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THE ETHOS OF A FRIEND

By David J. Perlman

If the increasing number of amicus filings with the Supreme Court is any indication, we seem to forget what's self-evident: no one is required to be an amicus. No particular "friend" is obligated to speak, and a court is never obligated to listen. When silence is an option, every supplement to the background cacophony is noise. It's the voice from an unexpected quarter singing the unexpected tune that's arresting.

The problem for an amicus, like many appellate problems, is one of rhetoric —a neglected, even denigrated, subject, once meriting independent study. In his *Rhetoric*, Aristotle identified three modes of persuasion, com-

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COURTS TO AMICI: ARE YOU INTERESTING?

By D. Alicia Hickok and Todd N. Hutchison

You've been approached to file an amicus brief in a pending or potential appeal. What you do next depends on where the appeal is pending. Should you get consent from the parties, or do you need the court's permission? Or can you just file the brief without asking anyone? If you need to file a motion, when do you file it and what do you need to say? And what does this "interest" requirement really mean? Getting the right an-

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EDITOR'S NOTE

This *Appellate Issues* addresses the theme of amicus representation from a rich variety of perspectives.

I am especially grateful to the contributors. Not only did they devote time and effort amidst demanding professional and personal lives, but they met the challenge of writing in a form not ordinarily employed in daily practice.

This endeavor expands the range of both writer and reader. While new technologies of communication flourish, the written word has yet to be supplanted. It remains the touchstone for legal meaning.

David J. Perlman, Editor

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monly referred to as logos, pathos, and ethos. Logos is the appeal to reason, pathos to the emotions, and ethos to the credibility, character, or authority of the speaker.

Aristotle considered logos to be the centerpiece of persuasion. Certainly, a lawyer who understands the syllogism and standard fallacies has a distinct advantage. Generic fallacies have an irrepressible way of cropping up in legal briefs, and anyone practiced in spotting the weeds is well equipped to clear the garden. But for an amicus, it's ethos that calls for special attention. "We believe good men more fully and more readily than others, "Aristotle wrote. "This is true generally whatever the question is and absolutely true where exact certainty is impossible and certainty is divided."

Aristotle's next statement discounts a particular aspect of ethos in favor of his didactic purpose; his point here is that speaking with credibility and authority is a matter of linguistic craftsmanship, which can be learned: "This kind of persuasion, like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak." For purposes of the *Rhetoric*, Aristotle took character to be immutable in order to focus on strategies of speaking. Yet preconceptions do have an impact, especially when remaining silent or selecting a particular speaker is an option.

Lawyers are well aware of this. We might, for example, select one plaintiff over another to litigate an issue intended for appellate review; the technical issue itself may be identical for each plaintiff, but one may garner more sympathy or better highlight the consequences of a ruling. In the amicus context, the speaker's identity is inherently significant. An argument already exists without him; the parties to it are duly recognized. At best, he's shouting from the sidelines. Why listen to self-declared "friends?"

In a recent interview on amicus briefs, the National Legal Director for the ACLU, Steven R. Shapiro, touched on the significance of the speaker's identity. While listing three reasons for arguing as an amicus, another, conceivably more exciting idea sprang to mind. An amicus brief "can be very powerful," he said, "because of the names on the cover almost without regard to what's between the covers."

And likewise, just as ethos can be forceful, it can be deflating. Indeed, for every incremental increase in partisanship, the loss in persuasion is exponential. We may hesitate to admit the diminishing effect of client identity because amicus representation is a growing appellate industry. But the negative side to ethos is suggested simply by scanning the dockets. The positions, and sometimes the arguments, of most amici can be divined from identity alone. It's no surprise, for example, that an assemblage of House Democrats took one side in *Hobby Lobby* and assemblage of House Republicans took the other. The House, of course, was divided.

On the same docket, another name appears: The Foundation for Moral Law. Under the politicized semantics of the day, it's obvious on which side an organization bearing such a name would lend its weight. Predictably, I found the same name on the docket of *Greece v. Galloway*, 133 S. Ct. 2388 (2014), the Establishment Clause case that arose from the town of Greece, New York opening its town board meetings with a prayer. Yet, here, the brief for Moral Law was grouped with respondents, that is, with the challengers to the town.

