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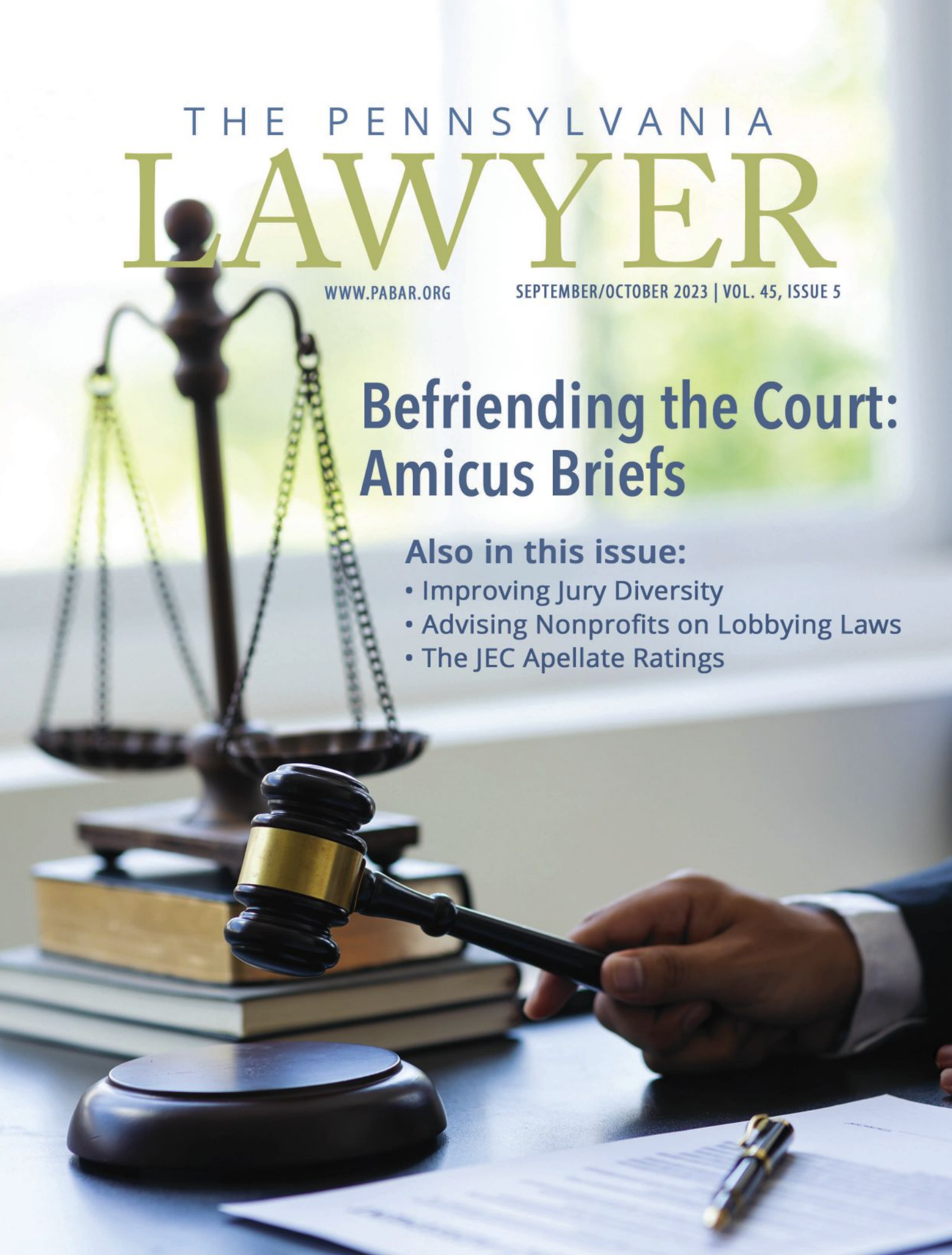

Befriending the Court: Amicus Briefs

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Befriending the Court:
Amicus Briefs and Appellate Rule 531

By Jonathan R. Bruno

Judges have it tough.

You don't believe me, I know. But suspend disbelief a moment and hear me out.

We lawyers get to do what judges don't. We get to take sides. We get to live (or die) on one side of the "v." And that brings clarity: Everything makes sense when you know where you stand.

Judges don't have that luxury. They straddle the "v." Their job is to weigh the parties' arguments, apply the law and identify (hopefully) the right result.

But identifying the right result can be challenging. Judges, even the greatest judges, are human. They labor under heavy caseloads. Their days, like ours, last just 24 hours. And the issues they face are weighty, complex and — yes — sometimes dull. (Imagine your least favorite subject in law school. Now imagine that subject's most abstruse sub-issues, arising in a case with a 10,000-page record. Now imagine being the generalist judge charged with deciding that case.)

