

# How To Draft An Amicus Brief That Actually Gets Read

By *Lawrence S. Ebner*



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Writing *amicus curiae* (“friend of the court”) briefs is my favorite activity as an appellate lawyer. Amicus briefs give organizations and individuals with something important to say about unresolved legal issues direct access to the Supreme Court, federal courts of appeals, and state appellate courts. And they continue to proliferate.

Hundreds of non-governmental amicus briefs on behalf of industry trade associations, public interest advocacy groups, and individuals ranging from law professors to scientists are filed every year in the U.S. Supreme Court to support dozens (among thousands) of pending certiorari petitions. Numerous amicus briefs also are filed at the merits stage, especially in blockbuster cases, after the Supreme Court grants review in about 60 to 75 cases per term. Amicus briefs also are commonplace in federal courts of appeals, and increasingly, in state supreme courts.

So if you are engaged to draft an amicus brief, how can you make it stand out in what may be a flurry, and sometimes blizzard, of other amicus briefs in the same case? In other words, how can you maximize the chances that your amicus brief will be read by justices or judges, or at least their law clerks? I have three overarching pieces of advice that are easy to understand but can be difficult to implement:

- Follow the rules.
- Say something different.
- Use an appropriate writing style.

## **Follow the Rules**

Although the need to read an appellate court’s rules relating to preparation and submission of amicus briefs is obvious, understanding and following them may be a challenge for inexperienced amicus counsel.

Supreme Court. Let’s start with the Supreme Court, whose requirements relating to amicus briefs are set forth at [Rule 37](#). At the petition stage, *see* Sup. Ct. R. 37.2(a), these are the most frequent pitfalls:

- Amicus briefs supporting a certiorari petition are due within 30 days after the petition is docketed. Although respondents often request, and easily obtain, extensions of time for preparing oppositions to certiorari petitions,

the Court *will not grant* an extension for the submission of amicus briefs. Note, however, that the 30-day period reboots if the Court calls for a response after the respondent waives its right to file an opposition to a certiorari petition.

- You must provide at least 10 days’ advance notice to counsel of record for all parties that you intend to file an amicus brief in support of a certiorari petition. You can accomplish this by email. The primary purpose of the advance notice is to afford the non-supported party an opportunity to request an extension of time to file its opposition brief, which otherwise would be due the same day that amicus briefs supporting the petition are due. (Note that non-governmental parties almost never file amicus briefs in support of the party opposing a certiorari petition. The conventional wisdom is that such briefs would be counterproductive by calling attention to a certiorari petition.)
- You also must obtain the parties’ consent to the filing of your amicus brief. Consent can be requested in the same email that provides the required advance notice. If the opposing party (foolishly) withholds consent, a motion for leave must be included in the same printed booklet as the amicus brief. *See* Sup. Ct. R. 37.2(b). Opposing consent to the filing of a timely amicus brief is bush league. The Court never denies a timely motion for consent to file an amicus brief that complies with the rules. In fact, the Court is considering whether to eliminate the consent requirement entirely.
- Provide the disclosure required by Sup. Ct. R. 37.6. This rule requires the first footnote on the first page of an amicus brief’s text to indicate whether a party or party’s counsel has helped to author or finance your amicus brief (see R. 37.6 for the magic language). The rationale for the disclosure rule is that the Court does not want parties to use amicus briefs as a way of circumventing word limits applicable to their own briefs.

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At the merits stage, *see* Sup. Ct. R. 37.3(a), advance notice is not required for submission of amicus briefs, but the consent requirement, and the Rule 37.6 disclosure requirement, apply. Merits-stage amicus briefs are due within 7 days after the time allowed for submission of the supported party’s principal brief. As with petition-stage amicus briefs, time extensions are not allowed.

Circuit Courts of Appeals. In federal courts of appeals, [Fed. R. App. P. 29](#) governs. Rule 29(a) includes a disclosure requirement similar to Sup. Ct. R. 37.6.



It always is important to see whether a particular circuit has issued a local rule that implements, or modifies, Rule 29. For example, [D.C. Cir. R. 29\(d\)](#) states that “[a]mici curiae on the same side must join in a single brief to the extent practicable,” and that a separate amicus brief “must contain a certificate of counsel plainly stating why the separate brief is necessary.”

Word Limits. Of course, there are word limits for amicus briefs. In the Supreme Court, petition-stage amicus briefs are limited to 6,000 words, and to 9,000 words at the merits stage. *See* [Sup. Ct. R. 33.1\(g\)](#). There also are format requirements for Supreme Court amicus briefs, which must be in printed booklet form and include a cover with the required color. *Id.* Experienced commercial Supreme Court printers work with the rules daily.

In federal courts of appeals, amicus briefs are limited to half the length allowed for the supported party’s brief, *see* Fed. R. App. P. 29(a)(5), except that an amicus brief filed in connection with a pending rehearing petition is limited to 2,600 words, *see* Fed. R. App. P. 29(b)(4).

Shorter is better. Amicus briefs should rarely reach, or even approach, these word limits, especially if multiple amicus briefs are being filed.

### **Say Something Different.**

Avoiding duplication of the arguments presented in the supported party’s brief—and to the extent possible, in other amicus briefs—is the single most important way an amicus counsel can increase the likelihood that his or her brief will get read. In fact, the Supreme Court’s amicus rules begin with the following admonition:

“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.” Sup. Ct. R. 37.

