

1999

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Recommended Citation

Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 Fordham Urb. L.J. 1605 (1999).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol26/iss5/12>

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FRIENDS OF THE COURT? THE ETHICS OF AMICUS BRIEF WRITING IN FIRST AMENDMENT LITIGATION

Allison Lucas*

The bane of lawyers is prolixity and duplication. . . . In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.¹

Introduction

In March 1993, James Perry, armed with an AR-7 rifle, strangled a quadriplegic, eight-year-old boy, and shot to death the boy's mother and his nurse in Rockville, Maryland.² Perry was a contract killer hired by the boy's father, who was interested in the almost \$2 million award that the boy had won in a settlement for injuries that had left him paralyzed for life.³ In preparing for and committing these murders, Perry followed – almost to the letter – a book entitled *Hit Man: A Technical Manual for Independent Contractors* (“*Hit Man*”), a 130-page “how-to” on murdering and becoming a professional killer.⁴ Perry was convicted in 1996 of capital murder, and subsequently the victims' families filed a civil lawsuit against Paladin Press, the publishers of *Hit Man*, for aiding and abetting the murders.⁵

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1. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, C.J.).

2. *See Perry v. Maryland*, 686 A.2d 274, 276 (Md. 1996).

3. *See Rice v. Paladin*, 128 F.3d 233, 239 (4th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3558 (U.S. Apr. 20, 1998) (No. 97-1325). Paladin settled the case in May, 1999. *See infra* note 5.

4. *See Perry*, 686 A.2d at 279.

5. *See Paladin*, 128 F.3d at 241. The case settled May 21, 1999, when Paladin Press agreed to a “multimillion-dollar settlement” with relatives of the three people murdered. *See Ruben Castaneda & Scott Wilson, “Hit Man” Publisher Settles Suit; Littleton Made First Amendment Defense Dicey*, WASH. POST, May 22, 1999, at A1. In addition to that part of the settlement, Paladin agreed to make contributions to two

The district court granted Paladin summary judgment, and in the appeal that followed, a host of media lawyers submitted an amicus curiae brief urging affirmation of the lower court decision.⁶ What followed was not only a reversal of summary judgment, but also a stunningly harsh critique of Paladin Press by Judge Luttig in the Fourth Circuit for its potentially critical role in the murders.⁷ Luttig also scolded the media organizations and their lawyers who zealously advocated on behalf of Paladin Press.⁸

The example above is only one among many cases in which the legal community and the community-at-large have become wary of enthusiastic support thrown behind a defendant, especially in situations where the defendant's conduct is egregious and the outcome is legally significant. This Note seeks to explore the ethics of writing amicus briefs, specifically in defamation and privacy cases where the conduct of defendants may seem indefensible to many mainstream journalists and their attorneys. By using two recent First Amendment cases, *Rice v. Paladin* and *Khawar v. Globe, International*,⁹ it will illustrate the potential conflicts and usefulness of writing such briefs. Part I will discuss the history of amicus curiae briefs, their purposes and cases where amicus briefs have been particularly helpful or persuasive for judges. It will also discuss Chief Judge Richard Posner's recent move to limit their use in the Seventh Circuit. Part II will discuss *Paladin* and *Khawar* and also review cases in which there was a strong public sentiment against the application of First Amendment protections to particular speech. Part III will analyze the debate on each side, arguing that despite the outrageous conduct of a media defendant, it is proper for other media lawyers to continue the practice of amici submissions. However, even though there is a moral obligation to continue representing a client in such cases, the scores of people in the media and general public may be justified in feeling that media organizations should not rush to defend any and all media conduct for which a publisher might be liable. This Note will conclude that

charities chosen by the plaintiff, and to give the plaintiffs the remaining 700 copies of the book. *See id.*

6. *See* Brief of ABC, Inc., et. al. as Amici Curiae, *Rice v. Paladin* 128 F.3d 233 (4th Cir. 1997) (No. 96-2412) [hereinafter ABC Paladin Amicus Brief] (on file with the *Fordham Urban Law Journal*). For further discussion of the amicus briefs, see part II, *infra*.

7. *See Paladin*, 128 F.3d 233 *passim*.

8. *See id.* at 265.

9. 965 P.2d 696 (Cal. 1998).

despite these justifications, it would be a bad precedent to start dismissing amicus concerns.

I: The History and Policies of Amicus Brief Writing

A. History of the Amici

Some scholars suggest that the use of amicus curiae is rooted in ancient Roman law,¹⁰ where the amicus was usually court-appointed and offered non-binding opinions on law unfamiliar to the court.¹¹ However, the role for which amicus briefs are known today became a common practice in England by the 17th Century.¹² The function of the amicus curiae at common law was a form of oral "shepardizing," the bringing up of cases not known to the judge.¹³ In this role, the amicus submission originally was intended to provide a court with impartial legal information that was beyond its notice or expertise, which is where the name amicus curiae, or "friend of the court" is derived.¹⁴ In many cases, the amicus was a bystander who acted on behalf of infants, and also called attention to manifest error, to the death of a party to the proceeding, and to existing applicable statutes.¹⁵ The amicus did not need to be an attorney, and the general attitude of the courts was to welcome such aid, since "it is for the honor of a court of justice to avoid error."¹⁶

The courts expanded amicus participation in the eighteenth and nineteenth centuries. Judges and attorneys alike appointed themselves amici and advised each other in client representation,¹⁷ overcoming the problem of representation of third parties in common lawsuits.¹⁸ In England, this expanded participation also included

10. 1 BOUVIER'S LAW DICTIONARY 188 (Rawle's 3d ed. 1914), cited in Judith S. Kaye, *One Judge's View of "Friends of the Court"*, N.Y. ST. BAR J., Apr. 1989, at 8, 9.

11. Comment, *The Amicus Curiae*, 55 N.W. U. L. REV. 469, 469 n.3 (1960).

12. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1964).

13. See *id.*

14. See Alexander Wohl, *Friends with Agendas*, A.B.A. J., Nov. 1996, at 46.

15. See Krislov, *supra* note 12, at 695.

16. *Id.* (citing *The Protector v. Geering*, 145 Eng. Rep. 394 (Ex. 1656)).

17. See Krislov, *supra* note 12, at 696.

18. See *id.* Problems of representation of third party interests under the common law system were plentiful. The complex federal system meant not only that state and national interests were conflicted, but also that an even greater number of conflicted public interests were potentially unrepresented in the courts of private suits. *Id.* at 697-99. Courts, "where obvious injustice would be caused by lack of representation, allowed outsiders to intervene generally by exercise of what was called 'the inherent power of a court of law to control its processes.' . . . [O]ften the court merely extended

taking sides. For example, in *Coxe v. Phillips*,¹⁹ an amicus represented a spouse's interests in an action on a promissory note, despite the fact that he was not party to the suit.²⁰

This pattern followed in the United States as well, where the amicus moved from being a friend of the court to a friend of a specific party. The practice started in the United States in the nineteenth century to address concerns of collusion between two adversaries.²¹ "The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented. . . . [T]he institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy."²²

Over the last century and a half, some courts have insisted on neutrality from an amicus,²³ and others have accepted only limited advocacy.²⁴ However, the majority of courts recognize that amici need not be completely disinterested, and an amicus "who takes a legal position and presents legal arguments in support of it [fulfills] a perfectly permissible role."²⁵

B. The Current Amici Curiae

There is little doubt that amicus briefs have shaped the law. The most visible court to be influenced by amici has been the Supreme Court, and one of the most influential amicus curiae has been the American Civil Liberties Union ("ACLU").²⁶ For example, in 1961 the ACLU convinced the Supreme Court to apply the exclu-

the privilege of filing a brief 'by leave of the court.'" *Id.* at 699 (quoting *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884)).

19. 95 Eng. Rep. 152 (K.B. 1736).

20. *Id.* The amicus in this case not only had the action vacated, but also was able to convince the court that the two parties involved were collusive, and had them found in contempt of court. See *Krislov, supra* note 12, at 696-97.

21. See *Green v. Biddle*, 21 U.S. 1 (1823) (granting amicus request for rehearing, due to nonrepresentation of state interests).

22. *Krislov, supra* note 12, at 704.

23. See *Central Hanover Bank & Trust Co. v. Saranac River Power Corp.*, 278 N.Y.S. 203 (1935) (refusing to consider an amicus brief because it was partisan).

