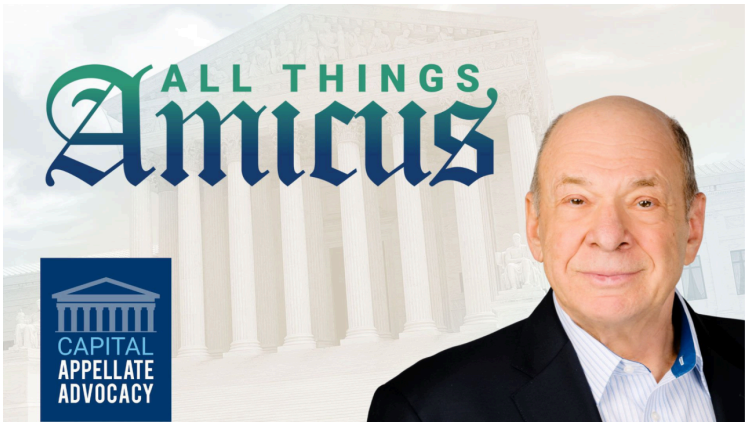
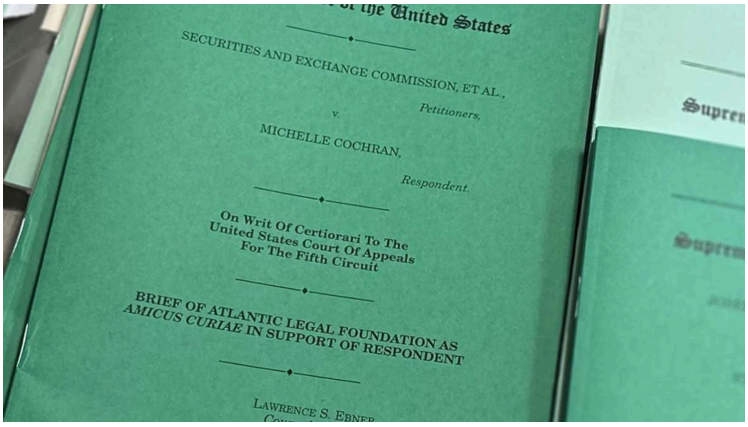


Why a Newsletter About Amicus Briefs?

Larry Ebner
Senior-Level, Pro-Business, Appellate Litigation Specialist 🔹 Founder, Capital Appellate Advocacy...

December 9, 2024

Why this newsletter? Because hundreds & hundreds of *amicus curiae* ("friend of the court") briefs are filed every year in the Supreme Court, federal courts of appeals, and state appellate courts. Amicus briefs have become an important, well-accepted part of appellate litigation. And for some observers, some amicus briefs—who files them; who helps pay for them—have become a controversial subject.



What purposes do amicus briefs serve?

- Effective amicus briefs provide federal and state appellate courts with *additional* perspective, argument, and/or information on the legal issues involved in an appeal. In the Supreme Court, at the

certiorari-petition stage, private-party amicus briefs (and sometimes government amicus briefs) help to explain why the Court should hear a case.

- Amicus briefs give a voice to non-litigants that have a serious interest in the legal questions presented by an appeal.

Who files amicus briefs? Frequent filers include:

- Nonprofit advocacy and professional organizations
- Industry trade associations
- Individual companies involved in other appeals that present the same legal issues
- Ad hoc groups of law professors, scientists, and other types of experts
- Coalitions of States through their Attorneys General or Solicitors General
- The United States through the Solicitor General

Who authors amicus briefs?

Most amicus briefs are written by appellate specialists, who understand the content, writing style, and format that appellate judges (and their law clerks) expect.

Why am I so interested in amicus briefs?

Writing amicus briefs is my favorite activity as a full-time appellate attorney. They provide me with the opportunity to use my analytical and brief-writing skills to address an enormous variety of important legal issues at the highest levels of our nation's judicial system.

Selfie at my Washington, DC desktop computer

During the past five decades, I have authored many dozens of amicus briefs, mostly in the Supreme Court, but sometimes in federal courts of appeals and state appellate courts. Since September 2020, as Executive Vice President & General Counsel of the **Atlantic Legal Foundation** (ALF), I have authored or co-authored more than 70 amicus briefs for that public interest law firm. My briefs for ALF focus on subjects such as free enterprise, limited and responsible government, sound science in judicial and regulatory proceedings, property rights, individual liberty, and effective education, including parental rights and school choice.