Naturally, I was intrigued. I dug into the brief. Then, amidst the argument-stream, I realized that something was amiss. It was flowing in the wrong direction. It occurred to me that the designation "in support of Respondent" appearing on the cover page must be a typographical error. But then again, may-

be my own reading experience deserves more credit. Maybe this wasn't such an innocent error but an odd, creative ploy to lure a reader in and actually persuade him.

The very same docket was predictable in another way. For every amicus whose name suggested a religious affiliation, the denomination — or else a declaration of atheism or secularism — was a fair indicator of which side the amicus supported. But there was an exception. And it stood out. The Baptist Joint Committee for Religious Liberty, the Synod of the Church of Christ, and the General Assembly of the Presbyterian Church took a stand against the town of Greece. I read this brief.

These amici present themselves as Christians who "believe that prayer is a voluntary, individual act of worship between the prayer-giver and God." In their view, "…decisions regarding whether to pray — and if so, when, and how — must be made voluntarily by each person, based on his or her own conscience, and not by the government." The argument becomes truly interesting: "It is because of — not in spite of — the importance of prayer and religion that *amici* object to 'the fusion of governmental and religious functions.'" The identity of the speaker means everything.

Efforts to transcend partisanship and self-interest, to bolster credibility — in a sense, to masquerade in a false identity— fall flat, at best. Sometimes, the major players are the most vulnerable. The Defense Research Institute, which has adopted its acronym, DRI, is forthright on its cover page. It states that it's the "voice of the defense bar." But, of course, it has a problem. By its very nature, it's impelled to argue for limiting liability and restricting plaintiffs' rights. This was its position last term before the Supreme Court.

In *Lexmark v. Static Control*, 134 S. Ct. 1377 (2014), a Lanham Act standing case, it argued for the most restrictive standing test, for which Lexmark had independently argued as a second alternative. *Pom Wonderful v. Coca-Cola Company*, 134 S. Ct. 2228 (2014) was another Lanham Act standing case. A pomegranate juice maker sued Coca-Cola for adding a trace of pomegranate and blueberry to a mixture of grape and apple juices and then labeling the product "Pomegranate Blueberry." Again, DRI followed the defendant's doctrinal lead. It argued that two other federal statutes governing labeling foreclosed a private right of action for a misleading label under the Lanham Act.

In a third case, *Halliburton v. Erica v. John Fund*, 134 S. Ct. 2228 (2014), DRI did something remarkable in context and rhetorically commendable. *Halliburtan* threatened to wipe out securities class actions by eliminating the fraud-on-the -market theory. Here, DRI did not follow Halliburtan and argue for effectively eliminating securities class actions by overruling *Basic v. Levinson*, 485 U.S. 228 (1984). Instead, it took the more moderate position —assessing, perhaps, that it was the more realistic one. It argued that fraud on the market is a rebuttable presumption for defendants to challenge at the class certification stage.

Yet, in each of these briefs, DRI, conscious of its problem, couldn't resist trying to shake itself of its acknowledged defense affiliation, and in so doing, it diminished its credibility. The Interest of Amicus sections of both the *Lexmark* and *Pom Wonderful* briefs state: "DRI has long been a voice for a fair and just system of civil litigation, seeking to ensure that it operates to effectively, expeditiously, and economically resolve disputes for litigants." Thus DRI presents itself as a manifestation of fairness, justice, and judicial efficiency. To be sure, you'd know it when you see it and see it when you know it. But … shucks, I missed the Kool-Aide.

Somehow, DRI felt the prick of this self-inflicted wound. For in *Halliburton*, the effort to alter identity

was consciously restrained. DRI exercised more rhetorical craftsmanship. The corresponding *Halliburtan* statement (similar to statements DRI uses elsewhere) recognizes its defense orientation, and on a literal plane, casts DRI as another participant in a dialogue striving for fairness and efficiency: "DRI seeks to address issues germane to defense attorneys, to pro-mote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, effi-cient, and — where national issues are involved — consistent."

An improvement, undoubtedly, but still, this invocation of aspirational ideals claims too much — advocacy in favor, and even on behalf, of such ideals. The rhetoric is still one of self-anointment. Tinker as it might, that voice — the voice of the defense bar — is what it is. Cloaking itself in the proclaimed glory of a greater enterprise, it will never cut a compelling figure. The mantle's too big. (Sorry, can't forget: it's the voice of the defense bar.) Perhaps there's a compulsion to counterbalance the organization that would co-opt ideals by fiat of a name-change — once, the American Trial Lawyers Association, and now, today, the American Association for Justice.