24. See *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991).

25. Gary F. Smith & Beth E. Terrell, *The Amicus Curiae: A Powerful Friend for Poverty Law Advocates*, CLEARINGHOUSE REV. 772, 776 (Nov.-Dec. 1995) (quoting *Funbus Sys. Inc. v. California Pub. Util. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986)). A more detailed discussion of the history of amicus briefs is beyond the scope of this discussion. For a comprehensive discussion of this topic, see generally *Krislov, supra* note 12.

26. See Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 L. & POL'Y 161 (1987).

sionary rule, previously applied only in federal actions, to the states.²⁷ From 1961 to 1966, the ACLU participated as amicus curiae in such groundbreaking decisions as *Gideon v. Wainwright*,²⁸ *Escobedo v. Illinois*²⁹ and *Miranda v. Arizona*.³⁰ During a twelve-year period from 1969-1981, the ACLU participated in forty-four percent of all criminal cases in which an amicus brief was filed.³¹

There are many other circumstances in which the Court has used amicus briefs to shape its opinions. In *Romer v. Evans*,³² Justice Kennedy's opinion seemed to accept the argument offered by Professor Laurence Tribe of Harvard and several other constitutional scholars, that a Colorado amendment constituted a *per se* violation of the equal protection guarantee under the Fourteenth Amendment.³³ In three separate antitrust cases in the Supreme Court's 1991-92 term, amici seem to have influenced the court.³⁴ And, from 1981 to 1989, the Securities and Exchange Commission ("SEC") filed briefs on the merits as amicus in nine Supreme Court cases - the SEC's views were adopted by the Court in eight of those cases.³⁵

27. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

[N]either of the principal litigants raised the issue of the exclusionary rule in their briefs or at oral argument, [but] the ACLU [in its amicus curiae brief] had asked the Court to find that evidence which is unlawfully and illegally obtained . . . not be permitted into a state proceeding and that its production is a violation of the Federal Constitution, the Fourth Amendment and Fourteenth Amendment. We have no hesitancy about it, because we think it is a necessary part of due process.

Ivers & O'Connor, *supra* note 26, at 163.

28. 372 U.S. 335 (1963) (holding that the Sixth Amendment right to trial includes the right to effective assistance of counsel).

29. 378 U.S. 478 (1964) (excluding evidence on a finding that denying an accused person's request for assistance constitutes a denial of the right to assistance of counsel).

30. 384 U.S. 436 (1966) (excluding statements of a defendant when procedural safeguards effective to secure the Fifth Amendment privilege against self-incrimination were not used).

31. See Ivers & O'Connor, *supra* note 26, at 168. In the 1998-99 term, the ACLU submitted 16 amicus curiae briefs to the Supreme Court. See ACLU Web Site (visited June 25, 1999) <<http://www.aclu.org/court/summ-95.html>>.

32. 517 U.S. 620 (1996) (striking down a Colorado voters' initiative that barred enactment of the state and local laws or regulations protecting homosexuals from discrimination).

33. See Wohl, *supra* note 14, at 48.

34. See Stephen Calkins, 61 ANTITRUST L.J. 269, 269 (1993) (discussing the role that amici played in *FTC v. Ticor Title Ins.*, 504 U.S. 621 (1992), *Morales v. TWA*, 504 U.S. 374 (1992), and *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992)).

35. *Id.* The court accepted the SEC's views in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), *Pinter v. Dahl*, 486 U.S. 622 (1988), *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377 (1983), *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 682-83 (1985),

The use of amicus briefs has flourished in local courts as well. In *Polaroid v. Travelers Indemnity Co.*,³⁶ even though the Massachusetts court ultimately rejected the amicus corporation's position, the court remarked that it found the brief to contain "the most comprehensive and instructive argument" on appellant's behalf.³⁷ The *Polaroid* court also indicated that the presence of amicus briefs prompted them to address issues they might not otherwise have addressed.³⁸ In several cases, courts have indicated that the views of amici influenced their opinions.³⁹

Currently, courts have found briefs so effective in a variety of types of litigation that some judges have even requested that certain advocates submit briefs.⁴⁰ For example, in Massachusetts, the Supreme Judicial Court has requested amicus briefs in connection with its advisory opinions to the legislature.⁴¹ In recent years, the Appeals Court in Massachusetts requested an amicus brief in at least two cases (both raising landlord-tenant issues).⁴² During a five and one half year period, about 200 cases in the Supreme Judicial Court of Massachusetts involved amicus briefs.⁴³

1. *Reasons for amicus submission*

There are several reasons why amicus briefs are requested. First, an amicus curiae can furnish a statewide or national perspective to show the legal or social consequences that a decision could have.⁴⁴ Second, it can be used to explain how a regulation or statute at

Gould v. Ruenfenacht, 471 U.S. 701, 702 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Bateman Eichler, Hill Richards Inc. v. Berner*, 472 U.S. 299, 300 (1985) and *Randall v. Loftsgaarden*, 478 U.S. 647, 649 (1986). The court declined to adopt the SEC's position in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). See *id.*

36. 610 N.E.2d 912 (Mass. 1993) (upholding insurers' refusal to settle pollution claims of insured).

37. *Id.* at 920 n.15.

38. See *id.*

39. See, e.g., *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 231 n.1 (1st Cir. 1992) (adopting recommendation of amici); *Harris v. Capitol Growth Investors XIV*, 805 P.2d 873 (Cal. 1991) (adopting an amici's point that plaintiff's interpretation of a statute would generate massive expenses within the states's business communities).

40. See E. Susan Garsh & Joanne D'Alcomo, *Role of the Amicus Brief*, MASSACHUSETTS CONTINUING LEGAL EDUCATION, APPELLATE PRACTICE IN MASSACHUSETTS §§ 17, 17.3 (1996).

41. See *id.*

42. See *Poncz v. Loftin*, 607 N.E.2d 765, 766 (Mass. 1993); *Jinwala v. Bizzaro*, 505 N.E.2d 904, 904 n.1 (1987).

43. Garsh & D'Alcomo, *supra* note 40, at § 17.3.

44. See *id.*

issue fits within a larger regulatory or statutory framework.⁴⁵ Third, the amicus can furnish additional information to describe how a particular industry operates.⁴⁶ Often, an amicus may have more familiarity with an issue on appeal than the parties themselves.⁴⁷ Finally, it can apprise the court of the details of another case pending in the system posing related issues.⁴⁸

For these reasons, the use of amicus briefs in appellate and Supreme Court litigation has exploded since the nineteenth and early twentieth centuries. In the 1995-96 term, amicus briefs were filed in nearly ninety percent of the cases the Supreme Court decided;⁴⁹ by contrast, during the 1980-81 term, seventy-one percent of the Court's cases decided by opinion had amicus filings, and only thirty-five percent of the cases decided in the 1965-66 term included such briefs.⁵⁰ In the 1998-99 term, ninety-five percent of cases argued before the Supreme Court had at least one amicus filing.⁵¹ The numbers are even more dramatic than they appear, since it is common for several amicus organizations to file briefs in a given case.⁵²

2. *Amicus Procedures*

Both federal and state courts usually are lenient about granting motions for leave to file an amicus brief. The showing that a proposed amicus must make is minimal; it is much lower than the threshold that must be met for intervention by a third party.⁵³ An intervenor must serve a motion that states the grounds for intervention and accompany a pleading setting forth the claim or defense for which intervention is sought.⁵⁴

In the Supreme Court, the rules for submitting amicus briefs are simple. An amicus brief submitted before the Court's consideration of a writ of *certiori* may be filed if accompanied by the written

45. *See id.*

46. *See id.*

47. David G. Knibb, *FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE US COURT OF APPEALS* § 29, 29.14 (3d. ed. 1997).

48. *See* Garsh & D'Alcomo, *supra* note 40, at § 17.3.

49. *See* Wohl, *supra* note 14, at 46.

50. *See* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

51. This statistic is based on a review of 90 cases argued before the Supreme Court this term.

52. *See* Ennis, *supra* note 50, at 603.

