

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9315

IN THE MATTER OF
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

REPLY OF *AMICUS CURIAE*
THE ADVISORY BOARD COMPANY
TO COMPLAINT COUNSEL'S RESPONSE TO MOTIONS FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEFS

[PUBLIC]

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Dated: January 11, 2006

The Advisory Board Company (“the Advisory Board”) submits this Reply to Complaint Counsel’s Response to Motions for Leave to File Amicus Curiae Briefs. With all due respect, Complaint Counsel’s Response is subject to very much the same criticism that it lodges against the Advisory Board’s Motion: a merits attack in the context of a motion for leave. The issue on a motion for leave is whether the Commission should grant leave to file an amicus brief, regardless of the actual substance of the amicus brief. Rather, the Commission should grant leave based “on the reasons why a brief of an amicus curiae is desirable” as set forth in 16 C.F.R. § 3.52(j). In other words, the Commission should not prejudge the merits of the brief in the context of a motion for leave to file the brief.

After candidly disclosing its interests as required by Commission rules, the Advisory Board sought leave because its experience in conducting “50 major studies and 3,000 customized research briefs each year on progressive management in health care” and “industry-wide perspective on this important issue [would] be of assistance to the Commission.” The Advisory Board’s Motion for Leave at 1. Complaint Counsel does not dispute that these grounds are “desirable” per Commission rules. 16 C.F.R § 3.52(j). Accordingly, leave should be granted.

Instead, Complaint Counsel makes a merits-based attack on a *single*¹ factual reference in the substantive brief that there is no probative basis for concluding that there was a nationwide trend of improved quality. The Advisory Board argued that the evidence Complaint Counsel identified and on which the Administrative Law Judge

¹ Although the Complaint Counsel identifies only one single instance based on evidence in the record, it expressly criticized that the Advisory Board’s amicus brief made “numerous factual representations.” Complaint Counsel is not clear as to what “factual representations” it criticizes. Perhaps, it criticizes the amicus’ references to “factual representations” in the record. Such references, however, are standard fare for an amicus brief.

(“ALJ”) relied does not support the conclusion that there was a “nationwide trend of improved quality” among hospitals from 1997 to 2004. ALJ Initial Decision at 180. This conclusion raised a serious question within the Advisory Board given its years of experience in conducting “50 major studies and 3,000 customized research briefs each year on progressive management in health care.” More importantly for the Commission, the studies cited by Complaint Counsel and the ALJ did not tend to prove the rather-significant “nationwide trend” conclusion made by the ALJ. The Advisory Board Amicus Brief at 5-7. In other words, the Advisory Board challenged evidence *in the record* that gave rise to a conclusion that the Board’s experience flatly contradicted. This is typical fodder for an amicus brief.

“The function of an amicus curiae is to call the court’s attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.” 4 AM. JUR. 2d *Amicus Curiae* § 6, at 326 (2d ed. 1995).

Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group. Amicus briefs give a voice to persons who are not parties but who may be affected by a decision.

Luther T. Munford, *When Does the Curiae Need an Amicus?* 1 J. of Appellate Prac. & Proc. 279, 281 (1999); *e.g.*, Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603 (1984); *see also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, SUPREME COURT PRACTICE 663 (8th ed. 2002) (stating that “the amicus who has a legitimate interest in a case does not face too great a hurdle in being allowed to file a brief”).

Moreover, the Advisory Board noted that in its experience no basis for concluding that the “nationwide trend of improved quality” exists. At its heart, this is a policy-driven or legislative fact² on which no absolute conclusion can be reached, because current data and techniques for evaluation are inadequate, rather than an adjudicative fact subject to determination through the adversarial process. Legislative facts are facts on which courts, and presumably the Commission, can rely to inform their decisions. Fed. R. Evid. 201. The Advisory Committee Note to Rule of Evidence 201 explains the significance of legislative facts to decisionmaking and why such facts are not subject to the adversarial process nor the rules with respect to judicial notice.

Finally, Complaint Counsel criticizes the Advisory Board as an interested person. This criticism sorely misses the point. *See* 16 C.F.R. § 3.52(j) (Commission rules envision interested persons by requiring the disclosure of interests); *Neonatology Assocs., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 131-32 (3d Cir. 2002) (rejecting the argument that an amicus must be an impartial person not motivated by pecuniary concerns). But for interested persons, there would be no amicus curiae.

In sum, for the reasons set forth in the motion for leave and above, the Advisory Board respectfully requests leave to file its amicus brief.

² “[L]egislative facts” are “those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” Fed. R. Evid. 201(a), advisory committee note. “Legislative facts are ordinarily general and do not concern the immediate parties.” *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

DATED this 11th day of January, 2006.

SNELL & WILMER L.L.P.

By

A handwritten signature in black ink, appearing to read "Dan W. Goldfine", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2006, I caused true and correct copies of the foregoing Motion for Leave to File Amicus Curiae Brief and accompanying Brief Amicus Curiae of The Advisors Board Company to be served as described below.

Service by overnight delivery of paper copies, including an original, signed version, 12 photocopies, and an electronic version was provided to:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-135
Washington, DC 20580

Service of one copy was provided, by First Class mail, postage prepaid, to:

Duane M. Kelley
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Chicago, IL 60601-9703

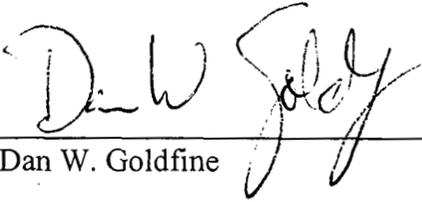
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