# PBA Federal Practice Committee

## Cases, News & Updates

April 2014

### The Do's and Don'ts of Federal Practice: Avoiding Mistakes that Lead to Waiver

The PBA Federal Practice Committee is providing four CLE programs in the western part of the state in the month of June. The programs will cover a number of tips for attorneys who appear in federal courts. Attorneys can earn 2 substantive CLE credits. The programs will be held in the following four locations:

**Tuesday, June 17, 2014**
9:00—11:30 a.m. Washington County Bar Association
2:00—4:30 p.m. at the Beaver County Bar Association

**Thursday, June 26, 2014**
9:00—11:30 a.m. Westmoreland County Bar Association
2:00 — 4:30 p.m. U.S. Federal Courthouse in Johnstown

### SAVE THE DATES

**May 7 - 9, 2014 ◆ Third Circuit Judicial Conference**
Hershey, Pennsylvania. For more information, go to http://www.ca3.uscourts.gov/save-date

**May 14 - 16, 2014 ◆ PBA Annual Meeting**
Hershey Lodge, Hershey, PA

**May 15, 2014 ◆ Federal Practice Committee Meeting**
2:30 - 4:00 p.m. Hershey Lodge, Hershey, PA

**June 17, 2014 or June 26, 2014 ◆ The Do's and Don'ts of Federal Practice: Avoiding Mistakes that Lead to Waiver**

### Judicial Vacancies

#### U.S. District Court, Eastern District of Pennsylvania

Gerald McHugh, Jr. and Edward G. Smith were confirmed by the Senate on March 31. Five vacancies remain. No other nominations are pending.

#### U.S. District Court, Western District of Pennsylvania

There are three vacancies.

#### United States Court of Appeals for the Third Circuit

Cheryl Ann Krause was nominated on 2/6/2014. Her nomination is pending in the U.S. Senate. One other vacancy still exists.

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### Do you have ideas for a CLE program in your area?

Let the Chair know if you would like us to host a local CLE program in your area, either independently or jointly with your local bar. We are prepared to present our "Tips and Traps" program and are exploring other program topics. The committee is interested in providing educational programs wherever interest exists.

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### On Pages 2-3

Summaries of the most interesting federal practice precedential opinions issued by the United States Court of Appeals for the Third Circuit from January through March, 2014.

***United States v. Marrero***, 743 F.3d 389 (3d Cir. 2014).

In *Marrero*, the Third Circuit considered whether prior convictions of simple assault and third-degree murder constituted crimes of violence for purposes of the career offender Guideline. There, Defendant Ricardo Marrero appealed his judgment of sentence after pleading guilty to two counts of bank robbery. He claimed that the District Court erred in classifying him as a "career offender" under § 4B1.1 of the United States Sentencing Guidelines, a classification issued to him based upon his conviction for three crimes of violence: (1) third-degree murder under 18 Pa. Cons. Stat. Ann. § 2502 (c); (2) simple assault under 18 Pa. Cons. Stat. Ann. § 2701(a)(1); and (3) the bank robberies in the instant case. At the outset of its analysis, the Third Circuit noted that Marrero could not properly be designated a career offender unless both of his state convictions were "crimes of violence." The Court, therefore, engaged in analysis of both of his prior convictions.

The Court first concluded that Marrero's simple assault conviction was a crime of violence. It analyzed that conviction under the "residual clause," which refers to offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another", since the crime of assault was not enumerated in the Guidelines. In reaching its ultimate conclusion, the Court noted that Marrero's admission that he placed his hands around his wife's neck and attempted to pull her up a flight of stairs constituted intent to cause bodily injury, which the Court had previously held qualified as a crime of violence. The Court then concluded that Marrero's conviction for third-degree was also a crime of violence. In doing so, it compared the elements of his murder conviction to the generic definition of murder, and held that the meaning of third-degree murder under Pennsylvania law "substantially correspond[ed] to the generic definition." Because both of Marrero's state convictions qualified as crimes of violence under U.S.S.G. § 4B1.2, the Court ultimately concluded that he was properly designated a career offender under U.S.S.G. § 4B1.1. The District Court's judgment of sentence was affirmed.