53. A party may intervene as a matter of right, or by permission. FED. R. CIV. P. 24(a)-(b).

54. *See* FED. R. CIV. P. 24(c).

consent of all parties, or if the court grants leave to file.⁵⁵ An amicus brief may also be filed in a case before the Court for oral argument if accompanied by the written consent of all parties, or if the Court grants leave.⁵⁶ The briefs must indicate whether counsel for a party authored the brief in whole or in part, and must identify every person or entity, other than the amicus curiae, who made a monetary contribution to the preparation or submission of the brief.⁵⁷ The rules are the same in the Federal Courts of Appeals.⁵⁸ One of the key limitations that courts have enunciated through opinions, is that an amicus may not raise issues that the parties could have but did not.⁵⁹

The rules of submitting amicus briefs in state courts vary with each state. For example, in New York State, an amicus party must satisfy the court that at least one of the following criteria has been met: (1) the parties are not capable of a full and adequate presentation, and the movant could remedy that situation; (2) the movant would invite the court's attention to law or arguments that might otherwise escape its consideration; or (3) an amicus brief would otherwise be of special assistance to the court. In addition, an amicus brief may not introduce new issues, but may only relate to the issues raised by the parties.⁶⁰

C. Limiting The Use Of Amicus Briefs

In 1989, Judge Judith Kaye (then Associate Judge of New York State's Court of Appeals – now Chief Justice) wrote her views on the worth of amicus briefs.⁶¹ She praised the Court of Appeals' expressed interest in receiving amicus curiae submissions,⁶² and said that despite the transformation from "selfless servant[s] of his-

55. See S. CT. R. 37.2(a).

56. See S. CT. R. 37.3(a).

57. See S. CT. R. 37.6. An exception is made for a brief written on behalf of the United States. See S. CT. R. 37.4.

58. See FED. R. APP. P. 29.

59. See *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1979) (refusing to consider arguments not raised by the parties); *Preservation Coalition Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982) (refusing to consider, on appeal, issues raised by parties below, but not amicus).

60. See N.Y. COMP. CODES R. & REGS. tit. 22 § 500.11(e) (1998).

61. See Kaye, *supra* note 10, at 9.

62. See *id.* The Court of Appeals amended its rules in 1988 so that when the court each week informed the public about its new filings, it also issued the following invitation to interested persons: "The subject matter of the newly filed cases may suggest appropriate motions and participation which the Court welcomes." *Id.*

tory" to their advocacy role today, "the amicus curiae . . . retain[s] the mark [of] a friend."⁶³

Eight years later, Judge Kaye's words were challenged. In *Ryan v. Commodity Futures Trading Commission*,⁶⁴ Judge Posner denied a motion for leave to file an amicus brief because the brief would repeat arguments made by a party.⁶⁵ In a short opinion, Posner argued that closer scrutiny of such briefs was necessary because the vast majority of amicus briefs did not materially assist the judges in deciding the case at hand.⁶⁶ He noted several situations where an amicus brief should normally be allowed.⁶⁷ The first situation is when a party is not represented at all. The second is when the amicus has an interest in some other case that may be affected through the decision in the present case (though not affected enough to entitle the amicus to intervene and become a party in the present case). The third is when the amicus has unique information or perspective that can help the court more than the litigants' lawyers can.⁶⁸ "Otherwise, leave to file an amicus curiae brief should be denied."⁶⁹

Other scholars argued Judge Posner's point long before the *Ryan* decision. Two law professors assert that in certain areas, such as social science, amicus briefs are too often designed to persuade rather than inform the court, and thus, the attorneys are not guided by scientific norms of neutrality and objectivity, but by the ideology of advocacy.⁷⁰ "The desire to win the case encourages the amici to distort or ignore any damaging social science findings."⁷¹

However, it is reliance on Judge Posner's criticism of the amicus brief in *Ryan* that has led other circuit courts to preclude amici

63. *See id.* at 13.

64. 125 F.3d 1062 (7th Cir. 1997).

65. *See id.* The Chicago Board of Trade moved under FED. R. APP. P. 29 for leave to file an amicus brief in support of the petitioner, who was challenging a disciplinary order of the Commodity Futures Trading Commission. Judge Posner originally denied the motion without a statement of reasons. This opinion stems from a further motion by the Board of Trade, asking Posner to explain his decision on the motion. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *Id.* These sentiments are echoed in *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903), *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983), *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) and *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991).

70. Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100 (1993).

71. *Id.*

from offering their opinions in cases.⁷² In addition, some state courts have taken the same position. In *Ferguson v. Brick*,⁷³ the Arkansas Supreme Court's attitude toward amici was almost hostile.⁷⁴ The court traced the descent of amicus briefs, from helpful friendships, to unabashed advocacy, and on to mere lobbying.⁷⁵ "Henceforth, we will deny permission to file a brief when the purpose is nothing more than to make a political endorsement of the basic brief."⁷⁶ The legal press has also used Judge Posner's opinion to reiterate that a "friend of the court" is quite different from a "friend of a party."⁷⁷

Although some courts have followed Judge Posner's lead, some lawyers have instead cited the dangers of his restrictions. Luther Munford, a prominent appellate attorney, argues that for decades partisan interests may befriend a court by providing useful information, even if it benefits only one side.⁷⁸ To illustrate his position, Munford points to the 1908 Brandeis brief in favor of child labor regulation,⁷⁹ written on behalf of the National Consumers League, as well as the important briefs written by the ACLU⁸⁰ and the Criminal Justice Legal Foundation.⁸¹

72. See e.g., *United States v. Hunter*, 1998 U.S. Dist. LEXIS 9869 (D. Vt. 1998) (denying the American Civil Liberties Foundation of Vermont its motion to file brief due to lack of convincing reason as to why an amicus brief was desirable); *United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n.7 (N.D. Ill. 1997) (denying several parties motions because it determined that the government and stationers "adequately and thoroughly addressed the issue at bar").

73. 649 S.W.2d 397 (Ark. 1983).

74. See *id.* at 398.

75. See *id.* at 397-98.

76. *Id.* at 173.

77. See *Amicus Briefs Must Add Something*, 13 NO. 1 FED. LITIGATOR 30 (Jan. 1998).

78. See Luther Munford, *Listening to Friends of the Court*, 84 A.B.A. J. 128 (Aug. 1998). Munford is the former president of the American Academy of Appellate Lawyers.

79. Louis D. Brandeis' brief for the defendant figured prominently in the opinion of *Muller v. Oregon*, 208 U.S. 412 (1908) (restricting women's working hours on the premise that a woman's primary function was to bear children). The brief contained two pages of legal arguments, but more than 100 pages referring to factual reports and existing laws affecting the parties. Briefs with this type of jurisprudence and constitutional advocacy have come to be known as "Brandeis briefs."

80. See discussion, *supra* notes 26-31, and accompanying text.

81. The Criminal Justice Legal Foundation in 1989 persuaded the Supreme Court to limit the retroactivity of a new constitutional ruling. See *Munford*, *supra* note 78, at 128.

3. *Ethical guidelines for submission*

Although there are no ethical code provisions governing the submission of amicus briefs, some portions of the *ABA Model Rules* and the *Model Code* indicate that it is ethical for an attorney to submit a brief if it would amount to helpful representation of his or her client.⁸² In addition, discipline may be imposed on a lawyer if he or she neglects a client matter;⁸³ however, since the topic of this Note deals with clients who are not parties to a litigation, it is unlikely these provisions would apply.

II. First Amendment Defendants And Their "Friends"

A. *Rice v. Paladin*

1. *The facts and lower court decision*

In early 1992, James Perry responded to a catalogue solicitation by Paladin Press,⁸⁴ and ordered two of the publisher's books: *Hit Man*, a how-to hit manual, and *How to Make Disposable Silencers*. A little more than a year later, Perry murdered Mildred Horn, her quadriplegic son Trevor, and Trevor's nurse.⁸⁵ Perry was found guilty of murder on three counts,⁸⁶ and subsequently, the victims' representatives filed a civil action against Paladin Press for aiding and abetting Perry in the commission of his murders through the publication of *Hit Man's* killing instructions.⁸⁷ The U.S. District Court for Maryland granted summary judgment to the publishers because Paladin's speech was not excepted by the "imminent lawless action" exception cited in the landmark First Amendment case *Brandenburg v. Ohio*.⁸⁸

82. See *infra* Part III.C for a fuller discussion of the Model Rules and Model Codes.

83. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1994) [hereinafter *Model Code*].

84. *Rice v. Paladin*, 128 F.3d 233, 241 n.2 (4th Cir. 1997).