But the stage here is an amicus brief. There shouldn't be a need to prop oneself in the heavens. Chances are, the attempt will expose how distant you remain.

A classic example of a persuasive amicus brief is Carter G. Phillips' in the affirmative action case *Grutter v. Bollinger*, 538 U.S. 306 (2003). It's the brief that came to Steven Shapiro's mind when he said that some briefs derive their power merely from the amici's identity. In this brief, amici were 29 former high-ranking officers and civilian military leaders. Among them were battle commanders and superintendents of military academies. Their background entitled them to the highest respect, both as individuals and as a group, and not just in the context of the case, but in society generally. Also, their credibility was unimpeachable on the functioning of the military and the impact of diversity on the military's performance. Finally, they weighed in on the side that would be the less expected of the two; they spoke in favor of affirmative action even though the political center of gravity within the military leadership falls more on the conservative than the liberal end of the spectrum.

And then, their argument was unique. But it was unique not because their lawyers wanted to promote arguments that the parties had overlooked or that seemed to require a more nuanced exposition. It was unique precisely because of the amici's identity; they spoke from experience on the subject for which they were the highest authority. Boiled down to its essence, their argument was that diversity in the officer corps was necessary for the military to defend the nation. It was a pragmatic argument. And it was ethos that propelled it beyond the familiar caverns of doctrinal discourse.

Equally exemplary is an amicus brief in *Association of Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013). In this case, the issue consisted of four words: are human genes patentable? Myriad, having isolated two genes linked to breast cancer, held patents for them. While a Myriad competitor might have challenged the patents' validity, counsel was alert to the power of ethos. Since the petitioners were medical professionals involved in genetic testing, they were a compelling voice for the adverse effects of a monopoly on cancer research, cancer screening, and cancer patients. They were victims but not economic victims. Their motive in the litigation was more sympathetic than Myriad's, and a prospective competitor's, profit motive.

While the *Grutter* amicus brief gains authority from the number of amici, thereby establishing a consen-

sus among revered military leaders, the exemplary amicus brief in *Myriad* derives its authority from the eminence of a singular individual — Dr. James D. Watson, the co-discoverer of the double-helix structure of DNA. The Table of Authorities alone says much about the brief; of the 14 items listed, only two are cases, and half are authored or co-authored by Watson. This fact both attests to Watson's authority and signals that the argument won't be legal.

Immediately after the Table, at the end of the short opening paragraph of the Interest of Amici Curiae section, the first citation appears. It functions as an exclamation mark. Meanwhile, the preceding two sentences establish Watson's unimpeachable authority simply through a declaration of fact:

> *Amicus curiae* James D. Watson, Ph.D., is the co-discoverer of the double helix structure of deoxyribonucleic acid ("DNA"). For this discovery, he and his colleague, the late Francis Crick (along with the late Maurice Wilkins for related work), were awarded the Nobel Prize in Physiology or Medicine in 1962. *See* James D. Watson, *The Double Helix* (1968).

Even more stunning than the Interest of Amici Curiae section is the first paragraph of the next section, the Summary of the Argument; after the prior section's description of Watson's preeminent qualifications, the prose suddenly breaks into the first person. Instantly, this very same historic figure materializes. He's here, entering his appearance, an advisor to the Justices and their clerks:

> A gene conveys information — the instructions for life. As a product of nature, a human gene's primary purpose is to encode the information for creating proteins, enzymes, cells and all the other components that make us who we are. I explained much of this when I submitted my amicus brief to the appeals court, but that court was unpersuaded. So I reiterate what I told the appeals court: Life's instructions ought not to be controlled by legal monopolies created at the whim of Congress or the courts.

The professorial, slightly exasperated tone of those initial first-person sentences might have been condescending or offensive. After all, Watson's saying: "I tried explaining things before, but the Federal Circuit didn't listen; so, I'm try again with you, Supreme Court." But Watson is qualified to assume a pedagogical posture regarding this subject, and further, even enhances his authority by unabashedly rising to the lecture stage that's his due.

Then, the passage's final message, momentarily dropping the first person pronoun, gains authority from sage-like simplicity: "Life's instructions ought not to be controlled by legal monopolies created at the whim of Congress or the courts." Here, both sound and diction reinforce ethos. The Johnsonian balance of sibilants and hard "c's" carries the ring of authority. Similarly, the characterization of the legal determinations of Congress and the courts as mere "whims" imposed on the reality of nature casts Watson as the extra-legal advisor that he is.

