Do Not Be Deterred

Learning the High Art of Amicus Brief Writing

By Lawrence S. Ebner

With practice and dedication, any litigator can master the art of drafting a persuasive amicus brief.

Crafting a persuasive amicus curiae brief is a high art. Just like conducting an effective cross-examination, or drafting a comprehensive set of interrogatories, there is a unique set of guidelines, skills, and techniques that every amicus brief author should master.

Keep It Short

At 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(g) (table). In the federal courts of appeals, the newly amended Federal Rules of Appellate Procedure limit amicus briefs to 6,500 words (unless modified by local circuit rules). *See* Fed. R. App. P. 29(a)(5) & 32(a)(7)(B)(i).

Truly effective amicus briefs, however, often do not require that much word volume to make an impact. Shorter is better. Because amicus briefs supplement the parties' briefs (which usually do occupy most of their allotted word volume), a concise amicus brief has a better chance of getting read and considered. This is especially true in appeals in which more than one amicus brief has been filed.

Utilize the Interest of the Amicus Curiae Section to Engage the Court

Every amicus brief begins with a section entitled something like "Interest of the Amicus Curiae." *See, e.g.*, Fed. R. App. P. 29(a)(4)(D). After glancing at the cover page and table of contents, the "Interest of the Amicus Curiae" section is usually what a member of the Court, or law clerks, read first. Unless the "Interest of the Amicus Curiae" section engages the reader, that may be the *only* part of the brief that he or she reads. (Amicus briefs frequently are filed on behalf of two or more amici curiae, in which case there will be an Interest of the Amici Curiae section. For convenience, this article refers only to a single amicus curiae.)

Inexperienced amicus brief writers sometimes make the mistake of limiting the Interest of the Amicus Curiae section to a few sentences identifying or describing the amicus curiae in general terms. For ex-

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ample, if the amicus curiae is a trade association, a neophyte amicus counsel may think that it is sufficient to borrow a few sentences from the "About" page on the group's website and use that alone as the amicus brief's "Interest of the Amicus Curiae" section. While that might be an appropriate way to begin the Interest section, it is not enough.

Instead, as the name implies, the Interest of the Amicus Curiae section should address exactly that subject: Why is this case, and/or the question presented, important to the amicus curiae and its members (and why should it be important to the Court)? What expertise, experience, or other background does the amicus curiae have in connection with the question presented and/or subject matter of the appeal? Has the amicus curiae filed other briefs on the same issue or related subjects in the same or other courts? If there is more than one question presented, which specific legal issue or issues does the amicus brief address? What will the amicus brief add to the Court's understanding or consideration of the issue or issues (*e.g.*, a unique, broad, or practical perspective; insight on the policy implications; additional jurisprudential, legislative, regulatory, or scientific or regulatory background). What position does the amicus brief advocate?

An Interest of the Amicus Curiae section drafted in this manner can quickly establish the credibility of the amicus curiae as well as draw the Court into the brief. The converse is also true. If the Interest section fails to provide adequate information about why the amicus brief is being filed, it may not be read. And in some appellate courts, such as the U.S. Court of Appeals for the Seventh Circuit, a motion for leave to file an amicus brief (when the unsupported party has withheld consent) may be denied.

Avoid Getting Bogged Down by the Facts of the Case

Writing an amicus brief can be a liberating experience. The brief can and should address the legal issues in an appeal, including their broader implications, without delving into the facts of the particular case in which the issues arise. No statement of facts is required, or desirable, in an amicus brief. *See, e.g.*, Fed. R. App. P. 29(a)(4). Although an amicus brief can be written at the "10,000-foot" or even "30,000-foot" level, it should not be totally oblivious to the facts of the case, especially when they squarely present a legal question or vividly illustrate the wisdom of a legal argument. Many amicus briefs weave a few factual and procedural background sentences into the "Interest of the Amicus Curiae" or "Summary of Argument" sections.

Stick to the Questions Presented

As a general rule, appellate courts will not consider legal issues that a party failed to raise and press in the lower courts, and thus preserve for appeal. Although it is permissible, and usually quite desirable, for an amicus curiae to present a new *argument* in connection with one of the questions presented, an amicus brief normally must avoid raising a legal issue that is not before the appellate court.

An interesting exception to this rule occurred in the case of *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014). In that case, which involved the evidentiary support needed to satisfy federal notice-of-removal requirements, the Supreme Court granted certiorari. DRI – The Voice of the Defense Bar filed a merits-stage amicus brief that aligned with the Court's ultimate decision on the merits. Another merits-stage amicus brief, filed by Public Citizen Litigation Group, argued that the notice-of-removal issue was not actually before the Court, and thus, that the Court lacked certiorari jurisdiction to consider that issue. Much of the hearing focused on that jurisdictional issue. In a 5–4 decision, over sharp dissents by Justices Scalia and Thomas, the Court retained jurisdiction and decided the notice-of-removal issue.

Do Not Repeat the Supported Party's Legal Arguments

In most cases, using your own words to reiterate the legal arguments that the supported party makes in its brief or petition will ensure that your amicus brief will be ignored. Even too much similarity between the argument headings in an amicus brief's table of contents and those in the supported party's brief or petition may enough to relegate the amicus brief to the bottom of the pile. Take the Supreme Court's admonition to heart:

> 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. 37.1.