85. See *id.* at 239.

86. See *Perry v. State*, 686 A.2d 274 (Md. 1996).

87. *Rice v. Paladin*, 940 F. Supp. 836 (D. Md. 1996). It is interesting, although not germane to the discussion, to note that the author of *Hit Man*, Rex Feral, was actually a divorced mother of two when she wrote the book in 1983. Originally, she submitted a novel, but Paladin's editors wanted a how-to. She got her ideas from books, television, movies, newspapers, police officers, her karate instructor and a lawyer friend. See David Montgomery, *If Books Could Kill; This Publisher Offers Lessons in Murder. Now He's a Target Himself*, WASH. POST, July 26, 1998, at F1.

88. *Paladin*, 940 F. Supp. at 845-46. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), was the landmark Supreme Court case stating that a statute that purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the describe type of action, was a violation of the First and Four-

The plaintiffs appealed to the Fourth Circuit. A host of prominent media entities, including the American Broadcasting Company, America Online, the New York Times Company, Society of Professional Journalists, and the Washington Post Company (hereinafter "Paladin amici"), submitted an amicus curiae brief to the Court of Appeals urging affirmation of the district court decision.⁸⁹ The amici argued that under *Brandenburg*, Paladin's books contain protected speech, because the books do not incite *imminent* lawless action. They also argued that the First Amendment does not yield to the law of aiding and abetting⁹⁰ and concluded that the lawsuit threatened entire genres of expression.⁹¹

2. The appellate decision

In April 1997, the Court of Appeals overturned the District Court decision, and found that the book was not entitled to protection under the First Amendment's free speech clause because it was not merely "abstract advocacy."⁹² Judge Luttig first quoted extensive passages from *Hit Man*, noting that "the court has even felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein."⁹³ He then illustrated the striking similarity between quoted passages from the *Hit Man* and James Perry's actions in 1993, and stated that a reasonable jury clearly could conclude that Paladin aided and abetted in Perry's triple murder⁹⁴ based on the stipulations of the parties⁹⁵

teenth Amendments. See *Brandenburg*, 395 U.S. at 449. The courts have used *Brandenburg* to exonerate defendants, absent a showing of "imminent lawless action."

89. See ABC Paladin Amicus Brief, *supra* note 6, at 2-3.

90. See *id.* at 17.

91. See *id.* at 22-27. The amici cite various publications, such as Abbie Hoffman, *Steal This Book* (1971), Malcolm X, *By Any Means Necessary* (2d ed. 1992), Jonathan Swift, *A Modest Proposal for Preventing the Children of Poor People in Ireland From Being a Burden to Their Parents or Country* (1729), as examples of threatened publications. See *id.* at 4-5.

92. *Rice v. Paladin*, 128 F.3d 233, 233 (4th Cir. 1997). The judge, in a 32-page decision, spent a good part of the opinion quoting graphic portions of the *Hit Man* text and comparing it to Perry's strikingly similar actions. For example, "Hit Man specifically instructs its audience of killers to shoot the victim through the eyes if possible: 'At least three shots should be fired to insure quick and sure death . . . [A]im for the head - preferably the eye sockets if you are a sharpshooter.' James Perry shot Mildred Horn and Janice Saunders two or three times through the eyes." *Id.* at 240.

93. *Paladin*, 128 F.3d at 239 n.1.

94. See *id.* at 242-43.

95. Those stipulations include an acknowledgement by Paladin that:

Paladin Press assisted Perry, according to Luttig, by providing detailed instructions on the techniques of murder and murder for hire with the *specific intent* of aiding and abetting the commission of these violent crimes.⁹⁶ He argued that this case bore no resemblance to a host of First Amendment cases in which the defendant promoted "theoretical advocacy."⁹⁷

3. *Legal community response*

The reaction from the legal community was similar. Rodney Smolla, a leading First Amendment lawyer, shifted away from his usual role to become one plaintiff's attorney. Writer and attorney Stuart Taylor agrees with Smolla's decision. "A murder manual intentionally marketed to would-be contract killers (along with fantasists and others) doesn't strike me as the kind of 'freedom of speech' that the framers sought to protect."⁹⁸

Smolla and Taylor are not alone. One critic champions government regulation of speech such as Paladin's, that provides detailed, step-by-step instructions about how to commit violent felonies.⁹⁹ Another detractor compares Paladin's liability to that of a gun dealer or a bar owner, saddling publishers with a duty to desist from publication of such books.¹⁰⁰ Some scholars echo Judge Luttig's view, dismissing concerns that a decision unfavorable to Paladin would implicate a host of authors, moviemakers and other

[I]n marketing *Hit Man*, Paladin 'intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes' but also that it 'intended and had knowledge' that *Hit Man* actually 'would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire.

Id. at 241.

96. *See id.* at 255. Judge Luttig's opinion notes that in cases where aiding and abetting liability was to be imposed on publishers, there is an intent requirement. He states that Paladin Press:

[S]tipulated to a set of facts which establish as a matter of law that the publisher is civilly liable for aiding and abetting James Perry in his triple murder, unless the First Amendment absolutely bars the imposition of liability upon a publisher for assisting in the commission of criminal acts.

Id. at 241.

97. *Id.* at 249 (citing *Scales v. United States*, 367 U.S. 203, 235 (1961)).

98. Stuart Taylor Jr., *A Constitutional Suicide Pact?*, *LEGAL TIMES*, Aug. 5, 1996, at 23.

99. *See* Avital T. Zer-Ilan, Note, *The First Amendment and Murder Manuals*, 106 *YALE L.J.* 2697, 2697 (1997) ("Instructional speech like the kind found in *Rice* is easily distinguishable from general advocacy, description, opinion or political speech. For example, speech that provides instructions on how to blow up buildings or commit murder, torture, or rape falls well within this exception.").

100. Bruce Fein, *Crime, Responsibility and Free Speech*, *WASH. TIMES*, Feb. 27, 1996, at A17.

artists. They question whether holding *Hit Man*'s publisher liable would really endanger the First Amendment rights of these media entities in light of the historic purposes of the Amendment.¹⁰¹

4. *Amici concerns*

After his assessment of the case and the district court's opinion, Judge Luttig sternly addressed the media amici's brief. His condemnation focused on the fact that the *Paladin* amici stood behind a defendant that *knowingly and intentionally* gave a dangerous weapon to a murderer.

That the national media organizations would feel obliged to vigorously defend *Paladin*'s assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which *Paladin* admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.¹⁰²

Judge Luttig further stated that it should be apparent to all parties involved that the First Amendment values that *Paladin* and amici sought to protect would not be adversely affected by allowing plaintiff's action against *Paladin* to proceed. "[N]either the extensive briefing by the parties and the numerous amici in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case."¹⁰³

Richard Smolla agrees with Judge Luttig about *Paladin*'s media amici. He compares *Paladin*'s amici with those who advocate similar protection for the publisher of a terrorist manual that provides detailed instructions on how to smuggle bombs onto airplanes. Similarly, Smolla indicates that the amici advocate for publication of manuals on how to steal nuclear materials from Russia, build a nuclear device and blow up a few million people.¹⁰⁴ "How imminent would the intended explosion have to be to satisfy [the 'imminent danger' exception to First Amendment protections cited in]

101. Amy Dilworth, Note, *Murder in the Abstract: The First Amendment and the Misappropriation of Brandenburg*, 6 WM. & MARY BILL RTS. J. 565, 587. See also Bennett L. Gershman, *Pervverting the First Amendment*, N.Y. L.J., Jan. 8, 1998, at 2.

102. *Paladin*, 128 F.3d at 265.

103. *Id.* Amici also argues that recognizing this type of cause of action against *Paladin* predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications or moves. The judge dismissed this contention as "simply not true." *Id.*

104. See Taylor, *supra* note 98, at 23.

Brandenburg? Is the Constitution a suicide pact?"¹⁰⁵ Law professor Bennett Gershman argues that when the free speech proponents champion subterfuge, the First Amendment is perverted and its friends are discredited.¹⁰⁶ He further argues that the media's complicity in *Paladin*'s "audacious misuse of the First Amendment should be underscored,"¹⁰⁷ and that the inability or unwillingness of presumably responsible members of the media to make elementary, common sense distinctions raises serious questions about their judgment.¹⁰⁸ He states that if defenders of the First Amendment fail to grasp that "simple but overarching truth, and fail to brand *Paladin*'s corruption for what it is, then they . . . delegitimize themselves."¹⁰⁹

B. *Khawar v. Globe, International*

1. *The Facts*

A similar sentiment to that stated in *Paladin* was enunciated in the recently decided case of *Khawar v. Globe International*¹¹⁰ In November 1988, Roundtable Publishing published a book entitled *The Senator Must Die: The Murder of Robert Kennedy*, alleging that the Iranian Shah's secret police, working together with the Mafia, carried out the 1968 assassination of Robert Kennedy. The book contained four photographs of a young man standing in a group of people around Senator Kennedy at the Ambassador Hotel in Los Angeles shortly before he was assassinated.¹¹¹ It identified the man in pictures as Ali Ahmand, and alleged that he was the real Kennedy murderer.