Some federal courts of appeals are even more explicit. For example, the Circuit Advisory Committee Note to [9th Circuit Rule 29-1](#) states as follows:

“The filing of multiple *amici curiae* briefs raising the same points in support of one party is disfavored. Prospective *amici* are encouraged to file a joint brief. Movants are reminded that the Court will review the *amicus curiae* brief in conjunction with the briefs submitted by the parties, so that *amici* briefs should not repeat arguments or factual statements made by the parties.”

Similarly, [5th Cir. R. 29.2](#) states in connection with the contents of an amicus brief:

“The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any non-conforming brief may be stricken, on motion or sua sponte.”

Avoiding repetition can be difficult, especially when the supported party’s petition or brief is comprehensive and well-researched and written. But if you want your brief to be read, it not only is possible, but also essential, to write an amicus brief that provides *additional* perspective, argument, or non-adjudicative information that is useful to the court.

For example:

- If your client is a trade association, your amicus brief could explain how the legal issues in a case, or adverse lower court rulings, impact the industry that the association represents.
- If the issue is a matter of statutory interpretation, your amicus brief might present legislative history not already included in the supported party’s brief.
- Or your brief might supplement, or delve more deeply into, cases that are cited in the supported party’s brief, or present your own critique of the lower court’s adverse opinion.
- Amicus briefs also can be quite useful when they cite secondary sources, such as law review articles, to augment the court’s understanding of an issue.
- Policy arguments that bolster legal arguments also are sometimes appropriate and beneficial.

Attorneys for the party seeking and/or receiving amicus support can and should play an important role in helping amicus counsel say something different. More specifically, party counsel can and should suggest potential amicus topics, and also help coordinate amicus briefs in an effort to avoid or reduce duplication.

Coordination of amicus briefs benefits appellate courts as well as amicus counsel. In fact, an Advisory Committee Note to the 2010 Amendments to Fed. R. App. P. 29 states that “[i]t should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments.”

Unfortunately, some party counsel, especially those who do not regularly practice in appellate courts, appear to care more about how many amicus briefs are being filed, and by whom, than avoiding repetition of argument. This approach is contrary to appellate courts' amicus brief rules and guidance. It also may be counterproductive and undermine the role of an *amicus curiae* serving both as a friend of the court as well as an advocate for the supported party's position.

### **Use An Appropriate Writing Style**

Amicus briefs are different than trial court briefs, both in content and style. There is an art to drafting effective amicus briefs—a skill, like trial skills, acquired through years of practice. Here are some of my personal tips to consider when writing amicus briefs:

- Recognize the importance of the Table of Contents, especially what is listed under Argument, which should provide a quick visual preview of the substance of the brief. Keep argument headings as short and simple as possible, and try to limit the brief to no more than one level of subheadings. I like to avoid the formality of Roman numerals, and the in-your-face message sent by ALL CAPS, which can make lengthy argument headings difficult to read. If judges or law clerks cannot easily make their way through the Table of Contents, they will not want to undertake the effort to read your brief.
- Make good use of the Interest of the *Amicus Curiae* section by engaging the reader. Do not make the mistake of limiting this section to a boilerplate description of the amicus organization that is submitting the brief. Instead, include a few paragraphs that elaborate on why the *amicus curiae* has an interest in the case and questions presented. In other words, explain why the brief is being submitted, and provide an overview of what the brief discusses. Tempt the court to read more.
- If you are filing an amicus brief on behalf of more than one organization, give some strategic thought to the order in which they should be listed on the cover and described in the Interest of the *Amici Curiae* section.
- Amicus briefs that present new arguments are fine, but do not interject new issues into the case. Nonetheless, if your amicus brief can restate and simplify the question presented, that may benefit the court as well as the supported party.
- Save the Summary of Argument as a final step in the drafting process. Remember, it's supposed to be a summary. If the summary is too detailed, it will deter the reader from reading the Argument section of the brief.
- Do not repeat, or get bogged down by, the facts or chronology of the case. Refer to the facts or chronology only to the extent necessary to support the arguments in your brief. Unlike the supported party's brief, which is written at the ground level and must contain a detailed Statement of the Case, your amicus brief should approach the issues at higher level, at least the 10,000-foot level, and maybe even the 20,000-foot or 30,000-foot level.
- Write in a concise, elevated, respectful style. Supreme Court briefs submitted by the Office of the



Solicitor General are widely considered to be the gold standard, and they provide some of the best examples. Appellate judges expect civility on the part of counsel, probably more so than trial court judges. Attack the opposing party's position, not the opposing party (or even worse, the lower court judges).

- Avoid substantive footnotes, especially if they are in font so microscopic, no one over the age of 25 can read them. The Supreme Court and federal courts of appeals have detailed font style and font size requirements, which are essential to follow if you want the court clerk to allow your brief to be filed.
- Finally, to produce your best written work product, consider using flat-fee, rather than hourly, billing, for drafting an amicus brief. My article, [Flat-Fee Legal Billing Can Liberate Attorneys](#), explains why.

### **Conclusion**

Amicus briefs play an important role in the American judicial system. They give a voice to non-parties on issues, and in cases, that are important to them. When written effectively, amicus briefs also can function as a true friend of the court. Follow the rules, say something different, and use an appropriate writing style.

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