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Featured Articles

The United States as *Amicus Curiae*: Making Uncle Sam Your New Best Friend

by Lawrence S. Ebner

The United States can be a party's best friend—or worst foe—when it enters an appeal as *amicus curiae*. This article provides attorneys with some practical guidance about interacting with the U.S. Department of Justice when it is engaged in the process of deciding whether to participate in an appeal and/or what position to advocate on behalf of the United States as *amicus curiae*.

A. Attending to the Interests of the United States

The United States is not bashful about participating as *amicus curiae* in appeals that implicate important federal interests. Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State." In other words, Congress has authorized the Department of Justice to appear in any suit, including private party litigation, to express and protect the interests of the federal government, including the interests of most federal departments and agencies.

The Office of the Solicitor General, which is comprised of the most select group of attorneys within the Justice Department and probably the entire federal government, represents the United States in

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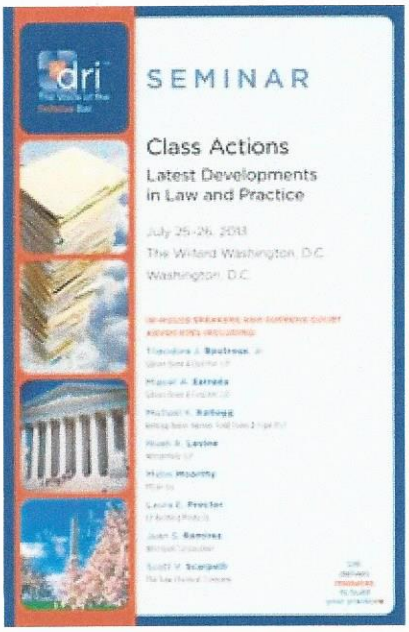

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General." Each term the Supreme Court issues CVSGs in a number of private party cases where a certiorari petition presents legal questions that appear to implicate important federal government interests. The Court issues a CVSG to obtain the Solicitor General's views not only on the legal issues in a case, but also on whether to grant review.In this way the Solicitor General serves an important, case-screening "gatekeeper" function for the Supreme Court. The Office of the Solicitor General posts such "invitation briefs" online. *See* *http://www.justice.gov/osg/briefs/index.html#filingtype*.

A CVSG is issued after the parties complete briefing on a certiorari petition, all other *amicus* briefs supporting or opposing the petition have been filed, and the Justices have held an initial private conference to discuss the petition. After a CVSG is issued, the Court, as a matter of practice, affords the Solicitor General as much time as needed to prepare and file the *amicus* brief. No further consideration is given to the certiorari petition until the Solicitor General files the brief, normally by the end of the term in which the CVSG is issued. As discussed below, the period during which the Office of the Solicitor General formulates and prepares an invited *amicus* brief on a pending certiorari petition affords the parties a crucial opportunity to provide input.

The United States also is subject to appellate rules governing *amicus* participation in oral argument. In the federal courts of appeals, "[a]n amicus curiae may participate in oral argument only with the court's permission." Fed. R. App. P. 29(g). Thus, if the Justice Department wishes to argue as *amicus curiae* at a court of appeals hearing, it first must file a motion seeking the court's permission to do so. Although such motions when filed on behalf of the United States are routinely granted, the Justice Department attorney appearing before the court of appeals, and counsel for the party that the United States is supporting, must share the time allotted to their side in the appeal.

Similarly, when the Supreme Court hears a case, the Solicitor General (or a member of his or her office) may participate in oral argument on behalf of the United States as *amicus curiae.* The Solicitor General

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Supreme Court proceedings. *See* 28 U.S.C. § 518; 28 C.F.R. § 0.20(a). This includes authoring Supreme Court *amicus* briefs and participating in oral arguments as *amicus curiae.* In the federal courts of appeals, the Justice Department's operating divisions (e.g., Civil Division; Environment and Natural Resources Division) usually take the lead in representing the United States as *amicus curiae*, but the Solicitor General must authorize all such *amicus* participation. *See* 28 C.F.R. § 0.20(c).

B. Playing By the Rules

When the United States decides to file an *amicus* brief in an appeal, neither the parties nor the court has a choice in the matter. Sup. Ct. R. 37.4 provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General." Similarly, Fed. R. App. P. 29(a) indicates that "[t]he United States or its officer or agency . . . may file an amicus-curiae brief without the consent of the parties or leave of court." State appellate courts have similar rules.