***In re Grand Jury Subpoena***, No. 13-1237, 2014 WL 541216 (3d Cir. Feb. 12, 2014).

In *In re Grand Jury Subpoena*, Corporation and Client (together, "Intervenors") were the targets of an ongoing grand jury investigation into alleged violations of the Foreign Corrupt Practices Act. The grand jury served a subpoena on Intervenors' former attorney ("Attorney") and the Government moved to enforce this subpoena and compel Attorney's testimony, based upon the crime-fraud exception to the attorney-client privilege. Intervenors sought to quash the subpoena by asserting the attorney-client privilege and work product protection. After questioning Attorney *in camera*, the District Court found that the crime-fraud exception applied and compelled Attorney to testify before the grand jury. Intervenors appealed, challenging the District Court's decision to conduct an *in camera* examination, the procedures it fashioned for the examination, and the court's ultimate finding that the crime-fraud exception applies.

The Third Circuit affirmed the order of the District Court enforcing the grand jury subpoena, holding that the standard announced in *United States v. Zolin*, 491 U.S. 554, 572 (1989), applied to determine whether to conduct an *in camera* examination of a witness. The Court also found that that the District Court did not abuse its discretion in applying that standard, in determining procedures for the examination, or in ultimately finding that the crime-fraud exception applied.

***In re Emoral, Inc.,*** 740 F.3d 875 (3d Cir. 2014).

In *In re Emoral, Inc.*, the Third Circuit considered whether personal injury causes of action arising from the alleged wrongful conduct of a debtor corporation, asserted against a third-party non-debtor corporation on a "mere continuation" theory of successor liability under state law, are properly characterized as "generalized claims" constituting property of the bankruptcy estate. The underlying facts of the case stemmed from the bankruptcy of Emoral, Inc., a chemical manufacturer that produced diacetyl (a chemical used in the food flavoring industry). Prior to Emoral's bankruptcy, Aaroma Holdings LLC ("Aaroma") acquired certain assets and assumed certain liabilities from Emoral. Potential liability associated with diacetyl exposure was not part of the asset purchase. The bankruptcy trustee later entered into a settlement agreement with Aaroma, in which all causes of action belonging to the bankruptcy estate against Aaroma were released.

At issue in this appeal was whether successor liability claims by individuals who claimed personal injury as a result of diacetyl exposure (the "diacetyl plaintiffs") against Aaroma are "generalized claims" that are property of the estate (and were released as part of the settlement), or "individualized claims" that may still be brought against Aaroma. The Court concluded that the claims are estate property because they are generalized claims shared by all creditors. The Court reasoned that the diacetyl plaintiffs' only cause of action against Aaroma was based upon a successor liability theory and not for any allegations of personal injury (since Aaroma did not purchase those potential liabilities and does not manufacture diacetyl).

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***Sharif v. Picone***, 740 F.3d 263 (3d Cir. 2014).

In *Sharif*, Plaintiff Iman Sharif appealed from a jury verdict in favor of several Northampton County Prison officers on his § 1983 excessive force claim. On appeal, Sharif argued that the District Court erred in admitting evidence of his prior plea of nolo contendere and resulting conviction for assault in connection with the incident that was at the heart of his § 1983 claim. He contended that Rule 410 of the Federal Rules of Evidence prohibited the admission of his nolo plea and that Rule 609 prohibited the admission of his resulting conviction.

The Third Circuit agreed with Sharif and vacated and remanded the case for a new trial. On his Rule 410 claim, the Court concluded that the admission of his plea of nolo contendere was not harmless error. It noted that the District Court clearly ruled that the nolo plea should be admitted, and used by the jury, to assess Sharif's credibility because his trial statement was inconsistent with his previous nolo plea. The Third Circuit concluded that this was incorrect, reasoning that a significant basis for prohibiting the evidence of the plea is the fear that it could be improperly viewed as an admission, which is how the District Court viewed it. As to Sharif's Rule 609 claim, the Court concluded that the admission of his resulting conviction was also not harmless error. In its rationale, the Court noted that Sharif's testimony was critical to his claim, as it was his account against the accounts of those accused of the wrongdoing. The Court concluded that, by admitting the additional conviction, along with other convictions that had already been admitted, the District Court made it nearly impossible for any juror to believe Sharif's version of the events.

