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Representing *Amici Curiae*

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Introduction

Preparation and submission of *amicus curiae* briefs is an important part of appellate litigation practice. This is especially true for us appellate lawyers in the nation's capital, where a plethora of trade associations and other organizations want to be heard on significant legal issues affecting their industries and members. *Amicus* briefs that support certiorari petitions, as well as those that address the merits of an appeal after the Supreme Court has granted review, are commonplace and often considered essential. Most federal courts of appeals and state appellate courts also welcome the well-presented views of *amici curiae.*

Let me clear up one point at the outset: In most cases, an *amicus curiae* does not purport to be some sort of neutral advisor to a panel of appellate judges. While "friend of a party" (*amicus litigatoris*) might be a more apt description than "friend of the court," those terms are not mutually exclusive. A concise, well-written, non-repetitive *amicus* brief not only can bolster a litigant's case, but also deepen an appellate court's understanding of legal issues and their significance.

This chapter offers some practical insights on the drafting and use of *amicus curiae* briefs. It is not intended to be a treatise on the subject, but for lawyers who spend most of their time in trial courts, or who want to develop a full-service appellate practice, the following guidance should be helpful.

Why File an *Amicus* Brief?

The typical reasons why private party *amicus* briefs are filed include the following:

- A trade association, business or professional organization, or public interest group wants to convey directly to an appellate court its perspective and views on legal issues that are important to its members. This frequently involves educating the court about the impact or ramifications of an issue on the *amicus curiae*, its members, and/or a broader segment of industry or the public. When an *amicus* brief is filed for this purpose, it often is submitted

on behalf of several *amici curiae* that have common or related interests in the questions presented. This not only signals the broad significance of the issue, but also increases the chances that the brief will be considered by the appellate court.

- A party's appellate brief needs bolstering. There may be one or more legal or policy arguments that a party's brief does not address, or *amici curiae* believe that a party's brief does not adequately present or respond to, certain legal arguments. *Amicus* briefs are not supposed to duplicate legal arguments contained in the supported party's brief. Appellate courts generally appreciate, however, an *amicus* brief that presents, in a significantly better way, legal arguments that are not well articulated in the supported party's brief.
- An *amicus curiae* wants to urge the Supreme Court to grant certiorari or a federal court of appeals to grant rehearing en banc.
- The outcome of an appeal may directly affect an *amicus curiae*'s position in another pending appeal or trial court proceeding. In this type of situation, the *amicus curiae*—which typically is an individual company—essentially has a direct stake in the issues presented for review and needs to be heard to protect its litigating position, financial interests, or other interests.
- An appellate court invites submission of a private party *amicus* brief. This is fairly unusual, but sometimes happens when the court needs objective expert or technical information that the parties themselves cannot provide. This probably comes closest to what purists would describe as an *amicus curiae* brief.

Government *Amicus* Briefs

When the United States, a federal department or agency, or a state (or local) government or agency has an interest in a private party appeal, it can file an *amicus curiae* brief. The parties' consent is normally not required.[1]

The most prominent example of a governmental *amicus* brief is when the Supreme Court issues an order inviting the Solicitor General to file an

[1] *See* SUP. CT. R. 37.4; FED. R. APP. P. 29(a).

amicus brief expressing the views of the United States on a certiorari petition before the Court decides whether to grant review. Because the Supreme Court follows the solicitor general's certiorari recommendation in a high percentage of cases, it is important for both sides' appellate counsel to meet with the Office of the Solicitor General as soon as possible after a Call for the Views of the Solicitor General (CVSG) is issued.[2]

Federal courts of appeal sometimes invite the United States to participate in private party appeals where important federal interests are implicated, or the United States can do so on its own initiative.[3] Similarly, a state, through its attorney general or solicitor general, can, and often does, participate in private party state court appeals where the state's interests are implicated.

In most cases, the federal or state *amicus curiae* will support one side or the other in an appeal. Sometimes, however, governmental *amicus curiae* will not align itself with either side if the government's interests are distinct.

The Rules

Counsel should take care, of course, to study and comply with all federal and local rules applicable to preparation and submission of *amicus* briefs. There are several potential pitfalls that counsel should note in particular:

Supreme Court (SUP. CT. R. 37)[4]

R. 37.2(a)[5]

An *amicus* brief supporting a petition for writ of certiorari must be filed within thirty days of when the case is placed on the Supreme Court docket or a response is called for by the Court, and this period will not be

[2] *See* Lawrence S. Ebner, *The United States as Amicus Curiae: Making Uncle Sam Your New Best Friend*, CERTWORTHY (Oct. 11, 2011) *available at* http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=7340&id=867.