The website for my own appellate boutique law firm, **Capital Appellate Advocacy PLLC**, devotes an entire section to **All Things Amicus**. If you want to check out some of my amicus briefs for **ALF**, **The DRI Center for Law and Public Policy**, and other organizations, you can access them **HERE**.

Visit All Things Amicus at capitalappellate.com

Amicus Practice Tips:

Three BIG Amicus Brief Mistakes

In addition to authoring amicus briefs, I enjoy writing *about* amicus briefs. Here is an article that I wrote in March 2024 for the **Federation of Defense & Corporate Counsel's** "Friday 5" newsletter:

If you really want to be a "friend of the court" — if you want your amicus brief to actually get read and persuade or inform the court — here are 3 major mistakes to avoid:

Mistake # 1 — Don't follow the rules.

This is an obvious mistake, but one often made by lawyers whose experience writing amicus briefs is limited.

The Supreme Court has a separate set of rules for amicus briefs. Sup. Ct. R. 37. So do the federal courts of appeals. Fed. R. App. P. 29. Most circuits also have their own local rules concerning amicus briefs. These detailed rules cover format, content, and more.

For example, one big pitfall to avoid is Sup. Ct. R. 37.2. It requires that all parties' counsel of record receive at least 10 days advance notice of your intention to file an amicus brief in support of a pending certiorari petition. Also, the Supreme Court no longer requires consent or a motion for leave to file an amicus brief. But this is still the requirement in all federal courts of appeals and most state appellate courts.

And both the Supreme Court and federal courts of appeals require amicus counsel to indicate whether a party, or party's counsel, has helped to author or finance the amicus brief in whole or part. An amicus brief lacking this disclosure will not be accepted for filing.

Mistake # 2 — Clutter your brief with subheadings & substantive footnotes, and don't stop writing until you reach the word limit.

You want your amicus brief to get read. But you are competing for the court's attention with the parties' own briefs, and often, with other amicus briefs. So you need to make your amicus brief an easy read: Keep it short, well under the word limit. Make it visually appealing, and pique the court's interest, by limiting the brief to just 2 or 3 major argument headings and only 1 level of subheadings. And if it's directly relevant and worth saying, put it in the text, not in footnotes (even if you use footnotes for case citations).

Mistake # 3 — Pretend that you are representing the party that your amicus brief supports.

This is probably the BIGGEST mistake that the author of an amicus brief can make. Simply put, the mistake is to submit an amicus brief that duplicates the legal arguments being made by the party that you are supporting.

> ***Instead, for your amicus brief to get read and be persuasive, SAY SOMETHING DIFFERENT!***

This admonition is built right into the Sup. Ct. R. 37.1. It states that "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."

Your brief can address the same legal arguments as the party you are supporting, but drill deeper (for example, by discussing legislative purpose and history in a statutory construction case, or additional relevant case law). Or your brief can add new legal arguments on the questions presented, or practical or policy perspective on the importance or impact of the legal issues in the case. But if you file a "me-too" brief that essentially repeats the arguments made in the brief filed by the party you are supporting, it probably won't get read.

Recent Supreme Court Amicus Filing:

ALF Urges Supreme Court To Reject Expansive View of Product Manufacturers' Aiding-and-Abetting Liability

This Spring the Supreme Court will be deciding whether Mexico can attempt to hold U.S. firearms manufacturers liable for "social costs" that the Mexican government incurs as a result of its own inability to curtail Mexican drug cartels from criminally misusing smuggled firearms in Mexico. With the expert assistance of product liability and firearms litigation expert **John Parker Sweeney** of Bradley Arant Boult Cummings LLP, I recently wrote an amicus brief on behalf of the Atlantic Legal Foundation urging the Court to reject Mexico's highly attenuated "aiding and abetting" civil liability theory. Read our brief **HERE.**

Flag of Estados Unidos Mexicanos

Case Background

The Mexican government has sued heavily regulated U.S. firearms manufacturers for $10 billion in damages and sweeping injunctive relief to redress "social costs" that it alleges to have incurred as a result of gun violence in Mexico. According to Mexico's complaint, filed in Massachusetts federal district court, the defendant manufacturers have knowingly "aided and abetted" Mexican drug cartels, which have smuggled American-made firearms into that country, and "proximately caused" the violence that the drug cartels have perpetrated there.