Five months after the book was published, the *Globe*, a weekly tabloid newspaper, ran an article containing an uncritical summary of the book's allegations. The *Globe* enlarged one of the photographs in the book, and added an arrow pointing to the accused man, and again identified him as the assassin.¹¹² The man in the photograph was actually named Khalid Khawar, not Ahmand; he was a photographer who had been hired by an Indian newspaper to write about the Los Angeles convention. In August 1989, Khawar,

105. *Id.*

106. *See* Gershman, *supra* note 101, at 2.

107. *Id.*

108. *See id.*

109. *Id.*

110. 965 P.2d 696 (Cal. 1998), *cert. denied*, 67 U.S.L.W. 3705 (U.S. May 17, 1999) (No. 98-1491).

111. *See id.* at 698-99.

112. *See id.*

who received death threats following the Globe article's release, sued the Globe, Roundtable and the book's author, Robert Morrow, for libel.¹¹³

The jury in the case granted judgment to Khawar in the amount of \$1.75 million, and held that: "(1) the Globe article contained statements about Khawar that were false and defamatory; (2) Globe published the article negligently and with malice or oppression; (3) with respect to Kennedy's assassination, Khawar was a private rather than public figure; and (4) the Globe article was a neutral and accurate report of the Morrow book."¹¹⁴ Since the last two determinations were advisory only, the trial court ruled as a matter of law that the article was not an accurate and neutral report.¹¹⁵ In affirming the trial court ruling, the California Court of Appeals held that California had not adopted a neutral reportage privilege for private figures, and therefore it was not necessary to decide whether the Globe article was a neutral report.¹¹⁶

2. *Neutral Reportage Defense*

In this case, the media's concern was the issue of applying *neutral reportage* to private figures. Neutral reportage is a privilege available in some states that gives a First Amendment defense to publishers who republish defamatory statements.¹¹⁷ The Second Circuit defined neutral reportage in 1977 in *Edwards v. National Audubon Society*, noting that "[W]hen a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regard-

113. *See id.* at 699. Although Morrow defaulted, and Roundtable settled with Khawar before trial, the trial court vacated Morrow's default and ultimately entered judgment in his favor, based on findings that Khawar could not be named in and could not be identified from the photographs in Morrow's book. *See id.*

114. *Id.* at 699.

115. *See id.* at 700. The trial court's decision that the Globe article was not a neutral report was based on its finding that although Khawar could be identified from the Globe photo, which included an arrow pointing directly at Khawar, it was impossible to identify Khawar from the smaller, darker and less distinct image of him that appeared in the Morrow book. *See id.*

116. *See Khawar v. Globe*, 54 Cal. Rptr.2d 92, 102-04 (1996).

117. *See Khawar*, 965 P.2d 696, 704 (Cal. 1998). The privilege is similar to the common law privilege of "fair report," which California codified in CAL. CIVIL CODE §§ 47(d) and 47(e). *See id.*

ing their validity.”¹¹⁸ The Supreme Court has never ruled on the neutral reportage privilege.¹¹⁹

Media conglomerates like ABC and CBS, publishers such as Knight-Ridder, and associations like the California First Amendment Coalition and the Radio-Television News Directors Association submitted a total of three amicus briefs¹²⁰ (“Globe amici”) urged the court to reverse the Court of Appeals, decision. The briefs asserted that the neutral reportage privilege extends protection to the media where they accurately and neutrally report that claims have been made about private individuals involved in public controversy.¹²¹

The briefs offered several other reasons for reversal. The first was that the court analysis did not focus on the republication aspect of the Globe’s defense.¹²² A duty to reinvestigate those claims would bar the media from informing the public about many newsworthy matters, in violation of the First Amendment. In addition, the ABC brief cited *Time v. Pape*,¹²³ which states that in the republication context, truth or falsity and actual malice are judged by examining whether the media accurately republished the underlying claims.¹²⁴

3. California’s Ruling

The California Supreme Court affirmed the appellate decision. Justice Kennard declined to address the amici’s concerns about neutral reportage for private figures, and instead affirmed the lower court opinion on this individual’s status as a private person for the purpose of defamation law.¹²⁵

Justice Kennard concluded that Khawar was not a public figure in relation to the article,¹²⁶ and stated that California does not rec-

118. *Edwards v. National Audubon Soc’y*, 556 F.2d 113, 120 (2d Cir. 1977) (citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971)).

119. *Khawar*, 965 P.2d 696, 705 (1998) (citing *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989) (declining to decide the issue)).

120. See Brief of ABC, Inc. et al. [hereinafter ABC Khawar Amicus Brief]; Brief of Los Angeles Times et al. [hereinafter L.A. Times Amicus Brief]; and Letter Brief of San Jose Mercury News, Inc. and Knight-Ridder Pub., Inc., as Amici Curiae, *Khawar v. Globe*, 965 P.2d 696 (on file with the *Fordham Urban Law Journal*).

121. See L.A. Times Amicus Brief at 20-22; ABC Amicus Brief at 7-13.

122. See L.A. Times Amicus Brief at 15.

123. 1 U.S. 279 (1971).

124. See *id.*, cited in ABC Khawar Amicus Brief, *supra* note 120, at 15-20.

125. *Khawar*, 965 P.2d at 703.

126. See *id.* at 698. Khawar was a young journalist at the time who was photographed near Kennedy, a prominent politician, moments before his death. However,

ognize neutral reportage for private figures. She declined to decide whether California recognized such a privilege for public officials or public figures, stating:¹²⁷

Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter of public concern. On the other hand, the report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations.¹²⁸

While the California courts did not address the amicus as the Fourth Circuit did in *Paladin*, the mainstream press did. Mike Wallace, CBS anchor for the television show "60 Minutes," ran a story criticizing the media (including his own network).¹²⁹ Speaking to a lawyer who worked on the amicus brief in support of the *Globe*, Wallace stated "I know damn well that I would never in a million years have been permitted to put on 60 Minutes what the *Globe* put in their magazine."¹³⁰ Howard Kurtz, press critic for the *Washington Post* added, "[t]he nation's top news organizations have a knee-jerk tendency to rush to the defense of any journalist in trouble. They're afraid [the *Khawar* case] would set some kind of legal precedent. I don't think we should apologize for the worst excesses of our business."¹³¹ Specific to this case, the *Globe* did not do any journalism homework to insure a fair report.¹³² But the argument was the same as in the *Paladin* case, in that the media entities involved in writing the amicus briefs compromised their journalistic ethics by supporting the *Globe*.

C. Other "Friends of the Courts"

Both *Paladin* and *Khawar* are good examples of the public's outraged response to the defense of the media's conduct, but they are not the only cases. For example, in September 1997, the death of

he was never a suspect, was never publicized and never sought to influence public discussion on the topic. *See id.*

127. *See id.* at 707 ("Republication of accusations made against private figures is never protected by the neutral reportage privilege.").

128. *Id.*

129. *60 Minutes* (CBS television broadcast, Sept. 6, 1998) (transcript on file with the *Fordham Urban Law Journal*).

130. *Id.*

131. *Id.*

132. *See Khawar v. Globe*, 965 P.2d 696, 708 (Cal. 1998).

Princess Diana and Dodi Fayed in Paris resulted in a backlash against the paparazzi and their tactics.¹³³

Scrutiny has hit the mainstream media as well. When Richard Jewell, a security guard in Atlanta, became a suspect in the Centennial Olympic Park bombing during the Olympics in July, 1996, the media essentially tried and convicted him in the press.¹³⁴ Federal prosecutors exonerated Jewell almost three months later;¹³⁵ he subsequently filed defamation suits against many major news organizations.¹³⁶

In 1992, a police officer's family sued rap artist Tupac Shakur, Atlantic Records, and Time Warner when the officer was shot by a 19-year-old man who had been listening to Shakur's album, *2pacalypse Now*.¹³⁷ On this case's heels, Ice-T also attracted attention when he released the song "Cop Killer" from his album, *Body Count*. The release of the song, and songs such as those found on *2pacalypse Now* led to an all-out attempt by groups such as the Combined Law Enforcement Association of Texas, and people like Oliver North and former Representative Susan Molinari to censor the music.¹³⁸ The protests seemed to have the desired effect. Due

133. See James C. Goodale & Jeremy Feigelson, *Greater Legal Restrictions on the Paparazzi?*, N.Y. L.J., Sept. 22, 1997, at 4.