Although the United States can appear in an appeal as *amicus curiae* whenever and wherever it wishes, the Justice Department normally must adhere to the rules regarding the timing, length, and format of *amicus* briefs. For example, unless enlarged, a Supreme Court *amicus* brief on the merits is limited to 9,000 words, *see* Sup. Ct. R. 33.1(g)(xi) & (xii), and an *amicus* brief in a federal court of appeals may be no more than half the maximum length allowed for a party's principal brief (i.e., generally no more than 7,000 words), *see* Fed. R. App. P. 29(d). These rules apply to *amicus* briefs filed on behalf of the United States as well as by other *amici*.

One important but unwritten exception relates to the Solicitor General's submission of an *amicus* brief at the Supreme Court's invitation during the certiorari petition stage (i.e., prior to the Court's decision on whether to grant review). In the vast majority of cases, the Solicitor General will not file an *amicus* brief relating to a pending certiorari petition unless the Court issues an order "inviting" the Solicitor General to submit a brief expressing the views of the United States. Such an order is commonly referred to as a "CVSG"—a "call for the views of the Solicitor

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first files a motion for permission to participate and for divided argument. *See* Sup. Ct. R. 28.4 & 28.7. As a matter of practice, the Supreme Court routinely grants such motions when filed by the Solicitor General's office,but almost always denies permission for non-federal government *amici* to stand up and argue before the Court.

C. When Uncle Sam Speaks, Appellate Courts Listen

Statistical analyses repeatedly confirm that the Solicitor General's influence in the Supreme Court would be difficult to overstate, including when he or she represents the United States as *amicus curiae.* According to one recent law review article, " [w]hen the Solicitor General is participating as amicus at the petition stage—almost always at the Court's invitation—the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases." Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev., 1323, 1333-34 (2010). And when the United States participates as *amicus* on the merits after the Supreme Court agrees to hear a case, the Solicitor General's office "wins 70-80% of the cases, regardless of which side it supports." *Id.* at 1335. Indeed, "the Solicitor General's presence as amicus has a powerful effect on outcome: a petitioner's likelihood of winning increases approximately 17% when the Solicitor General comes in on its side and decreases approximately 26% when the Solicitor General supports the respondent." *Id.*

Although not as easily quantifiable, the influence that the United States wields as *amicus curiae* in the federal courts of appeals also is quite significant, but probably less impressive than in the Supreme Court. The arguments presented by the Justice Department on behalf of the United States as *amicus curiae* in the courts of appeals represent advocacy views, and even if not afforded "*Chevron* deference," are entitled to a level of judicial respect commensurate with their persuasiveness. *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (discussing the degree of deference afforded to federal government "litigating positions"); *see also United States v. Mead*,

533 U.S. 218, 221, 228 (2001).

D. What is the *Federal* Interest?

The U.S. Department of Justice is fiercely independent when it participates in an appeal on behalf of the United States as *amicus curiae*. This does not mean, however, that the Justice Department is indifferent to the parties' views. Instead, there are opportunities for both sides in an appeal to provide the Office of the Solicitor General and/or Justice Department operating divisions with timely and meaningful input. Thoughtful and well presented insights from parties' appellate counsel regarding the legal issues in an appeal are generally not only welcome, but also carefully considered.

The most effective input that a party can provide will directly address the Justice Department's constant, overarching concern in each and every appeal where the United States is appearing, or may appear, as *amicus curiae*: What is the *federal* interest at stake in the appeal? The federal interest may be fundamental, such as judicial respect for the separation of powers. Or it may be more practical, such as judicial interpretation or application of a federal regulatory statute. But in every case where Justice Department attorneys are contemplating *amicus* participation, they will be closely examining the federal interests that should be identified, advocated, and protected.

E. Presenting Your Views To the Office of the Solicitor General

Regardless of whether you represent the petitioner or respondent, or the appellant or appellee, your fundamental objective should be to explain persuasively why the federal government's interests coincide, or at least are consistent, with your party's interests in the legal issues raised by an appeal.

The best—and most important—opportunity to do so probably is when a certiorari petition has been filed and the Supreme Court, after meeting in conference, has requested the Solicitor General to submit an *amicus* brief expressing the views of the United States. This is the time for a party to take full advantage of its most experienced and skilled

appellate advocates. As soon as a CVSG is issued, appellate counsel should prepare a Memorandum for the Office of the Solicitor General. Because the memorandum is intended for the federal government's Supreme Court counsel, who are among the most sophisticated appellate lawyers (and best brief writers) in the nation, it should be of Supreme Court quality both in terms of substance and style.