There is an exception to the admonition against repeating a party's arguments: In a rare case in which the supported party's brief does a truly inadequate job of articulating an argument on a legal issue, it probably is okay for an amicus brief to provide the court with the well-researched and written, high-quality legal argument that the supported party's brief failed to present. Such an amicus brief presumably would fall into the category of providing an appellate court with "relevant matter not already brought to its attention by the parties." *Id.*

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Avoiding repetition of a supported party's arguments does not mean that an amicus brief should shy away from digging deeper into an argument. An amicus brief, for example, could provide an in-depth discussion of case law that the supported party's brief merely cites. Or an amicus brief can augment or bolster a party's argument by referring to law review articles or other scholarly materials. If a case involves interpretation of a statute, an amicus brief might present relevant legislative history. And of course, an amicus brief has free rein to criticize a lower court's opinion or the legal arguments that the opposing party has made or can be anticipated to make.

An amicus brief also can provide *non-case-specific* factual information that may

Amicus, continued on page 81

Amicus, from page 45
be helpful to an appellate court's understanding of the legal issues or their implications or ramifications. Such extra-record factual information, which fits into the original notion of a "friend of the court," can range from historical background to economic or sociological statistics to engineering or scientific data.

But in all events, do not submit a "me-too" amicus brief that replicates arguments contained in other briefs. This also applies to situations in which more than one amicus brief is being submitted. Coordinating various amicus briefs, or submitting a single brief on behalf of co-amici, helps avoid the problem of duplicative amicus briefs.

Write in an Elevated and Restrained Tone

Appellate briefs are, or at least should be, fundamentally different from trial court briefs. As an amicus counsel, you can be a strong advocate for your amicus client's position without having to write a brief that is as confrontational or antagonistic, and even *ad hominem,* as many trial court briefs tend to be. An amicus brief can be written in a loftier style, and speak with authority, without adopting an erudite tone or reading like a law review article. The text should be as straightforward as possible. Keep sentences as short as possible, but do not use made-up acronyms. Vivid words and phrases can be used, but with care, and always in a way that is respectful to the judiciary and to the parties and their counsel. Remember that your amicus brief is directed to the questions presented, not to the litigating parties themselves.

The Office of the Solicitor General of the United States (OSG) is composed of outstanding appellate attorneys whose Supreme Court briefs provide aspirational examples of the appropriate writing style and tone for amicus curiae and other types of appellate briefs. (Note, however, that the OSG briefs have their own structural and citation formats.) OSG briefs are available online at https://www.justice.gov/osg/supreme-court-briefs.

Edit, and Re-edit, Your Brief

There is no such thing as too much editing or proofreading of an amicus brief, even if you have to eat some billable time to do it. Be certain to know and respect an appellate court's format requirements. Adhere to Bluebook or other standard citation style, including in the table of authorities. Limit the length of block quotes. Use "emphasis added" sparingly, and never use bold font to emphasize words or phrases. (Many appellate judges find bolding to be offensive.) Keep footnotes short and to a minimum, and do not use a font size so small (*e.g.*, 8-point Times New Roman) that footnotes will be virtually impossible to read by anyone who does not have 20-20 vision.

Do Not Allow the Supported Party or Its Counsel to Write Your Brief

Supreme Court Rule 37.6 requires the first footnote on the first page of every amicus brief filed in that Court to "indicate whether counsel for a party authored the brief in whole or in part." Amicus briefs filed in the federal courts of appeals must include the same disclosure. *See* Fed. R. App. P. 29(a)(4)(E). The 2010 Advisory Committee Notes accompanying the federal appellate rule indicate that it "serves to deter counsel from using an amicus brief to circumvent page limits on parties' briefs." This does not mean, however, that a supported party's counsel should avoid contact with amicus counsel. To the contrary, party counsel's solicitation and coordination of amicus briefs, suggestions for topics, issues, or arguments, sharing of research materials, and commentary on near-final drafts, continue to be a common and desirable aspect of amicus brief practice. Indeed, the Advisory Committee Notes indicate 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."

As a corollary, do not allow counsel for an opposing party to condition his or her consent to file an amicus brief on an opportunity to preview your brief. In the vast majority of cases there is no justification for a party to withhold consent for the filing of a timely amicus brief in support of the other side. An opposing counsel's pre-approval of the content of an amicus brief as a condition for consent is simply out of line in appellate courts, and it does not serve the interests of justice.

The "Amicus Machine" Should Not Deter You from Learning the High Art of Amicus Brief Writing

As the title of this article suggests, writing an effective amicus brief is an art. Although it is a high art form that many appellate specialists have mastered, it would be too self-serving to suggest that only highly experienced appellate attorneys have the skill to write persuasive amicus briefs.

A recent law review article contends that at the Supreme Court level, a relatively small number of renowned appellate advocates operate a self-perpetuating "amicus machine" that is both "clubby" and "elite." Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1908 (2016). The authors define the so-called amicus machine as "a systematic, choreographed engine designed by people in the know to get the Justices the information they crave, packaged by lawyers they trust." *Id*. at 1915. Armed with statistics about the elite law firms that solicit and file many Supreme Court amicus briefs, the authors go so far as to assert that "the modern Supreme Court itself embraces the work of the amicus machine. The Justices seem to prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy." *Id*. at 1907. The list of contributors who the authors interviewed for their supposedly objective article reads like the membership roster of the exclusive club that the authors laud.

Most Supreme Court "repeat players" are truly stellar appellate advocates, who deserve their well-earned reputations as outstanding, sought-after members of the Supreme Court Bar, especially in the area of oral advocacy. While those marquee-level attorneys appear as counsel of record on Supreme Court amicus briefs, it is typically their juniors who do the actual drafting (or at least initial drafting) of amicus briefs. Those less experienced, but talented, attorneys produce excellent work product. But neither they nor their super-star colleagues have a monopoly on the ability to author high-impact amicus briefs. Instead, any dedicated attorney who wants to spend the time honing his or her writing skills at the appellate level can learn the art of drafting a persuasive amicus brief for submission to the Supreme Court, federal courts of appeals, or state appellate courts. FD