[3] *See* 28 U.S.C. § 517 (2011) (authorizing the Attorney General to send the Solicitor General or other Department of Justice representative to any federal or state court "to attend to the interests of the United States").

[4] SUP. CT. R. 37.

[5] SUP. CT. R. 37.2(a).

extended. A motion for leave is not required if all parties consent in writing. A minimum of ten days prior to the due date, the *amicus curiae* must provide written notice of intention to file to counsel of record for all parties, unless the *amicus* brief is filed earlier than ten days before the due date. This notice requirement enables the respondent to decide whether to seek an extension of time so that it can review any *amicus* briefs prior to filing its brief in opposition, which also is due thirty days after a case is placed on the docket.

R. 37.3(a)[6]

If certiorari is granted, *amicus* briefs on the merits are due within seven days after the brief for the party supported is filed. There is no advance notice requirement. Again, a motion for leave is not required if the parties provide written consent to the filing of the brief. Counsel of record sometimes will file blanket consents with the Clerk of the Court.

Also, in cases before the Court for oral argument, an electronic version (e.g., pdf version) of an *amicus* brief must be transmitted to the clerk and the parties' counsel of record, as well as being submitted in printed, booklet form.[7]

R. 37.6[8]

The first footnote on the first page of text in every private party *amicus* brief must "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution." The primary purpose of this disclosure rule is to preserve the integrity of *amicus* briefs by deterring a party or its counsel from using *amicus* briefs as page/word extensions. The rule does not prevent a party's counsel and *amicus* counsel from conferring about the content of a prospective *amicus* brief.

[6] SUP. CT. R. 37.3(a).
[7] *See also* SUP. CT. R. 33 (booklet format; word limits, etc.).
[8] SUP. CT. R. 37.6.

Federal Courts of Appeals (FED. R. APP. P. 29 & any corresponding circuit rule)[9]

R. 29(a)[10]

Unless modified by local rule, a motion for leave to file an *amicus* brief is not required if the brief states that all parties have consented to its filing.

R. 29(c)(5)[11]

Private party *amicus* briefs filed in the federal courts of appeal must now contain a disclosure statement similar to the statement required by Sup. Ct. R. 37.6.[12] Again, the purpose is to preserve the credibility of *amicus* briefs by preventing parties' counsel from using *amicus* briefs as their own supplemental briefs.

R. 29(e)[13]

In the courts of appeal, *amicus* briefs are due no later than seven days after the principal brief of the party being supported is filed.

Circuit Rules

Most federal circuits have their own supplemental rules regarding preparation and submission of *amicus* briefs. It is essential that counsel review the local circuit rules, as well as the federal rules.

Some Practical Considerations

Solicitation of Prospective Amici Curiae

Consolidating the views of multiple *amici curiae* into a single brief is often beneficial and sometimes necessary since most trade associations and other nonprofit organizations have limited budgets for judicial advocacy. Prospective *amici curiae* can be solicited by a party—either directly or

[9] FED. R. APP. P. 29.
[10] FED. R. APP. P. 29(a).
[11] FED. R. APP. P. 29(c)(5).
[12] SUP. CT. R. 37.6.
[13] FED. R. APP. P. 29(e).

through counsel—seeking *amicus* support, or by an *amicus* or counsel desiring to organize an *amici* brief.

The best way to proceed is for one organization to take the lead on the brief and to solicit others to join. This is frequently accomplished by circulating an *amicus* solicitation memo, which *amicus* counsel, and sometime a party's counsel, prepares to provide information about the case, the issues, the need for *amicus* support, the schedule, and the estimated legal fees and costs. A meeting or conference call among *amici* (or prospective *amici*) should follow. Cost-sharing arrangements are common, although some organizations will agree to lend their names to a brief only if they can get a free ride or make only a minimal financial contribution. Ground rules need to be set early, especially regarding matters such as the order in which *amici* will be listed on the brief, any information required to be provided by *amici*, which attorney will take the lead in drafting the brief, and the schedule for reviewing and providing comments on drafts.

Obtaining Consent

This is usually, but not always, a non-issue. Withholding consent to submission of *amicus* briefs is strongly disfavored by most appellate courts.[14] Some trial counsel, especially those who have not had much exposure to appellate practice, will withhold consent, or even proactively object, simply because they do not like the idea that the opposing party will be receiving *amicus* support. Few appellate courts will deny permission to file a timely *amicus* brief simply because the opposing party objects. Other counsel will try to make their consent contingent upon an opportunity to review the proposed *amicus* brief in advance. Such a request is entirely inappropriate and should be flatly rejected.