## RESOURCES

**Pennsylvania Bar Association** www.pabar.org

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**Federal Judicial Center**
http://www.fjc.gov/federal/courts.nsf

**U.S. District Court, Middle District of Pennsylvania**
http://www.pamd.uscourts.gov/

**U.S. District Court, Eastern District of Pennsylvania**
http://www.paed.uscourts.gov/

**U.S. District Court, Western District Pennsylvania**
http://www.pawd.uscourts.gov/

## Amicus Curiae Briefs in the U.S. Court of Appeals for the Third Circuit and the Appellate Courts of Pennsylvania: The Essentials

**Donna M. Doblick, Esq.**

In litigation where the stakes are high—either in financial terms or because the case is apt to establish a precedent that will significantly impact persons other than the litigants—it is common for one or both of the parties to solicit amicus curiae briefs. From the perspective of the putative amicus who is approached to weigh in on an appeal, participating in this way can be desirable. A well-crafted amicus brief can be a powerful and a cost-effective way to influence the development of the law without the downsides of being an actual party to, or intervenor in, litigation.

Although an amicus may not, of course, raise issues on appeal that have not been raised and preserved by the parties themselves, a well-thought out amicus brief can: put the legal questions before the court in a broader context (*e.g.*, historical or societal); elaborate on arguments in ways that space constraints may have limited the parties from doing; or supply the court with technical or specialized data or other information that may not be readily available to the court or the parties. A good amicus brief also can highlight the systemic impact that extending the law in a particular way is likely to have on an entire industry or an entire class of litigants.

It is common to see an amicus brief that has been filed on behalf of several interested persons, entities or organizations. Not only is there "power in numbers," but soliciting several amici to sign off on a single brief can be a particularly cost-effective way of making an impactful statement. This is especially true in today's world of prevalent alternative fee arrangements, since amicus brief tend to lend themselves nicely to fixed fee or capped fee arrangements with outside counsel.

More often than not, a lawyer for one of the parties decides to seek assistance from potential amici while the appeal is already underway and the clock therefore is already ticking. Under those circumstances in particular, it is imperative that the lawyer appreciate the timing and other logistical rules attendant to amicus participation so that she and the putative amici whose assistance she is trying to enlist can evaluate up-front whether deadlines and other circumstances will give the amici's lawyers—who, after all, may not be following the case and may not be familiar with the critical arguments—time to get up to speed and then craft a brief that is persuasive and not redundant.

This article and the accompanying chart set forth the essential rules governing amicus briefs in the appellate courts of Pennsylvania and the U.S. Courts of Appeals, including in particular, the Third Circuit. Although I make several references herein to the practices of other U.S. Courts of Appeals, always be sure to consult those courts' local rules.

*Donna is a Pittsburgh-based partner in the Appellate Group of Reed Smith LLP. She has extensive experience handling the appeals of complex commercial cases in the appellate courts of Pennsylvania and in nearly every U.S. Court of Appeals throughout the country. Donna also consults on and drafts amicus briefs in the state and federal courts of appeals.*