Yet, remarkably, it's that earlier, unexpected intrusion of the first person that renders this general thesis both credible and congenial. One need only conduct a rhetorical experiment. Read the passage without the first person sentences. The final pronouncement becomes just that: yet another club to which assertive lawyers ask their brief-weary readers to submit.

When I spoke to him on the phone, Counsel of Record on the brief, Matthew J. Dowd, described it as a collaboration with Watson. His goal was to avoid

another, repetitive "me too" brief, thereby observing the recommendation of Supreme Court Rule 37(1) (which is echoed in the Committee Notes to Federal Rule of Appellate Procedure 29). The first-person pronoun instantly furthered this goal by uniqueness alone.

But it went deeper. Although Rule 37(1) requires that amicus briefs be filed by a member of the bar, it seemed senseless, Dowd said, to submit a brief on behalf of a Nobel prize-winning scientist nominally written by an attorney. The decision to use the first person singular irrevocably planted the collaboration in the compelling, complex, personal voice of Dr. James D. Watson.

Like Phillips' brief in *Grutter*, the Watson brief also responds to Rule 37's not-too-subtle prod to say something new and different by offering the amicus' extra-legal perspective. Perhaps only Watson could write, as he does at the beginning of the Argument section: "The opinions [in this case] admirably describe the scientific details of DNA and human genes, but the opinions by the appeals court miss the fundamentally unique nature of the human gene." In the succeeding sentences, he ever so slightly veers away from science:

> Simply put, no other molecule can store the information necessary to propagate human life the way human DNA does. It is a chemical entity, but DNA's importance flows from its ability to encode and transmit the instructions for creating a human being.

This statement, factual though it is, carries a value judgment — the idea that DNA's unique importance stems from its fundamental connection to the propagation of human life. Coming from Watson, this key idea carries special power. Our reception of it would be more ho-hum, matter-of-fact if the speaker were a spiritual leader whose starting premise was that human life, and perhaps life in general, is sacred.

Yet the brief still portrays Watson as a scientist, though a multi-faceted one. He describes the discovery of DNA's structure in both historical and the genuinely personal terms that he alone is capable of utilizing. He also touches on the social history of genetics; he decries the eugenics movement, and, anticipating what is pertinent in the Supreme Court setting, decries Justice Holmes' regrettable conclusion that "three generations of imbeciles are enough." At the same time, and significant to the patent issue, he foresees curing disease through genetic engineering.

He craftily moves more deeply into the messy territory of values, but he does so still through the vehicle of history and from a direction opposite to his own; he recounts the early fear of DNA research and the accusations that researchers were treading on sacred ground — that they were playing God. Then, he affirms his scientific standing while, also, implicitly reaffirming the uniqueness of human DNA: "We were not playing God, but that is what many people thought — not because of who we were but because we were working with the instructions for creating human life."

Concluding the argument on the unique significance of the human DNA molecule, Watson refrains from being lured beyond the field of authority he credibly created and inhabits:

> A human gene is a product of nature and is more than simply a fragment of a longer DNA polymer. A human gene's patentability cannot depend simply on whether a covalent bond is broken during purification. Human genes — unlike any other chemical composition — reveal information that can be important in life-or-death situations. The information contained

> in our genes lets us predict our future. With a gene sequence in hand, we can know with some degree of certainty whether we will develop cancer, a neurological disease, or some other malady. This information should not be monopolized by any one individual, company or government.

Watson's argument has two additional extra-legal branches. As a co-discoverer of the double helix, as one of the originators of the Human Genome Project, and as the National Institute of Health's Director of the Project, he is suited to speak on the Project's multinational, public character and the importance of its fruits remaining in the public domain. Additionally, he's an especially credible voice for the argument that patenting human genes isn't necessary to promote scientific research, and in fact, would inhibit research, particularly research having medical benefits.

While it's clear from the Watson brief that he long ago objected to patenting genes — he resigned from NIH over the issue — and that other scientists also objected, it's far from obvious that scientists in general would object to patentability. After all, respondent Myriad Genetics relied on science to isolate the genes associated with breast cancer, and patents in general yield financial rewards to scientific discoveries having practical applications. To uninformed laymen, it might seem that science would be more aligned with what Watson's brief refers to as the "myopic" view, the idea that DNA has much in common with other molecules, than with the idea that DNA is unique, and even awe-inspiring, precisely because of its relationship to life. To some extent, like the *Grutter* amici, Watson speaks against a grain of expectation, even if locating a general, public expectation is an inexact, subjective science. And yet — as in *Grutter* — while the amicus argument cuts against currents of expectation, its expression is completely natural, for it springs from the only source qualified to make it.