Identifying the right result gets a little easier, in theory, when the adversarial system works as it should. Clarity comes from the clash of arguments. We litigators must therefore marshal our best arguments, respond directly to those of our opponents, practice candor and make our written submissions as "user-friendly" as possible.

Even when we do so (and certainly when we don't), courts sometimes need a little help from their friends. That's where amici curiae fit in.

Friends of the Court

Historically, an amicus curiae was a disinterested nonparty, usually appointed by the court, who offered some edification on one or more legal issues arising in a pending matter.

Modern practice differs from this historical standard in two respects. First, modern amici are not disinterested: They typically have some stake in the outcome (or in the precedent that may be set by the outcome) of a pending case. Our rules reflect this reality. Pennsylvania Rule of Appellate Procedure 531 defines an amicus as a nonparty "interested in the questions involved" in an appeal. The corresponding federal rule speaks of an amicus' "interest in the case."

"Interest" here should be understood broadly. An amicus need not have a stake so tangible as to become an intervenor. Intervenors, under Pennsylvania's civil rules, typically have a "legally enforceable interest" in the case, and so attain "all the rights and liabilities of a party to the action." The interest of an amicus, by contrast, is usually more attenuated. And its role is limited accordingly. In most cases, an amicus does no more than file a single brief.

The second way that modern amicus practice departs from its roots is that court appointment is now the exception, rather than the rule. Courts do still appoint amici from time to time. It happens, for instance, where weighty legal issues arise in a case involving a self-represented party or where the government has chosen not to defend a statute or regulation challenged as unconstitutional. More frequently, though, amici appoint themselves, entering the fray without judicial invitation.

Amici cannot raise new legal issues or expand the record any more than they can initiate appeals in the first place.

Invitations to participate, in fact, come more often from parties than from courts. A party may recruit one or more amici to advocate for that party's preferred outcome. This underscores another important feature of modern amicus practice. While Pennsylvania's Appellate Rule 531, like its federal counterpart, permits an amicus to write in support of neither party, most amici do take sides, explicitly urging the court to affirm, reverse or take some other step that will amount to a victory for the supported party.

Amici in Pennsylvania's Appellate Courts

Amicus briefs have become all but ubiquitous in recent decades. In the U.S. Supreme Court, for example, it is now common for a dozen or more such briefs to be filed in every merits case.

Fewer amici participate per case, on average, in Pennsylvania's appellate courts. But amicus participation here is no less important than in the nation's capital. And our courts are no less well acquainted with this important feature of the appellate process.

In the Supreme Court of Pennsylvania, for example, of the approximately 40 cases that yielded precedential opinions in 2022, about 19 (or 48%) saw amicus briefs filed. The year before, 2021, the Court issued about 112 precedential opinions, and amici participated in no fewer than 60 (or 54%) of those cases.

These figures make sense. Our Supreme Court is the nation's oldest and among its most respected appellate courts. It routinely tackles unsettled legal questions of profound importance to the people of this commonwealth. Understandably, then, organizations and individuals who are not parties frequently seek a voice in the Court's adjudicative process.

Pennsylvania's intermediate appellate courts are no strangers to amicus briefs, either. Because the Superior Court and Commonwealth Court (when exercising appellate jurisdiction) are error-correcting courts and thus usually are not called upon to enunciate new legal principles or to weigh competing policy arguments, those tribunals see amicus briefs filed less frequently than our Supreme Court does.

Take the Superior Court, for example. According to statistics compiled by its staff,

amicus briefs were filed in approximately 15 to 20 cases annually, on average, over the last several years. Measured against the Superior Court's caseload of about 6,500 appeals filed annually (again on average) during that period, 15 to 20 is a relatively small number. But that hardly means amicus briefs go unnoticed when they are filed.

Particularly when the Superior Court and Commonwealth Court do encounter issues of first impression, amici have a special opportunity to identify policy considerations and practicalities that may bear on how those issues should be resolved. In cases like that, a helpful amicus brief may be just as valuable to an intermediate appellate court as it would be to a court of last resort.

When I asked retired Superior Court President Judge Joseph A. Del Sole and Superior Court Judge Mary Jane Bowes about their experiences with amicus briefs, both remarked that a good amicus brief can be very helpful in an appropriate case.

Which raises the question: Just what makes an amicus brief work? The beginning of an answer may be found in Appellate Rule 531.

Essentials of Appellate Rule 531

Rule 531 is an original appellate rule: It's been part of the Pennsylvania Rules of Appellate Procedure since those rules were adopted in 1975.