134. See, e.g., Kathy Scruggs & Ron Martz, *FBI Suspects "Hero" Guard May Have Planted Bomb*, ATLANTA J. & CONST., July 30, 1996, at 1X (stating that "Richard Jewell . . . fits the profile of the lone bomber. This profile generally includes a frustrated white man who is a former police officer, member of the military or police 'wannabe' who seeks to become a hero."), Andrea Peyser, *Who Checked "Rambo" Crossing Guard's Record?*, N.Y. POST, July 31, 1996, at 3 ("He was a fat, failed former sheriff's deputy[.]"). Jewell, initially identified as a hero for discovering a knapsack containing the bomb, was turned into a suspect within days of the explosion. For weeks following the incident, "a horde of news media members camped outside his mother's apartment . . . where Jewell live[d]." Bill Rankin, *Jewell is Cleared in Bomb Case: No Longer a 'Target,' Feds Say*, ATLANTA J. & CONST., Oct. 27, 1996, at A1.

135. See Rankin, *supra*, at A1.

136. Jewell settled his claims against NBC and CNN for undisclosed amounts. Suits against the *Atlanta Journal-Constitution*, and the *New York Post*, are pending. See Jewell v. NYP Holdings, 23 F. Supp. 2d 348 (S.D.N.Y. 1998). See also Charles L. Babcock & Cami Dawson Boyd, *Can Suspects Sue the Media for Coverage of Investigations?*, 15 COMM. LAW. 3 (Summer 1997); *Judge Lets Jewell Continue Suit*, FLORIDA TODAY, Oct. 3, 1998, at 3A.

137. See Davidson v. Time Warner, 25 Media L. Rep. 1705 (S.D. Tex. 1997). The plaintiffs argued in this suit that *2Pacalypse Now* did not merit First Amendment protection because it was obscene, contained "fighting words," defamed police officers and tended to incite imminent illegal conduct on the part of individuals like the officer's killer. The court, however, granted summary judgment to the defendants.

138. See Jason Talerman, Note, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117, 137 (1994) (noting that both Representative Susan Molinari and Oliver North cited Time Warner's profit motive as contrary to constitutional protection).

to these objections and support of the censorship by public officials, musician Ice-T voluntarily withdrew "Cop Killer" from *Body Count*.¹³⁹ Two weeks after Ice-T pulled the song, he and other rap artists met with Warner Group. The musicians were told to change their lyrics or find another label.¹⁴⁰

III: Analysis of the Debate

"I disapprove of what you say, but I will defend to the death your right to say it."¹⁴¹ These words by Voltaire echo the sentiments of both the media and their lawyers, when it comes to defending the First Amendment. *Paladin* and *Khawar* question whether it is permissible – and proper – for the media to support parties in a litigation who have, by social, moral and journalistic standards, acted inappropriately. They also question whether it is unethical for lawyers to support the media's attempts to defend such conduct.

The answer to the first question, according to Judge Luttig, and other critics like Chief Judge Richard Posner and Mike Wallace, is that it is *not* proper.¹⁴² Anti-media sentiment has grown tremendously in recent years, to the point where a recent Roper-Freedom Forum-Parade poll states that fewer than twenty percent of people polled rated the ethics of journalists as high, and sixty-five percent of respondents said there are times when publication or broadcast should be prevented.¹⁴³ For those who wish to maintain the prestige of journalism, it may be critical to point out defendants who give the profession a bad name.

Ultimately though, it is wrong to criticize the media and their amici for defending their peers. There are compelling explanations that indicate that the scores of media who have sided with such defendants have made the right decision. One of the most important reasons is that a media client may think it has a legitimate interest in the outcome of the case purely from a precedential standpoint – the case law may be unclear or non-existent. If this is the case, then the media are only protecting their First Amendment freedoms, and their actions are proper.

139. *See id.* at 135.

140. *See id.*

141. Talerman, *supra* note 138, at 117 (citing Voltaire).

142. *See supra* notes 64-69, 129-31 and accompanying text.

143. *See* ROPER CENTER FOR PUBLIC OPINION RESEARCH, NEWS JUNKIES, NEWS CRITICS: HOW AMERICANS USE THE NEWS AND WHAT THEY THINK ABOUT IT (Feb. 1997), *cited in* Daniel Schorr, *Forgive Us Our Press Passes*, 20 HASTINGS COMM/ENT. L.J. 269, 271 (Winter 1998).

A. The Goals of an Amicus

The first step in the analysis of Judge Luttig's and Mike Wallace's arguments is defining precisely the goals of an amicus curiae. Judge Posner argues that many amicus briefs are simply redundant, echoing the parties' briefs rather than giving new legal analysis, and are thus detrimental, not legitimate.¹⁴⁴ In *Ryan v. Commodity Futures Trading Commission*,¹⁴⁵ the amicus claimed to have an overriding interest in the case because the defendant was one of its members. Accordingly, it wanted to express its view that the evidence clearly established the lack of any need for the sanction imposed by the Commodity Futures Trading Commission.¹⁴⁶ Judge Posner replied that the court is helped only "by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention," not by an amicus' "expression of a 'strongly held view' about the weight of the evidence."¹⁴⁷ Judge Posner's point is well taken. Appellate judges are flooded with briefs on both sides of the argument, and many attorneys understand that the courts should not be compelled to read additional briefs that merely scream "me too."¹⁴⁸

Putting the redundancy argument aside, parties in an amicus curiae brief do not necessarily support a defendant's conduct alleged by the plaintiff. Instead, they may provide the court a legal analysis illustrating why a decision will be bad precedent for other similarly situation parties.¹⁴⁹ In addition, they may focus the court's attention on the broader implications of various possible rulings.¹⁵⁰

There are also times when, because of page limitations on the briefs of parties to the litigation, or because of other considerations, an amicus may be in a better position to make a specific point than a party to the litigation. For example, in *Metromedia v. San Diego*,¹⁵¹ San Francisco sought to exclude most billboards from

144. See *supra* notes 64-68, and accompanying text.

145. 125 F.3d 1062 (7th Cir. 1997).

146. See *id.*

147. *Id.* at 1064.

148. Thomas R. Newman & Steven J. Ahmuty, Jr., *Justifying the Filing of Amicus Briefs*, N.Y. L.J., Feb. 2, 1998, at 3.

149. See, e.g., Brief for the Lawyer's Committee for Civil Rights Under Law, as Amicus Curiae, *Haddle v. Garrison*, 132 F.3d 46 (11th Cir. 1997) (arguing that the lower court decision would deny the protections afforded in section 1985(2) to individuals working under employment contracts of indefinite length).

150. See Ennis, *supra* note 50, at 608.

151. 458 U.S. 1 (1982).

designated sections of the city.¹⁵² The billboards carried primarily commercial messages, but also some political messages as well. Billboard owners were not in a position to argue credibly on behalf of political speech because they did not engage in political speech (they leased billboard space only), and so the billboard owners' lawyer invited the ACLU to file an amicus brief emphasizing the political speech aspects of the case.¹⁵³

Other legitimate reasons for filing amicus briefs include clarifying convoluted litigation, collecting useful historical or factual references that merit judicial notice or urging limitations on rulings.¹⁵⁴ It is imperative to the adversary system that an amicus with legitimate interests be able to assert its arguments. Thus, it can be deemed ethical for an amicus party to submit a brief where that party is motivated by one of the enumerated reasons.

B. Legitimate Interests

It is clear that Judge Luttig, Mike Wallace and their peers, saw few, if any, legitimate interests expressed by the amici who filed in the *Paladin* and *Globe* cases. However, there are strong arguments for amici involvement in both *Paladin* and *Khawar*. In these cases, it is not necessarily *whom* the media stood behind, but the constitutional right each supported that legitimized each interest. Thus, the media amici pass a "legitimate interest" test that refute the critics' notions of the amici's decision to file in the litigation.