Amidst the over-supply of amicus filings, other excellent briefs have surfaced and gems remain to be discovered. Among these is satirist P. J. O'Rourke's exemplary, if inimitable, free speech brief in *Susan B. Anthony List v. Driehaus*, No. 13-193 (Sup. Ct. June 16, 2014). The brief is fully loaded. Its sentences are torpedoes. They're devastatingly effective. Here, it's the satiric tone that's unexpected.

And so attorneys might ask, is this writing appropriate? Does it lack the proper decorum for the United States Supreme Court? But as a matter of ethos, it's befitting an author holding the title "H. L. Mencken Research Fellow," affiliated with his co-amicus, the Cato Institute. Indeed, precisely **because** of O'Rourke's voice, sounding off on free speech, it's virtually impossible to insulate yourself from its potency by taking a high road. Up there, in that fussy ether, you're liable to skewer yourself unwittingly.

In an "experiment" Supreme Court practitioners Goldstein & Russell recently filed what they dubbed a "true" amicus brief. The firm has no client and no interest in the case. Its goal is to offer the Court useful factual information. Specifically, the brief analyzes an ambiguity within a collective bargaining agreement, but instead of focusing on the agreement at issue — the parties' battle — it focuses on a host of other agreements, conceivably impacted by, and so influential to, a ruling. Worthwhile as this experiment may be, this is a brief of a different order. Its "truth-value" (to adapt Goldstein's term) stems from its **not** being advocacy — although a brief of this sort might soon become the subject of contention.

Along more conventional lines, Apple Inc. thought about ethos in *Highmark Inc. v. Allcare Health Management Systems*, 134 S. Ct. 1744 (2014). The case concerned the standard for awarding attorneys fees to

the prevailing party in patent infringement litigation, and, of course, the phenomenon of patent trolls. While it was predictable that Apple would favor a lower standard, one more threatening to unfounded claims and patent trolls, still Apple is in a position to portray itself in a way that enhanced its credibility. As a shrewd understatement, Apple — being Apple — is able to claim in its very first sentence that "…it is widely considered to be the country's leading innovator in its field."

Apple could also make a credible declaration of neutrality:

> Apple has seen these [patent] disputes from both sides — one day taking on a copycat and the next defending itself against a patent holder alleging infringement. Apple therefore has a strong interest in the U.S. patent system….

Thus, instead of filing in support of Petitioner, Apple filed "in support of neither party" and, without promoting a specific rule, argues that the Federal Circuit set too high a bar in light of the reality of patent trolls. Although the iPhone might be superfluous, as a matter or rhetoric, Aristotle would approve.

More than anything else, it's his ancient concept of ethos that drives the best amicus briefs. It's ethos that expands the argument beyond the legal domain. It's ethos that engenders plain, and sometimes elegant, English. Ethos might grab a judge. It can rivet a clerk. It might launch ideas from an obscure docket into the public sphere. When silence is an option, even a norm, ethos counts.

And so, ultimately, what is the ethos of a friend? Ironically, the answer was well known all along. It lies within the ethos of a friend — and sometimes in the province of a friend alone — to say what his readers least expect to hear.

Those amicus briefs: they need some work.

[1] *Practice note: an implanted typo may also operate to extend the deadline. Sup. Ct. R. 37(3)(a).*

...Continued from page 1: Courts to Amici: Are You Interesting?

swers to these questions can help save you time, help you tell your client's story, and possibly help you avoid the court's anger. In this article, we focus on the primary requirement for amicus curiae briefs in most jurisdictions – that the amicus articulate its "interest" in submitting a brief. These requirements – and many useful others – are summarized in appended Tables A through C, which compile information from the fifty states, the District of Columbia, and the federal appellate courts.

Federal Rule of Appellate Procedure 29 discusses the "interest" of an amicus in two places: in (b), describing the contents of a motion for leave to file, which must set forth both "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case," and in (c)(4), in which one of the required elements of any amicus brief is a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file.

Thirty-nine states and the District of Columbia likewise include an express requirement in their rules that an amicus identify its "interest." *See*