long since disappeared. In the beginning, a lawyer would write the brief or provide the information, thus fulfilling the definition of "friend" of the court. (See Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae,* 49 U. Rich. L. Rev. 361, 369 (2015)). Now, when one refers to the amicus curiae, they are not referring to the lawyer who prepared the brief but to the person or entity on whose behalf the brief is filed; this has been common practice in the United States since the 1930s.

Amicus curiae can make different contributions and have various potential relationships to a case. If one thinks about them considering how they are related to the case, for example, there are those who advocate for one side of the dispute, those who support the other or those who support neither party. Much more rarely, the court sometimes appoints a lawyer as amicus to argue a particular issue or invites a person or group to provide their perspective. If one thinks about amicus curiae and considers the ways they can contribute to a case, they will discover even more examples, given that *amicus curiae* contributions can include but are not limited to the following:

- Providing practical perspectives on the consequences of potential outcomes
- Offering a different analytical approach to the legal issues before the court
- Explaining the broader regulatory or commercial context in which a question comes to the court
- Highlighting factual, historical or legal nuance glossed over or missed by the parties
- Supplying empirical data informing one or another question implicated by an appeal
- Conveying instruction on highly technical, scientific or specialized subjects beyond the ken of judges, who are usually generalists
- Identifying how other jurisdictions — cities, states or even foreign countries — have approached one or another aspect of a legal question or regulatory challenge.

A Brief Overview of Amicus Curiae Briefs

History, usage & pronunciation

The applicable rules and practice for *amicus curiae* briefs also vary depending on the court involved, including due dates, page limits, format, allowed substantive content and even who can file. Some courts require that all of the parties consent to the filing of a brief by a particular *amicus curiae*, some do not.

Amicus curiae briefs are most common in the Supreme Court of the United States and less common in the federal courts of appeals. The rate of *amicus curiae* participation in state courts varies greatly between states. However, even as far back as 1984, one prominent law firm partner argued that "[i]n today's world, effective representation of your client requires that you at least seriously explore the possibility of enlisting persuasive amicus support on your client's behalf." Anderson, 49 U. Rich. L. Rev. at 370 (citing Bruce J. Ennis, SYMPOSIUM ON SUPREME COURT ADVOCACY: EFFECTIVE AMICUS BRIEFS., 33 Cath. U.L. Rev. 603, 604). *Amicus curiae* briefs are particularly common where a case may have broader implications than just to the litigants. Nonprofit entities and professional associations frequently file such briefs, particularly where the implications of the case may impact the entity's membership. IRWA recently filed an amicus brief in the North Carolina Court of Appeals in a case implicating the finality of judgments and settlements in right of way matters. A copy of the brief can be found on the website. To access the brief, visit www.irwaonline.org and click on the Member Resources tab > Publications > Amicus Brief.

Now on to a question that comes up frequently regarding *amicus curiae* briefs, what is the correct pronunciation? The second word, *curiae*, is subject to little debate, and the correct pronunciation is /KYOOR-ee-I/. However, the word "amicus" has some variability in pronunciation. According to Bryan Garner, the traditional and predominant pronunciation is /uh-MEE-kuhs/, and thus the entire phrase is /uh-MEE-kuhs KYOOR-ee-I/. (See Garner, Brian J., *LawProse Lesson #259: Friendly banter about "amicus"*, https://lawprose.org/friendly-banter-amicus/). When lawyers shorten this phrase to amicus or amicus brief, they often pronounce it as /AM-i-kuhs/ which I know, because frankly, that is how I say it. Thankfully, Mr. Garner provides me an out for my variant pronunciation, indicating "[t]his is thought by some to be an error, but many cultured judges say it that way. Branding the variant pronunciation an error would be silly and pretentious. Many lawyers vacillate between the two in daily speech." The plural of *amicus curiae* is *amici curiae*, "friends of the court," and the modern pronunciation of the plural form, amici, in the United States is /uh-MEE-kee/. Apologies to anyone who speaks Italian, but the Italian pronunciation /uh-MEE-chee/ is not used in this legal context. ✪

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