Coordination with the Supported Party's Counsel

At a minimum, counsel for *amicus curiae* should provide the supported party's counsel a reasonable opportunity to comment on a final draft of the brief before it is submitted. This is more than a courtesy; it is important from the viewpoint of ensuring consistency of position, and also because the party's counsel will be much more familiar with the issues and facts and

[14] *See* SUP. CT. R. 37.2(b).

may be able to make helpful suggestions. There are limits, however, to the type of input that the supported party's counsel should provide. Any sort of major editing or revision by the party's counsel—albeit merely in the form of a "suggestion"—would be inappropriate, and if extensive, could trigger disclosure requirements.

Of course, coordinating in advance with the supported party's counsel is desirable. It not only is appropriate, but usually helpful, for *amicus* counsel to contact the supported party's counsel to solicit ideas on what issues or points to address, and/or types of information to provide, in the *amicus* brief. In appeals where more than one *amicus* brief will be filed, it is common for the supported party's counsel to organize an *amicus* meeting to ensure that all counsel have a common understanding of the case background and posture, and also to identify issues or subjects that might be covered in the *amicus* briefs. *Amici* may want to decide how to allocate subjects among their briefs.

Structure, Approach, and Style

Although *amicus* briefs must adhere to appellate courts' rules regarding corporate and authorship/sponsorship disclosures, length, and typography, *amicus* counsel have considerable flexibility in deciding how to structure their brief.[15] Many *amicus* briefs include only a statement of interest, argument, and conclusion.

One component that normally does not appear in private party *amicus* briefs is a separate statement of the issues or questions presented. There is no reason to replicate the statement contained in the supported party's brief and any deviation from the way that the supported party has framed the issues creates the risk of inconsistency. Merely trying to reword or improve the supported party's statement of issues, or attempting to spin the issues in a way more favorable to the *amici curiae*, is normally insufficient justification for including a separate issues statement in an *amicus* brief. The exception, however, would be if the supported party's brief truly does not articulate the issues concisely, clearly, or accurately.

[15] *See* FED. R. APP. P. 29(c).

Statement of Interest

Every *amicus* brief must include a statement explaining the interest of the *amicus* or *amici curiae*. This is a vital part of the *amicus* brief and should not be approached in a perfunctory manner. For example, if the brief is being submitted on behalf of trade associations, it should not merely recite the general descriptions of the associations contained on their websites.
While a general description of each *amicus curiae* should be included, it should be short—as a rule of thumb, no more than a few sentences for each *amicus curiae*. More importantly, the statement of interest should not stop there. In no more than three or four paragraphs, the statement of interest should:

1. Explain what the *amici*'s common or related interests in the appeal and its issues are;
2. Highlight why those issues are important to the *amici* and/or the public; and
3. Provide a short and general overview of the arguments and/or information presented in the brief.

This approach makes the brief relevant from the outset, serves as a preview of the argument or discussion to follow, and hopefully piques the judges' (or their law clerks') interest enough to read the entire brief. An example of a statement of interest submitted on behalf of trade associations in a product liability case that the Supreme Court accepted for review appears in Appendix C to this book.

Argument

Amicus curiae briefs should enhance an appellate court's understanding of, or illuminate its perspective on, one or more of the appeal's legal issues and their potential implications. Probably the most common mistake made in *amicus* briefs is to repeat the legal arguments contained in the brief of the supported party. This is what the Supreme Court Rules say on this subject:

> An *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. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.[16]

Somewhat more indirectly, the Federal Rules of Appellate Procedure require an *amicus* brief to be "desirable" as well as "relevant."[17]
An *amicus* brief is not desirable if it merely replicates legal arguments that are adequately presented in the supported party's brief. Instead, an *amicus* brief should:

1. Expand on legal arguments not fully briefed by the supported party (e.g., discuss the purpose and legislative history of the statutory provision at issue; discuss additional case law that addresses the issue; cite law review articles on the issue);
2. Raise additional legal arguments relevant to the issues but not presented by the supported party (or considered by the lower court);
3. Discuss the broader impact (e.g., on an industry; on consumers or another segment of the public) if the lower court's ruling is affirmed/reversed; and
4. Present additional, relevant, but non-case specific, factual information.

Conclusion

In most cases, the conclusion of an *amicus* brief should be the same as the conclusion in the supported party's brief (e.g., grant the certiorari petition; affirm/reverse the district court's decision; vacate the agency's regulation and remand it for further consideration; and grant the petition for rehearing en banc).

Style

Writing an *amicus* brief is a somewhat liberating experience. Unlike a party's brief, it does not need to include components such as a statement of jurisdiction, statement of the case, statement of facts, or standard of review.

[16] SUP. CT. R. 37.1.
[17] FED. R. APP. P. 29(b)(2).