| | U.S. Courts of Appeal | Appellate Courts of Pennsylvania |
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| Does an amicus have a right to file a brief without first obtaining leave of court? | Generally, no. Fed. R. App. P. 29(a) provides that "[t]he United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing."<br><br>In the Third Circuit, a motion for leave to file an amicus brief can be heard by a single motions judge. *See* 3d Cir. L.R. 27.5, Committee Comments. | Generally, yes. Pa. R. App. P. 531(a) provides that "[a]nyone interested in the questions involved in any matter pending in an appellate court" may file an amicus curiae brief.<br><br>This presumptive right to file an amicus brief also applies when the Supreme Court of Pennsylvania has accepted a certified question of state law from a federal court. Pa. S. Ct. I.O.P. 10C(4).<br><br>The right to file an amicus brief conferred by Pa. R. App. P. 531 specifically *excludes* Petitions for Allowance of Appeal to the Supreme Court. |
| What should an amicus establish in its motion for leave to file a brief? | A motion for leave to file an amicus brief *must be accompanied by the proposed brief itself,* and must state (1) "the movant's interest;" and (2) "the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). | No rule governs the criteria a putative amicus must satisfy in those instances where it does not have the right to file a brief. The amicus would be well-served, however, by hewing closely to the requirements of the federal rule. |
| When is the amicus brief due? | If (as in most cases) the amicus brief supports a party, the brief (and, if required, the motion for leave to file the brief) must be filed within seven (7) days after the principal brief of the party whose position it supports is filed. If the amicus does not support either party, its brief must be filed and served no later than seven (7) days after the appellant's/petitioner's principal brief is filed. Fed. R. App. P. 29(e). | If (as in most cases) the amicus supports the position of a party, the brief must be filed and served "in the manner and number required and within the time allowed by these rules with respect to the party whose position" the amicus brief supports. Pa. R. App. P. 531(a)(1). If the amicus does not support any party's position (*e.g.*, if the court itself requested amicus participation), the brief must be filed and served when the appellant's brief is due. *Id.*<br><br>*See* Pa. R. App. P. 531(2) for the rules that apply when the parties have elected to proceed using the large record/deferred brief method. |
| Does the amicus have the right to file a reply brief? | No. Fed. R. App. P. 29(f). | No. Pa. R. App. P. 2113 provides that the appellant and, in the case of a cross-appeal, the appellee, may file a reply brief. "No further briefs may be filed except with leave of court." Pa. R. App. P. 2113(c). |
| Does the amicus have the right to participate in oral argument? | No. Fed. R. App. P. 29(g). | No. Pa. R. App. P. 531(b). Also note that the rule provides that "[r]equests for leave to present oral argument . . . will be granted only for extraordinary reasons." |

| | U.S. Courts of Appeal | Appellate Courts of Pennsylvania |
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| Is the amicus required to make disclosures about contributions to the brief? | Yes. Unless the amicus is the federal/state government, Fed. R. App. P. 29(c)(5) requires the amicus to include a statement that indicates whether: "(A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person – other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."<br><br>"A party's or counsel's payment of general membership dues to an amicus need not be disclosed." Fed. R. App. P. 29(c)(5), Advisory Committee Notes (2010). | No. |
| Are there limits on the length of an amicus brief? | Yes. Unless leave of court is received, an amicus brief "may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Fed. R. App. P. 29(d). In the typical case, this means an amicus brief is subject to a 7,000-word limit. *See* Fed. R. App. P. 32(a)(7)(B)(i).<br><br>In the Third Circuit, the statement required by Fed. R. App. P. 29(c)(4) ("a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file") does not count toward the word limit. 3d Cir. L.R. 29.1(b).<br><br>An order expanding the type-volume limitation for a party's principal brief *does not* automatically expand the type-volume limit on an amicus brief. Fed. R. App. P. 29(d). | The rules are not entirely clear about this. Pa. R. App. P. 531(a) provides that an amicus may serve its brief "in the manner . . . allowed by these rules with respect to the party whose position . . . the amicus brief will support." Pa. R. App. P. 2135 (as amended Mar. 27, 2013) provides, in turn, that a party's principal brief shall not exceed 14,000 words. Thus, although a page limit is not expressly stated in the rule governing amicus briefs, one should assume that the "manner" of filing a brief includes the Rule 2135 type-volume limit. Accordingly, an amicus should seek leave of court before filing a brief that exceeds 14,000 words. |