If you are representing the petitioner (i.e., the party that lost in the court of appeals), your memorandum should focus on why the United States should support the granting of review. The memorandum should not be just a retread of your certiorari petition, which the Solicitor General's office will have studied. Instead, your memorandum should supplement the certiorari petition by elaborating upon the important federal jurisprudential, policy, and/or practical interests implicated by the questions presented for review. Although you are acting as an advocate, your memorandum should summarize the judicial landscape relating to the questions presented as thoroughly and forthrightly as possible, discussing both favorable and unfavorable decisions, and of course, identifying any inter-circuit conflicts. The memorandum also should address the merits by explaining as succinctly as possible why the court of appeals decided the case incorrectly. If the lower court's ruling will have a broad adverse impact beyond the parties in the case, that too should be emphasized, as well as why from both a postural and factual perspective, the case is an appropriate, if not excellent, vehicle for Supreme Court review.

When you are representing the respondent (i.e., the party that prevailed in the court of appeals), your goal should be to draft a memorandum that explains why the Solicitor General should recommend against certiorari. The memorandum should supplement the certiorari opposition brief that you filed with the Court, and focus on the reasons why denying review would be consistent with federal interests. Your memorandum should explain why the court of appeals decided the case correctly, and to the extent possible, why the lower court's ruling does not conflict with any decisions of the Supreme Court or other circuits. If the legal issues involved are narrow, the

memorandum should discuss why they are not likely to recur, and if they are novel, why further percolation of those issues in the lower courts is desirable. And if the case in any way from a postural or factual perspective is a less-than-perfect vehicle for Supreme Court review, your memorandum should explain why the case is not certworthy.

In addition to submitting your memorandum to the Solicitor General, you can and should request an in-person meeting to further advocate your party's views. In many cases the Solicitor General's office often will be amenable to holding such a meeting, but be forewarned that both sides will be invited to appear in succession, probably on the same day. When such a meeting is held, normally in one of the Solicitor General's ornate conference rooms at the Main Justice building in the Federal Triangle, key attorneys from cognizant divisions of the Justice Department, and also from potentially interested federal departments and agencies, may be present.

Do not expect to engage in some sort of casual give-and-take chat about the case. This type of meeting is more like a moot court session, with the Solicitor General or one of the Deputies presiding, and joined by several of his or her assistants. Each side in the appeal presents separately, outside the presence of the other, and usually is afforded no more than an hour.

A party should select a single, experienced, federal appellate advocate, who is thoroughly steeped in the appeal and relevant case law, to take the lead in presenting the party's views to the Solicitor General and other assembled government attorneys. The party's counsel should be prepared for some tough and pointed questioning. After each side's presentation has been made, the Solicitor General and his or her colleagues, joined by the other government attorneys in attendance, will deliberate among themselves. The Solicitor General reveals the government's final position only when the brief for the United States as *amicus curiae* is filed with the Supreme Court.

F. Additional Opportunities for Input

When a case is before a circuit court of appeals, a federal department or agency with a significant interest in the issues may request the appropriate division at the Department of Justice to consider filing an *amicus* brief to express the government's views. As indicated above, the Solicitor General must approve any such request. *See* 28 C.F.R. § 0.20(c). Or a court of appeals panel may *sua sponte* request the Justice Department to file an *amicus* brief. But unlike the Supreme Court's issuance of a CVSG invitation, which the Solicitor General always accepts, the Justice Department feels no compulsion to file an *amicus* brief when requested by a court of appeals. (The same is true at the district court level, where the Justice Department may file, either on its initiative or at the court's request, a Statement of Interest—essentially an *amicus* brief—under § 517.) Again, the Solicitor General must approved *amicus* participation. When the Justice Department does file an *amicus* brief, it also may request the court's permission to participate in oral argument alongside the attorney for the side that it is supporting.

If a party knows that the Justice Department is considering *amicus* participation in a court of appeals case, it can prepare and send to the appropriate Assistant Attorney General and/or his or her appellate staff, a memorandum discussing the issues and the party's perspective on the significant federal interests, if any, that are at stake. It is also possible to request a meeting, but obtaining one may be less likely than when a CVSG has been issued. When and if a meeting is held, counsel for the other side in the appeal will be afforded the opportunity to express their party's views. Although meetings at the Justice Department regarding possible *amicus* participation in the courts of appeals normally are held with, and conducted by, the cognizant departmental division, a representative of the Solicitor General's office, as well as counsel from interested departments or agencies, are present. Again, a party would be wise to rely upon experienced appellate counsel to prepare a pre-meeting memorandum and take the lead at any meeting with Justice Department officials.

G. Conclusion

The presence of the United States is a powerful factor in any appeal. The government's participation as *amicus curiae* almost always reflects the fact that there are important federal interests involved in the case. A party's appellate counsel should endeavor to persuade the Department of Justice that the federal government's interests and his or her client's interests are closely aligned. Although Uncle Sam, even when supporting a party as *amicus curiae*, may be reluctant to create the impression that he is either side's new best friend, a party should to try to make him, at the very least, a very welcome kissing cousin.

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