Indeed, an *amicus* brief does not need to be bound by the facts of the case at all. In other words, an *amicus* brief should transcend the parties, the facts, and the case.

An *amicus* brief submitted to the Supreme Court, a federal court of appeals, or a state appellate court should be written by an appellate attorney. Unlike lawyers who spend most of their time in trial courts, or who draft briefs that are primarily factual in nature, attorneys who specialize in appellate litigation possess a particular combination of knowledge, skills, and experience that enable them to produce the types of briefs that appellate courts yearn to read. This includes *amicus* briefs, which need to be concise, sharply focused, and written in an elevated, informative, and somewhat restrained style.

Oral Argument

Amici curiae are invariably required to express their views to appellate courts through the submission of written briefs. In the Supreme Court, *amicus* counsel is almost never allowed to participate in oral argument by sharing time with the supported party's counsel.[18]

There are two exceptions: When the United States participates in an appeal as *amicus curiae*, the solicitor general routinely requests, and the Court almost always allows, a "divided argument" (i.e., an opportunity for the Solicitor General's Office to share in the oral argument time allotted to the supported party). The other exception—which is quite rare—is when the Court requests a member of the Supreme Court Bar to submit an *amicus* brief and participate in oral argument on an issue that neither party has addressed. This occurred, for example, during the Court's October 2011 term in connection with the health care cases.

At the federal court of appeals level, Fed. R. App. P. 29(g), as amended in December 2010, states that "[a]n *amicus curiae* may participate in oral argument only with the court's permission."[19] Even though the United

[18] *See* SUP. CT. R. 28.7 (allowing *amicus curiae*, who have not obtained a supported party's consent, to participate in oral argument "only in the most extraordinary circumstances").
[19] FED. R. APP. P. 29(g).

States, or a state government, does not need consent to submit an *amicus* brief, it must request permission to participate in oral argument. Such permission is usually granted. Private *amici curiae*, however, rarely present oral argument, and when they do, it is almost always when the supported party cedes some of its allotted time.

When *amicus curiae*—including a governmental *amicus*—is going to participate in oral argument, it is essential that counsel for the supported party and the *amicus curiae* confer in advance to coordinate their presentations. Conducting a moot court in which both counsel participate is highly desirable.

Conclusion

Amicus support can be highly beneficial to a party involved in a federal or state court appeal, especially in cases involving issues that have impact beyond the immediate litigants.

One of the first questions that an attorney representing a party in an appeal should consider is whether it is a case where *amicus* support is desirable. If so, that attorney, in consultation with his client, should promptly begin identifying and contacting potential *amici curiae*. Trade or business associations, professional groups, and even individual companies should seriously consider participating in an appeal as *amicus curiae* if its interests, or those of its members, may be significantly affected by the outcome.

Equally important, a well-written, non-duplicative *amicus* brief can be a significant aid to an appellate court seeking to gain a deep understanding of the legal issues and to comprehend the breadth of their implications and potential impact. Attorneys who are skilled in appellate brief writing are in the best position to prepare *amicus curiae* briefs that achieve this objective.

Key Takeaways

- Remember that a concise, well-written, and non-repetitive *amicus* brief not only can strengthen a litigant's case, but also help the appellate court to understand the legal issues at hand and their significance.

- Be sure to study and comply with all rules, including local circuit rules, for the preparation and submission of *amicus* briefs and avoid the common pitfalls.
- When it makes sense, work with other organizations to consolidate views of multiple *amici curiae* into a single brief. This can be helpful to those organizations that may have limited budgets for judicial advocacy. You should be sure to provide the supported party's counsel with the final draft of the brief to comment on before it is submitted. This allows them to ensure consistency of position and accuracy of information.
- An *amicus* brief should include a statement of interest, argument, and conclusion. The supported party's statement of issues normally does not need to be replicated in an *amicus* brief. The arguments presented should be in sync with the supported party's brief, should be concise, sharply focused, and written in an elevated, informative, and restrained style.

Lawrence S. Ebner founded and leads the nationwide appellate litigation practice at McKenna Long & Aldridge LLP. Resident in the firm's Washington, D.C. office, Mr. Ebner has authored dozens of high-impact *amicus curiae* briefs on behalf of national business organizations and individual companies that want to express their views on important legal issues directly to the Supreme Court of the United States, U.S. courts of appeals, and state appellate courts. Much of his legal work focuses on complex legal issues involving federally regulated or procured products or services. Mr. Ebner is a graduate of Harvard Law School (1972) and Dartmouth College (1969).

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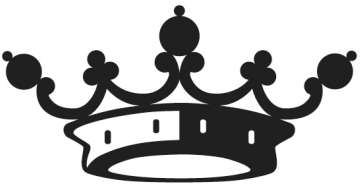

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