| | U.S. Courts of Appeal | Appellate Courts of Pennsylvania |
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| May an amicus support efforts to obtain rehearing or rehearing en banc? | The Federal Rules of Appellate Procedure do not expressly regulate the circumstances under which an amicus may support an effort to obtain rehearing by the panel or en banc. Several U.S. Courts of Appeals do, however, regulate this practice by local rule or precedent.<br><br>If there is no local rule, the provisions of Fed. R. App. P. 29 apply. *See* Fed. R. App. P. 29(e), Advisory Committee Notes (1998) (noting that a court may permit an amicus to file in support of a party's petition for rehearing).<br><br>In the Third Circuit, if panel rehearing or rehearing en banc is granted *and* the Court permits the parties to file additional briefs, the amicus must file its brief as per Fed. R. App. P. 29(c). 3d Cir. L.R. 29.1. If the Court does not direct any additional briefing, a new amicus may file its brief "within 28 days after the date of the order granting rehearing." *Id.*<br><br>Note that the Third Circuit's local rule governing amicus participation at the rehearing stage expressly requires the amicus "to attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding unnecessary repetition or restatement of those arguments in the amicus brief." 3d Cir. L.R. 29.1(a). | No. Pa. R. App. P. 2544 provides that reargument (by the court en banc) is sought by application, not by a motion accompanied by a brief, and Pa. R. App. P. 2544(b) provides that "no separate brief in support of an application for reargument will be received."<br><br>The Superior Court's internal operating procedures (I.O.P. § 65.39) similarly provides that reconsideration by the panel should be sought by petition, not by a motion accompanied by a brief. |

A few aspects of the chart are worth some additional commentary and explication. Not surprisingly, the rules governing amicus participation vary between the state and federal courts of appeals. For example, as a threshold matter, keep in mind that one can file an amicus brief in the Superior, Commonwealth, and Supreme Courts of Pennsylvania without first seeking leave of court, whereas leave of court typically will be required in the U.S. Courts of Appeals (unless all parties consent to the filing). In federal court, the motion for leave to file an amicus brief must be accompanied by the proposed brief itself, and must state the movant's interest, why it would be desirable to permit the brief, and why the matters are relevant to the disposition of the case. Fed. R. App. P. 29(b). Most of the U.S. Courts of Appeals, including the Third Circuit, are generally receptive to amicus briefs. *E.g., Neonatology Assocs. v. Comm'r, Internal Revenue Service,* 293 F.3d

128, 133 (3d Cir. 2002) (Alito, J.) (the Court should grant a motion for leave to file an amicus brief if Rule 29's criteria, "as broadly interpreted," are satisfied). Some Circuits, however, (namely, the Seventh, and Judge Posner in particular) are predisposed *not* to permit amicus participation. *See, e.g., Voices for Choice v. Illinois Bell Telephone Co.,* 339 F.3d 542 (7th Cir. 2003) (Posner, J.). Other Circuits will not permit an amicus to participate if doing so would cause a judge to recuse himself or herself. *See, e.g.,* 2d Cir. L. R. 29.1(a); 5th Cir. L.R. 29.4; D.C. Cir. Handbook, Part IX(A)(4); *Hydro Resources, Inc. v. U.S. E.P.A.,* 608 F.3d 1131, 1143 (10th Cir. 2010).

The operative deadlines for the filing of amicus briefs also vary. In state court, an amicus typically is due the same day as the principal brief of the party the amicus is supporting; in federal court, amici have a seven (7)-day grace period. This one-week lag is supposed to give the amicus time to review the brief of the party it is supporting and thereby "avoid repetitious argument." Fed. R. App. P. 29(e), Advisory Committee Notes (1998). Although the courts can extend those deadlines for good cause shown, keep in mind that litigants have a right to reply to any arguments made in an amicus brief. It thus is unseemly at best, and futile at worst, for an amicus to seek leave of court (federal or state) to file an amicus brief after the briefing has closed (or worse still, after the court has heard oral argument or taken the case under submission). Moreover, a Note to Pa. R. App. P. 531 provides that, if an amicus "cannot comply with the requirements of this rule because of ignorance of the pendency of the question," it may seek relief pursuant to Pa. R. App. P. 105(b) (enlargement of time for good cause shown). Query whether the wording of this Note permits an amicus in state court to seek an enlargement of time for reasons *other than* "ignorance of the pendency of the question."