1. *Paladin's Critics and the Brandenburg Precedent*

In *Paladin*, the amici articulated a chilling effect argument¹⁵⁵ that the District Court accepted. However, the Fourth Circuit rejected this claim, arguing that:

152. *See id.*

153. *See Ennis, supra* note 50, at 607. The majority of the Court in *Metromedia* agreed to strike down the San Diego ordinance. The four justices in the plurality "thought the ordinance was constitutional insofar as it regulated only commercial speech, but struck down the entire ordinance because it unconstitutionally regulated political speech, and the commercial and political regulations were not severable." *Id.*

154. *See ABC Paladin Amicus Brief, supra* note 6, at 128.

155. *See id.* The Amici concluded:

A word, a lyric, a film clip – these are the living embodiments of our proud heritage of defending the rights of even the most outrageous speaker. They are capable of enriching, entertaining, educating, and – occasionally – shocking and horrifying us. But whatever their power, they are incapable of acting. To hold a word or an image jointly responsible for even the most ghastly criminal act diminishes us all, because it means that some speech surely will be chilled in the process.

Id. at 28.

[F]or almost any broadcast, book, movie or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be . . . a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct.¹⁵⁶

The crux of the majority's criticism was that because *Paladin* admitted that it intended and knew the book would be used "immediately in the commission of murder and other crimes[.]"¹⁵⁷ this case did not affect any First Amendment principles. The court's argument focused on *Paladin*'s actions, and its intent to publish dangerous speech.

Despite the court's assertion, the chilling effect that reversal of the District Court's summary judgment would have on subsequent media conduct was a valid concern for the media amici. The media did not cheer for *Paladin*, nor did they argue that the book was necessary. Furthermore, they did not condone the type of violence advocated in *Paladin* Press' books. Instead, the *Paladin* amici argued there was no distinction between the constitutional protection for the type of information found in *Hit Man*, and protection for similar information found in "a vast array of fiction, nonfiction, music, electronic communication, and video programming."¹⁵⁸

The media's position is reasonable and passes a legitimacy test. It was in the media's best interest in *Paladin* to advocate for First Amendment freedoms. The media generally strive to extend First Amendment protections as much as possible, thereby alleviating concerns about potential lawsuits.¹⁵⁹ In this case, the media entities were worried that the precedent set by a reversal of summary judgment for the defendant would subject information in books to censure review by trial.¹⁶⁰

156. *Paladin*, 128 F.3d at 266.

157. *Id.* at 265.

158. ABC *Paladin* Amicus Brief, *supra* note 6, at 2.

159. For example, the media have previously stood behind defendants like *Hustler Magazine*. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (prohibiting public figures and officials from recovering damages for the tort of intentional infliction of emotional distress without showing a false statement of fact being made with actual malice); *Hustler v. Herceg*, 814 F.2d 1017 (5th Cir. 1987) (holding that a *Hustler* article did not incite an adolescent to perform an act that led to his death).

160. See ABC *Paladin* Amicus Brief, *supra* note 6, at 22. The ABC *Paladin* Amicus Brief states:

Because it is unclear how restrictive the limits set by *Brandenburg v. Ohio*¹⁶¹ are, it is in the media's interests to ensure that such protections continue. Because *Brandenburg* has almost exclusively been applied to political speech,¹⁶² some Paladin supporters wonder whether its First Amendment protections would extend to Paladin if it had written a chapter in its book extolling the virtues of contract killing.¹⁶³ It was this type of arbitrary line-drawing that the amici attempted to defend themselves against.

2. *The Globe and Neutral Reportage*

Mike Wallace and Howard Kurtz presented a similar argument to that of Judge Luttig. Wallace's "60 Minutes" interview with Khalid Khawar occurred before the California Supreme Court ruled on the case.¹⁶⁴ Criticizing the media's defense of Paladin, Wallace noted that "[t]his case is about Khalid Khawar, who was libeled. The jury found that he had been libeled. An appellate court agreed. That's what the case is about. It's about a human being and his family."¹⁶⁵

Nevertheless, the media amici make several compelling arguments that this case was about more than the facts. There was an important legal issue at stake – the application of neutral reportage to public figures. "[T]he neutral reportage privilege protects the media from defamation liability for the non-malicious publication of a serious accusation made by a prominent person where such accusations in and of themselves are newsworthy, while preserving the private figure's right to seek damages from the original publisher."¹⁶⁶ The impact of the *Khawar* litigation would not be limited to tabloids like the *Globe* or the *Enquirer*, but also to the

A decision that allows this claim to survive – even for a brief time – will have a destabilizing effect on First Amendment law, and will inevitably unleash a hailstorm of derivative suits on the communications industry as plaintiffs search for deep pockets to avenge imagined affronts, or real affronts better recompensed by perpetrator than publisher.

Id. See also *supra* notes 26-31 (providing examples of this premise) and accompanying text.

161. 395 U.S. 444 (1969).

162. See Robert J. Coursey III, Note & Comment, *Another Case of Freedom vs. Safety: Stretching the First Amendment to Protect the Publication of Murder Manuals – Brandenburg Need Not Apply?*, 14 GA. ST. U. L. REV. 875, 899 (1998).

163. See *id.* at 899-900.

164. *60 Minutes* (CBS television broadcast, Sept. 6, 1998).

165. *Id.*

166. L.A. Times Amicus Brief, *supra* note 120, at 24.

mainstream press; and there was the possibility that future courts may eliminate neutral reportage altogether.¹⁶⁷

The amici expressed additional concern about the Court of Appeals ruling – that failure to reinvestigate a story constitutes “actual malice” if the court later concludes that the book’s assertions were improbable.¹⁶⁸ The brief filed on behalf of ABC noted that where the media simply informs the public of the “historical fact” that allegations have been made, and do not report the allegations as true or otherwise distort them, then “the media cannot be held liable because the report was ‘materially true’ and thus ‘constitutionally protected.’”¹⁶⁹

In addition, the brief filed by Davis, Wright and Tremaine, attorneys for the amici curiae, including the Los Angeles Times, NBC, and the New York Times, argue that a ruling mandating a duty of independent investigation resurrects strict scrutiny.¹⁷⁰ In this portion of the brief, there are only brief mentions of the *Globe* case; the rest of the argument is a strictly legal analysis.

What the amici stress – and what people like Mike Wallace and Howard Kurtz largely ignore – is that it is not necessarily *Paladin*, or the *Globe*, that the media amici are defending. Instead, the amici’s primary goal is to protect the constitutional rights guaranteed and extended by the First Amendment. In the final paragraph of the *Paladin* amicus curiae brief, amici note that “[r]einstatement of this case will engender a new tort against the written word – a futile exercise in ‘pigeonholing’ [that] endangers the pigeon.”¹⁷¹

C. Legitimate Interests of Lawyers

If there is a compelling and legitimate interest of the media amici, the same conclusion can be reached for the lawyers who write the amicus for their media clients. As noted above, there are

167. See Jane Kirtley, *Defamation Judgment Puts Onus on Media*, AM. JOURNALISM REV., Jan. 1, 1999. Kirtley stated:

Future courts may interpret the ruling as creating a legal obligation to independently investigate defamatory statements made by authoritative sources before repeating them. That may be a desirable journalistic aspiration. But courts are ill equipped to second-guess news judgment or allocation of resources. You can bet they’ll seldom be satisfied that a reporter did all he or she could to determine the truth.

Id.

168. See *Khawar v. Globe*, 54 Cal. Rptr. 2d 92 (Ct. App. 1996).

169. ABC *Khawar* Amicus Brief, *supra* note 120, at 20.

170. L.A. Times Brief, *supra* note 166, at 9.

171. ABC *Paladin* Amicus Brief, *supra* note 6, at 27 (citing LAURENCE TRIBE, AM. CONSTITUTIONAL L. §§ 12–18, at 943 (2d ed. 1988)).

many reasons why the media amici have a vested interest in defending their peers. If that is the case, and an appellate decision may affect future litigation for the lawyer's client, that lawyer has an obligation to serve the amici's interests.

Even if that were not the case – even if the media had been misguided – there still may be the ethical obligation of the amici's lawyers to advocate for their clients. There are no *ABA Model Rule* or *Code* provisions that deal specifically with advocating for a non-client in a case that may have an effect on a current client. However, there are several general comments that provide a good basis for analysis.

The *ABA Model Rules of Professional Conduct* (“*Model Rules*”) require a lawyer to act with reasonable diligence and promptness in representing a client.¹⁷² The *Model Rules* further state that “a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”¹⁷³ An amicus brief would likely fall within the ambit of “lawful and ethical measures.”

