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In-House Litigation Managers Need To 'Think Amicus'

Law360, New York (June 10, 2014, 10:36 AM ET) -- If you are an in-house counsel who oversees or manages litigation for your company, law firms probably have asked you to sign onto, and maybe help fund, amicus curiae briefs addressing legal issues that affect your industry. And when your company is a party in an appeal, your outside appellate counsel may have suggested soliciting amicus support. Amicus briefs have become such an important part of the appellate litigation process, you should be more than reactive. Instead, be proactive by "thinking amicus" whenever (i) your company is involved in an appeal presenting legal issues that impact your industry, or (ii) you become aware of an appeal whose outcome may affect your business.

Regardless of whether your company is the appellant or appellee (or petitioner or respondent), you should at least think about whether one or more amicus briefs would bolster your case. It is perfectly fine, and commonplace, to solicit amicus support from trade associations or other organizations, and even from your competitors, if the issues in an appeal have broad interest or potential impact. But don't wait until the last minute. Many appellate courts require amicus briefs to be filed at the same time, or shortly after, the supported party's brief is due. Preparing a well-crafted amicus brief takes time, and many trade associations and other organizations that file amicus briefs have internal review committees and procedures that in most circumstances require at least two weeks before a decision on whether to provide amicus support can be made. The sooner you provide notice of a pending or impending appeal to prospective amici, the better.

As a proactive in-house counsel, you should take the initiative to identify and contact prospective amici, and perhaps even foster formation of an ad hoc group of associations or companies to file an amicus brief. You also should brainstorm possible amicus topics with your outside appellate counsel, and provide that list, as well as case background, to prospective amici. Sometimes convening a timely meeting of associations, organizations and companies that might be interested in providing amicus support is a good way to initiate, and coordinate, amicus activity in your case. You also may want to suggest names of potential amicus counsel — ideally, appellate lawyers who already have some familiarity with the issue or industry.

Keep in mind that an amicus brief that merely repeats arguments presented by the supported party is disfavored, ineffective and potentially counterproductive. See, e.g., Sup. Ct. R. 37.1. Instead, an amicus brief should provide the appellate court with additional perspective on one or more of the legal issues, and discuss the potential impacts of either affirming or reversing the lower court's ruling. In other words, an amicus brief should help the court understand the importance, dimensions and ramifications of the questions presented. While it is fine to suggest amicus topics — and also read and comment on a draft amicus brief — a party's counsel should not author an amicus brief in whole or part. Doing so requires disclosure in the U.S. Supreme Court and the federal courts of appeals. See Sup. Ct. R. 37.6; Fed. R. Civ. P. 29(c)(5). Nor can a party fund an

amicus brief without disclosing that fact. Id. These disclosure rules are intended to deter a party or its counsel from using an amicus brief as a page or word extension.

As an in-house counsel who "thinks amicus," you also need to be continuously on the lookout for other appeals in the U.S. Supreme Court, federal courts of appeals, or state appellate courts, that involve issues of importance to your company. These days, it is not difficult to discover such appeals by reading online publications such as Law360 or Scotusblog. Rather than assuming that your industry's trade groups are way ahead of you, be proactive by alerting them to pending appeals in which they may want to file an amicus brief on behalf of your company and member companies. Occasionally, you may have to take the initiative by forming, and helping to fund, an ad hoc coalition of companies to file an amicus brief on an issue in which you all have a common interest.

An important corollary to being on the lookout for appeals of interest is when your company is a party in an appeal and there is another appeal involving a different company but the same or similar issues in the same court. In those circumstances, it often is beneficial to file an amicus brief in the name of your own company in that other pending appeal. By doing so, you can both alert the panel assigned to the other appeal that your own appeal is pending before the same court, and present your views on the issues. Such an amicus brief helps to protect your company's interests by hopefully preventing issuance of an adverse precedent that affects the outcome of your case.

Finally, be proactive by thinking about the position that the federal government (i.e., the Solicitor General or a division of the U.S. Department of Justice), or a state government (i.e., state attorney general or state solicitor general), may take as amicus curiae, often by invitation of the court. If possible, arrange for your industry representatives to meet with government attorneys in advance of their amicus brief, so that they fully understand the industry's position on, and concerns about, the issues on appeal.

In short, if you are a fan of amicus briefs, you can be more than a spectator. You can and should play an active role soliciting amicus support when cases that you are managing go on appeal and involve significant legal issues that transcend the case. And you can and should monitor other appellate litigation that presents issues of interest to your industry or company, and when appropriate, help to protect those interests by marshaling amicus participation.

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