The rule's basic framework is simple. It says that if you're weighing in at the merits stage of any appeal, you may file an amicus brief without leave of court. Likewise, if you're weighing in on a pending petition for allowance of appeal to the Pennsylvania Supreme Court — and if you previously participated as an amicus below — then you may file an amicus brief without leave of court. In any other circumstance, leave is required. (Amici sometimes request leave to file reply briefs, for example.)

The rule generally limits merits-stage amicus briefs to 7,000 words and allowance-of-appeal-stage amicus briefs to 4,500 words, unless the court orders otherwise.

As for content, Rule 531 grants substantial leeway. The only required components of an amicus brief are a statement of interest and a certificate of compliance with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. The statement of interest should do two things. First, it should briefly articulate the nature of the amicus' interest. Second, it must identify anyone who paid for or authored any part of the brief. The obvious effect of this requirement is to ensure that if a party funded or composed a brief that was nominally submitted on behalf an amicus, that fact will be disclosed.

Notably, the rule says nothing about what kind of argument an amicus brief should contain, except that an amicus may, but need not, support any party's position as to affirmance or reversal.

Consider how your brief might assist the court in narrowing or otherwise calibrating its holding.

The Official Note offers additional insight. Citing binding precedent, the note first highlights that amici, as nonparties, cannot raise issues that have not been preserved by the parties. The key word there is "issues." The legal issues to be addressed by an amicus must have been properly teed up for the appellate court by the parties. Thus, for example, if the parties have only ever quarreled over whether Statute A compels a certain result, amici ordinarily should not raise the distinct question whether Statute B does so.

None of this means, however, that amici are limited to repeating the parties' specific arguments. The official note to Rule 531 explains that, in the view of the Pennsylvania Supreme Court, "[a]n amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court," whereas one "that does not serve this purpose" (i.e., that does not somehow expand upon what the parties have said) "burdens the Court, and its filing is not favored."

Let that sink in. An amicus brief that merely parrots the parties' arguments is a burden and should not be filed. On the other hand, an amicus brief that somehow expands upon the parties' arguments, offers additional context for them or identifies other relevant considerations not already identified by the parties is a help.

This imperative to be nonduplicative suggests that an amicus, while preparing its brief, should know what the brief of the party it supports will argue. Prefiling communication therefore is essential. This is especially so in Pennsylvania, because Rule 531 requires amici to file their briefs on or before the date of filing of the brief of the party being supported (or, if neither party is being supported, on or before the date the appellant's brief is filed).

Finally, as to oral argument, Rule 531 makes clear that amici may participate only with leave of court, which will be granted only for "extraordinary reasons." Experience teaches that such participation, while rare, may be slightly more likely if requested by a party. For example, a solo practitioner in a case involving substantial legal issues might file an application for relief seeking to split its argument time with a supportive amicus.

Amici, as nonparties, cannot raise issues that have not been preserved by the parties.

Tips for Amici and Their Counsel

Complying with Rule 531 is the beginning of befriending the court. But amici and their counsel shouldn't stop there. I recommend considering the following points, too:

Build Credibility. Use your brief's required statement of interest to build credibility. If the case involves widgets, and the amicus is an association of widget-makers knowledgeable about the regulatory environment for widget-making, then explain that fact. Offer specific examples of the amicus' key experience. Where appropriate, cite relevant figures. ("The Pennsylvania Association of Widget-Makers comprises more than 1,500 manufacturers from across the commonwealth. Its members collectively serve some 3 million customers annually.")

Leverage Your Perspective. Having told the court who you are, bring that unique experience to bear in your brief. Embrace the role of teacher. If your perspective affords you the ability to tell the court something it doesn't already know, then do so. And where opportunities arise to provide context that is missing from the parties' briefs — or missing from the ruling below — bring that context to the court's attention. Likewise, if you can cite reliable studies or academic research as relevant background, consider doing so.

Know Your Audience. Always tailor your approach to the procedural posture and the forum. If you're before an intermediate appellate court in a case not involving an issue of first impression, remember that the jurists to whom you're speaking are in the business of correcting errors by applying precedent. Focus on legal argument, then. Discuss binding authority. And devote less space to policy arguments than you might before the Supreme Court of Pennsylvania. If, on the other hand, your brief is being filed at the allowance-of-appeal stage, remember that the Supreme Court is trying to determine whether any of the issues identified by the petitioner really warrant further review. You may be especially well equipped to explain the significance of the issues or to explain why the decision below is (or is not) workable. Furnish those explanations.

