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March 11, 2016

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You are hereby notified that the Court has entered the following order:

No. 2015AP157-CR State v. Loomis L.C.#2013CF98

The court having considered the motion of Northpointe Inc. for leave to file a non-party brief amicus curiae;

IT IS ORDERED that the motion is denied.

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). The requirements set forth in Wis. Stat. § 809.19(7) governing amicus briefs are relatively few. See Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin, ch. 11, § VIII, at 25-26 (2015). The motion in the instant case meets these requirements.

¶2 The court issues an order denying the motion. I would grant the motion.

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¶3 Once again, the court offers no explanation of its order to assist this movant or future movants.

¶4 Northpointe, Inc. states that it wishes to file an amicus brief because it developed COMPAS, the sentencing tool at issue in the instant case. Northpointe argues that it is uniquely positioned to discuss the history, accuracy, and efficacy of COMPAS, as well as the use of actuarial risk needs assessments across the criminal justice continuum, and may bring to the court's attention certain issues and points of law that may assist the court in reaching its decision on the merits.

¶5 I surmise that the court may be denying this motion because, as the developer of COMPAS, Northpointe, Inc. would have an interest in promoting its product and might benefit or be harmed financially by the court's writing on COMPAS in State v. Loomis. Northpointe does not, however, appear to have a specific interest in the circuit court's decision about the sentence to be imposed on this particular defendant, Eric Loomis.

¶6 In addition to Northpointe's financial interest, it claims the software is proprietary information.

¶7 I would not necessarily deny a motion to file an amicus brief because the movant has a financial or other interest in the subject matter of the case or because of the claim of the software's proprietary nature. Amici generally have a strong interest in a case or an important stake in an outcome. Why else would a person or entity take the time and trouble to seek amicus status?

¶8 The propriety of using COMPAS and risk assessment instruments to reach evidence-based decisions is an emerging area of the law. COMPAS risk assessment instruments present issues that are novel, technical, and complex. The court's decision in the instant case may affect far more people than the parties.

¶9 The briefs of both parties cite to reference materials relating to COMPAS, risk-needs assessment, and evidence-based sentencing. Why cannot an amicus brief by Northpointe play the same role as the citations in the briefs to reference books or articles by Northpointe or about Northpointe's COMPAS? The court knows of Northpointe's financial and proprietary interests and can take these into account in evaluating Northpointe's amicus brief.

¶10 Judges across the country disagree regarding the merits of amicus briefs or the approach a court should take to requests to file amicus briefs. Compare, e.g., Judge Richard Posner's views expressed in Voices for Choice v. Ill. Bell. Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) (generally viewed as hostile to amicus briefs), with then-Judge Samuel Alito's views expressed in Neonatology Assocs. P.A. v. C.I.R., 293 F.3d 128, 133 (3d Cir. 2002) (generally viewed as more friendly toward amicus briefs).

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¶11 Much has been written about amicus briefs and risk assessments. For discussions of amicus briefs or risk assessment tools, see, e.g., Cecelia Klingele, The Promises and Perils of Evidence Based Corrections, 91 Notre Dame L. Rev. 537 (2015); Lawrence S. Edner & Rubin S. Conrad, Making Strategic Use of Amicus Briefs, For the Defense (Oct. 2015); Mary-Christine Sungaila, Amicus Briefs: How to Write Them, When to Ask for Them, GP Solo (Sept/Oct. 2015); Michael K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?, 41 Am. U. L. Rev. 1243 (1992); Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L.J. 694 (1963); Andrew Frey, Amici Curiae: Friends of the Court or Nuisances?, Litig., Fall 2006, at 5; Philip B. Kurland & Dennis J. Hutchinson, With Friends Like These . . ., Am. Bar. Ass'n J., Aug. 1984, at 16; Joseph Fred Benson, The Court Needs Its Friends, Am. Bar. Ass'n J., Aug. 1984, at 16; Neal Nettesheim & Clare Ryan, Friend of the Court Briefs: What the Curiae Wants in an Amicus, Wis. Lawyer, May 2007, at 11; Judith S. Kaye, An Invitation to "Friends", N.Y.L.J., Dec. 28, 1988, at 1.

¶12 My analysis of this court's orders accepting and rejecting amicus briefs over the years is that they generally do not explain the court's decision; they do not guide lawyers and other interested persons in filing amicus briefs in future cases; and they do not provide the benefit of reasoned decisions so that the court can be thoughtful and consistent in its approach to amicus briefs.

¶13 The court should, in my opinion, take a more expansive view to granting motions to file an amicus brief. A court can use all the help it can get. An amicus may have particular expertise and may present a perspective that the parties cannot or will not advocate. I agree with Judge Samuel Alito (now Supreme Court Justice Samuel Alito) in writing that requiring amici to be limited to persons or entities that are impartial or disinterested "is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." Neonatology Assocs., 293 F.3d at 131.

¶14 The court knows of Northpointe's financial and proprietary interests. If the amicus brief proves useless to the court, the court can easily set it aside.

¶15 In closing, I write to object once again to unilateral directives imposed by one member of the court on a justice's separate writings. For my prior writings objecting to this practice, see my dissent to the December 4, 2015 unpublished order of four justices setting a deadline for motions to intervene in the John Doe trilogy; my concurrence/dissent to the January 12, 2016 unpublished order of four justices granting the motion of three district attorneys to intervene in the John Doe trilogy; my separate writings in the unpublished orders granting review in three cases, State v. Finley, No. 2014AP2488-CR; Wis. Carry v. City of Madison, No. 2015AP146; and Regency West Apts. v. City of Racine, No. 2014AP2947; my concurrence/dissent in In re Disciplinary Proceedings Against Roitburd; 2015 WI 1, ¶¶35-54, ___ Wis. 2d ___, ___ N.W.2d ___; and my concurrence/dissent to the March 8, 2016 order denying judicial notice in Clark v. Am. Cyanamid Co., No. 2014AP775.

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¶16 As I have often written, I favor deadlines for writings of justices and staff. But deadlines should be imposed by the court and uniformly and consistently applied.

¶17 For the reasons set forth, I dissent and would grant the request to file an amicus brief.

Prosser, J., dissents and would grant the motion.

Diane M. Fremgen
Clerk of Supreme Court