*A well-done amicus brief can be the court's friend and your client's friend as well.*

It is most common to see amicus participation at the merits briefing stage, and the federal and state rules are primarily drafted with that circumstance in mind. If you are considering seeking amicus support at some different stage of the appeal, be sure to closely read the rules—including the local rules of the particular U.S. Court of Appeals you are in—in order to evaluate early on whether you are on a fool's errand. For example, a putative amicus does *not* have a right to file a brief in support of a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, and the Supreme Court is highly unlikely to grant a motion for leave to file an amicus brief at that stage.

Similarly, a close reading of the Pennsylvania Rules of Appellate Procedure reveals that a putative amicus does not have a right to file a brief in support of an application for reargument (en banc), either. In both Pennsylvania and the federal system, the deadline for filing an amicus brief is tied to the deadline for the filing of the party's principal *brief*. However, in Pennsylvania, reargument before the full court is sought by *application*, not by a motion accompanied by a brief. *See* Pa. R. App. P. 2544. Indeed, Rule 2544(b) expressly provides that "no separate brief in support of an application for reargument will be received." This

prohibition on briefs means that the Prothonotary *will not even accept* an amicus brief tendered in support of an application for reargument, regardless of whether all parties have consented to its filing.

In federal court, rehearing and rehearing en banc also is sought by petition, not by a motion supported by a brief. Although the Federal Rules of Appellate Procedure do not expressly prohibit amicus briefs in support of a petition for rehearing or rehearing en banc, several of the Courts of Appeals have local rules (or precedent) governing this practice; some of the Circuits prohibit amicus participation at this stage altogether; others regulate it. *See, e.g.*, D.C. Cir. L.R. 35(f); *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 458 F.3d 359, 361 (4th Cir. 2006); 7th Cir. L.R. 35; 9th Cir. L.R. 29-2(a); 10th Cir. L.R. 29.1; Fed. Cir. L.R. 35(g) and 40(g). Moreover, precisely because rehearing is sought by petition, not by a motion and a brief, at least one Court of Appeals has held that the seven-day grace period set forth in Fed. R. App. P. 29(b) for filing an amicus brief *does not apply* in the context of a petition for rehearing. To the contrary, the Seventh Circuit concluded that an amicus who wants to file a brief in support of a petition for rehearing or rehearing en banc must use the same schedule as the petitioner itself. *Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723 (7th Cir. 2009) (Easterbrook, C.J.). If the potential amicus needs more time, it must ask the *litigant* to seek an extension of time for filing *its petition*. *Id.* Although the Third Circuit has not expressly endorsed that construction of Fed. R. App. P. 29(e), prudence dictates that the amicus get its brief (and, if needed, a motion for leave to file it) on file as quickly as possible—ideally, long before seven days have passed—especially since the Court moves quickly on rehearing petitions. *See* 3d Cir. I.O.P. 8.1, 8.2, 9.5.

Lastly, if soliciting amicus support in the U.S. Courts of Appeals, be cognizant of the recent (2010) amendments to Fed. R. App. P. 29(c), which impose significant transparency requirements on putative amici curiae. Specifically, all amicus briefs filed in the U.S. Courts of Appeals must expressly advise the Court whether an attorney for a party helped write the brief, and whether anyone (including a party, a party's attorney, or any other person) helped defray the costs of preparing the brief. This disclosure requirement "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs," and "also may help judges assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." Fed. R. App. P. 29(c)(5), Advisory Committee Notes (2010). Note, however, that mere "coordination between the amicus and the party whose position the amicus supports" need not be disclosed. *Id.*

In sum, a well-done amicus brief can be the court's friend and your client's friend as well. Before you solicit amicus participation, however, it behooves you to be aware of the rules governing amicus involvement in your jurisdiction, so you can be fully conversant about the deadlines the organizations whose help you are seeking can expect to face, the risk (in some circumstances) that the court may not accept the filing at all, and the information (if any) the amici will be expected to disclose. With those "nuts and bolts" well in-hand, you can then devote your energies to working with the amici to map out the arguments most likely to advance your cause.