Contribute to the Appellate Process. As noted earlier, amici are not parties. Accordingly, amici cannot raise new legal issues or expand the record any more than they can initiate appeals in the first place. Within those confines, however, amici can contribute meaningfully to the appellate process. They can do so by, in the words of Rule 531's Official Note, "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties[.]" Achieving this result means reflecting on how the arguments to be presented will avoid simply repeating the arguments of the parties. In that connection, I quote a revealing observation made by the majority in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 386 n.23 (Pa. 2014): "[A]lthough amicus arguments and interests will not be dispositive as a general proposition, their representation often affects the scope of the principle articulated (for example, amicus's interests often offer the court a broader perspective on the relevant issues to appropriately narrow the holding)." Consider how your brief might assist the court in narrowing or otherwise calibrating its holding.

Maintain Decorum. A few of my fellow appellate lawyers have recently drawn attention to the rise of what they call "cheeky amici." The term refers to amicus briefs that push the boundaries of decorum or that try, perhaps a little too hard, to steal the spotlight. A brief filed earlier this year in the U.S. Supreme Court typifies the category. The brief in question was filed with a request for leave to file a 12-pack of colored pencils, to be used by the justices in completing connect-the-dot exercises that the amicus attached to its brief and addressed to each justice (and law clerk!) by name. The gimmick certainly got press. What it didn't get was any mention in the Court's opinion — an opinion that ruled unanimously against that amicus' favored position. This suggests a lesson. Don't be too cute. Maintain decorum. Remember that by participating as an amicus curiae, you are entering a judicial proceeding, no less than if you walked into the courtroom mid-argument. An appeal is not a game show. Nor is it a political brawl, even if the case involves controversial issues. Measure your tone accordingly. (Watch what you cite, too. A few years back, an amicus brief filed in the Pennsylvania Supreme Court cited a list of supposed "Judicial Hellholes" that included the City of Philadelphia. Justice David N. Wecht responded, in a concurring opinion, by reminding amici to avoid

relying on "unduly caustic or inflammatory materials[.]")

Tips for Parties and Their Counsel

Parties to an appeal should likewise give some thought to amicus practice. Points for reflection include the following:

To Recruit or Not to Recruit? Consider whether it makes sense to recruit a supportive amicus. Identify relevant organizations that might take an interest in your case. And think creatively, as amicus briefs can pack a special punch when the message they deliver comes from an unlikely messenger. (A brief by the Association of Widget-Makers in support of the state agency that regulates widget-makers — now that's likely to be noticed.) Start the conversation with potential amici early. Above all, assess whether a potential amicus and its counsel are well equipped to draft an effective brief, one that will do more than duplicate your own arguments. Remember that having no supportive amicus brief might be preferable to having a poorly drafted one. Likewise, remember that if anyone other than the amicus, its members or its counsel takes on an authorship role or contributes any money to pay for the brief's preparation, these circumstances must be disclosed in the statement of interest.

Lean on Friendly Amici — But Not Too Much. If a supportive amicus brief will be filed in your case, craft your own brief accordingly. Communicate with the amicus before filing so you know what to expect. If, for example, the amicus will expand upon the relevant legislative history of the statutory provision at issue or will discuss relevant adjacent provisions that shed light on how the subject provision is best construed, you might choose to devote comparatively less space to such context. But proceed with caution. Amici are powerless to initiate an appeal on your behalf and powerless to preserve issues for you. Likewise, remember that while Pennsylvania Rule of Appellate Procedure 2137 allows you to adopt by reference any portion of a fellow appellant's or appellee's brief, the rule does not expressly authorize adoption or incorporation by reference of an amicus brief.

Respond to Unfriendly Amici. If an amicus brief is filed in support of your opponent, don't let its arguments go unrebutted. As a rule, you should spend less time responding to such amici than to your opponent. But it still makes sense to articulate some response. Notably, nothing in the rule governing appellees' briefs (Pa.R.A.P. 2112) prevents an appellee from responding to arguments raised by a pro-appellant amicus. And the rule governing reply briefs (Pa.R.A.P. 2113) specifically authorizes appellants to address any matters raised by any amicus.

Judges have a tall task. Amici can lend a helping hand. To do so, every amicus should engage appellate counsel conversant in the process. And every amicus should remember its obligation to be a true friend, not only to the party it supports, but to the court it purports to assist. ⚖

Jonathan Bruno is an appellate lawyer and former law professor based in Pittsburgh. He practices before all three Pennsylvania appellate courts and the U.S. Court of Appeals for the Third Circuit, where he clerked before joining the firm of Del Sole Cavanaugh Stroyd. Bruno is secretary of the PBA Appellate Advocacy Committee. He earned his J.D. and Ph.D. at Harvard. For helpful feedback on earlier drafts of this article, the author thanks Judges Mary Jane Bowes, Joseph A. Del Sole (Ret.) and D. Michael Fisher, and attorneys David R. Fine and Paige H. Forster. Contact Bruno at jbruno@dscslaw.com.

If you would like to comment on this article for publication in our next issue, please email us at editor@pabar.org.