The *Model Rules* also note that a lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.¹⁷⁴ The *Model Code of Professional Conduct* (“*Model Code*”) similarly notes that a lawyer should represent a client zealously within the bounds of the law.¹⁷⁵ An attorney's ethical obligation to assist the judge or jury in arriving at its distillation of the “truth” is best fulfilled through the zealous advocacy of the client's position under the existing paradigm of civil litigation.¹⁷⁶ The attorney's primary obligation is to pursue – to the fullest extent of the law – his or her client's rights.¹⁷⁷

172. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

173. *Id.* Rule 1.3 cmt. 1.

174. *See id.* Rule 1.3 cmt. 1.

175. MODEL CODE Canon 7. Some states have moved to eliminate the word “zeal” in their Codes of Professional Responsibility because a lawyer on behalf of a client might interpret zealousness to mean “zealotry,” justifying wrongful conduct. It might also be interpreted to imply a requirement of personal involvement rather than detached commitment. *See* George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, 59 OCT. OR. ST. B. BULL. 31, 32 (1998). An in-depth analysis of this point is beyond the scope of this article.

176. Jamil N. Alibhai et al., *Zealous Advocacy and the Search for Truth*, 61 TEX. B.J. 1009, 1014 (1998).

177. *See id.*

Rule 1.3 of the *Model Rules* tangentially addresses the role of a lawyer when the relationship is ongoing; it states that if a lawyer has served a client over a substantial period in a variety of matters, the client can assume that the lawyer will serve on a continuing basis.¹⁷⁸

Finally, it is up to the client to determine the objective of the litigation.¹⁷⁹ Logically, it seems that if the objectives of a client are to prevent bad precedent for possible future litigation, it is the obligation of the lawyer to represent his or her client in that matter. However, the rules also state that a lawyer has professional discretion in determining the means by which a matter should be pursued.¹⁸⁰ It is, however, within the ethical boundaries that a lawyer pursue any objectives of the client.¹⁸¹

The *Model Rules* provide an escape hatch for an attorney. A lawyer may withdraw from a matter if the client insists on pursuing an objective that the lawyer finds repugnant or imprudent.¹⁸² However, it would be hard in these cases for a lawyer to prove that such objections are repugnant to him or her.

When taken collectively, it becomes clear that there is no ethical problem with a lawyer writing a brief on behalf of an interested third party. Furthermore, if there is a legal avenue for that client to take, there may even be an obligation to pursue such a course of action. If a lawyer is within his or her boundaries to promote an objective of an interested media client, there is no reason why that attorney should be required to withdraw, especially if the lawyer is not particularly disturbed by the behavior the media client wants to uphold.¹⁸³ In tandem with the idea that an attorney should represent a client zealously, it only makes sense that writing amicus briefs falls within the ambit of responsible lawyering.

178. See MODEL RULES Rule 1.3 cmt. 3 (“[A] lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue, to serve on a continuing basis unless the lawyer gives notice of withdrawal.”).

179. MODEL RULES Rule 1.2.

180. See *id.*

181. The exception, of course, is to perpetuate or aid in the commission of a crime. See MODEL RULES Rule 1.16 cmt. 2. See also MODEL CODE at DR 2-110(b).

182. MODEL RULES Rule 1.16.

183. It is useful to note that a lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views or activities. MODEL RULES Rule 1.2(b).

If it is not unethical on the part of media entities and their lawyers to advocate as amici on behalf of a media defendants,¹⁸⁴ why, in these cases, do some members of the media shy away from defending organizations such as the *Globe* and Paladin Press? A plausible reason may be that the press and other media would like to distance themselves as much as possible from tabloids or "alternative" publishing companies such as Paladin. When Howard Kurtz notes in Mike Wallace's "60 Minutes" interview with Khawar, that "we should [not] apologize for the worst excesses in our business," he adds, "I think we should blow the whistle on them."¹⁸⁵ The media have been accused of tabloid journalism for years,¹⁸⁶ and some journalists wonder aloud how to rise above the stereotypes.¹⁸⁷

Many authors of articles and discussions regarding these cases defend Paladin and the *Globe*,¹⁸⁸ but even more still distance themselves from the publishers.¹⁸⁹ However, "[t]hese are hardly the kinds of facts that First Amendment lawyers die for," writes one editor about the Paladin case.¹⁹⁰ "But as is so often the case with constitutional rights, they must defend the most unsavory characters . . . to protect the rest of us."¹⁹¹

It is unlikely that in either *Paladin* or *Khawar*, the mainstream media would publish these types of articles or books. The media are loosely governed by their own set of rules that the Society of Professional Journalists ("SPJ") promulgated in its Code of Ethics in 1926, and revised in 1973, 1984, 1987 and 1996.¹⁹² The rules pro-

184. The only caveat is that a lawyer may not further a crime or fraud. See MODEL CODE at 7-102.

185. *60 Minutes* (CBS television broadcast, Sept. 6, 1998).

186. See generally JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* (1996) (criticizing major news organizations for accelerating the decline of journalism); HOWARD KURTZ, *HOT AIR: ALL TALK ALL THE TIME* (1996) (saying that the press have given into sensationalism).

187. See, e.g., Jon Lafayette, *RTNDA: Journalists Hash Out Trust Issue: Has Credibility Eroded?*, ELECTRONIC MEDIA, Sept. 22, 1997, at 1A. The article describes the Radio-Television News Directors Association's annual conference where speakers discussed accountability to the public. *Id.*

188. See, e.g., Andrea Neal, *In Defense of the Most Unsavory*, INDIANAPOLIS STAR, Mar. 14, 1996, at A8 (defending Paladin Press, stating that "the information found in *Hit Man* can be found in other works of fiction and non-fiction"); Kirtley, *supra* note 167 ("My support for self-criticism [by the media] stops at the courthouse door.").

189. See, e.g., Fein, *supra* note 100 ("[D]rawing sensible lines is the hallmark of enlightened law The First Amendment is no exception.").

190. Neal, *supra* note 188.

191. *Id.*

192. David A. Logan, "Stunt Journalism," *Professional Norms, and the Public Mistrust of the Media*, 9 U. FLA. J. L. & PUB. POL'Y 151, 160 (1998).

vided for journalists, unlike the Codes, do not come with the threat of disciplinary procedures if they are not followed.¹⁹³ In addition, the journalism codes that are in place deal only in generalities.¹⁹⁴ For example, the American Society of Newspaper Editors calls for “the highest ethical and professional performance,” in its “Statement of Principles” but does not define that term.¹⁹⁵ “[T]here is an obligation on the part of each editor, each reporter, each publisher, to decide upon her or his own ethical standard,” says respected journalist A.M. Rosenthal.¹⁹⁶ “I do not believe in regulation of the newspaper business from the outside, and philosophically, I have to be against regulation from the inside. I do not want to sit in judgment on another newspaper and I do not think it is a healthy thing to do.”¹⁹⁷

Moreover, the press have no guidelines with regard to assisting media defendants – most likely they will do what is in their best interests for their own publications. If this is the case, then it might be in the best interest for a single publication to discredit a defendant or media amici to uphold its own integrity.

Conclusion

For those who chose to criticize the media entities that signed on to the *Paladin* and *Globe* amicus briefs, it may be that these critics have false views of what it means to write an amicus brief. Although the one understanding of amici has come to be advocacy for a certain client,¹⁹⁸ many amici – and in fact those that are probably most effective – are those who argue a legal issue without zealously advocating for a specific defendant.¹⁹⁹ This is actually a return to where amici have stood since the 1800s – as a friend to the court and to the *law*.

However, it may also be the case that a new rule of law would be a crucial defensive or offensive tactic for a party. In such cases, regardless of the enthusiasm for with which a friend advocates, it

193. Deann Evans, *Most Journalists Follow Basic Ethical Rules*, SALT LAKE TRIBUNE, May 22, 1994, at F4.

194. See Brian Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 100 (1994).

195. American Society of Newspaper Editor, *Statement of Principles* (visited June 25, 1999) <<http://www.asne.org/kiosk/archive/principl.htm>>.

196. Remarks by A.M. Rosenthal, ASNE 1987, Proceedings of the 1987 Convention of the American Society of Newspaper Editors, at 36, 45, cited in, Murchison, *supra* note 194, at 101.

197. *Id.*

198. For history of amicus briefs, see *supra* Part I.

199. See ACLU cases, *supra* notes 26-31 and accompanying text.

would set a bad precedent to condemn amici who stand up for their peers and the law.