The district court dismissed Mexico's action based on the broad immunity-from-suit that Congress has afforded to U.S. firearms manufacturers under the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-7903. But a First Circuit panel reversed, holding that the litigation can proceed because Mexico's allegations are "not implausible."

The firearms manufacturers filed a petition for a writ of certiorari, *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos,* No. 23-1141. Recognizing the potential implications of the case for manufacturers of any type of product that has been, or can be, criminally misused, ALF filed an amicus brief supporting the petition. The Supreme Court granted the petition on October 4, 2024. Now ALF has filed a merits-stage amicus brief urging the Court to reject Mexico's expansive theory of civil aiding-and-abetting liability.

ALF's Amicus Brief

ALF's **brief** focuses on the First Circuit's expansive, aberrant, and erroneous view of product manufacturers' civil aiding-and-abetting liability for the criminal conduct of far-removed third-party wrongdoers. In particular the court of appeals opinion conflicts with the teaching of *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023), which is now the Supreme Court's leading precedent on civil aiding-and-abetting liability. *Taamneh* holds that neither knowledge of product misuse nor failure to prevent it is enough for aiding-and-abetting liability. Instead, a product manufacturer must engage in "affirmative and culpable misconduct" to help make a third party's wrongful conduct succeed.

ALF's brief explains that Mexico's lengthy complaint reads like anti-gun activists' playbook. For example, the amicus brief takes issue with the complaint's core allegation that the defendant firearms manufacturers design their products as "military-grade weapons." In reality, the modern semiautomatic rifles targeted by Mexico's complaint, such as the AR-15, are among the world's most popular firearms for shooting enthusiasts and hunters, and also are widely used for home defense.

The amicus brief also explains that the First Circuit's expansive view of civil aiding-and-abetting liability, coupled with its convoluted extension of proximate cause, harms the public interest. Unless reversed, the First

Circuit's opinion would open courthouse doors to aiding-and-abetting litigation brought by foreign governments, state or local governments, or even classes of individuals against all sorts of industries and companies that manufacture products that are, or could be, misused for criminal purposes.

The substantial costs of having to defend, or insure against, opportunistic aiding-and-abetting litigation targeting manufacturers of essential or otherwise beneficial products that sometimes are criminally misused would make the products more expensive and/or less available, perhaps even forcing some manufacturers or their product lines entirely out of business. Similarly troubling, manufacturers might curtail development of product safety and other improvements out of fear that they are not being introduced quickly enough to satisfy litigious foreign or domestic governmental officials. This would create a pervasive, pernicious, litigation-driven nightmare that provides no benefit to the American public and that the Supreme Court should not countenance.

Proposed Amicus Rules Change:

U.S. Judicial Conference Should Reject Amicus Brief Rules Change

Photograph of U.S. Court of Appeals for the Fourth Circuit courtesy of Nick Kosar, Open Road Digital

The U.S. Judicial Conference's Advisory Committee on Appellate Rules has proposed amendments to Federal Rule of Appellate Procedure 29 that would hinder, rather than facilitate, the filing of amicus briefs in federal courts of appeals.

Currently, Rule 29(a) permits the filing of a merits-stage amicus brief in a federal court of appeals if all parties consent to its filing, or alternatively, with the court's permission. The proposed amendments, however, would eliminate filing with consent, and instead, require that every court of appeals amicus brief be accompanied by a motion for leave to file that discusses, among other things, "the reason . . . the brief is helpful."

The Judicial Conference's Committee on Rules of Practice and Procedure is soliciting public comment on the proposed amendments.

On behalf of the Atlantic Legal Foundation, I have prepared and submitted **comments** urging the Judicial Conference to reject the proposed motion-for-leave requirement. ALF's comments explain that requiring a motion for leave for every amicus brief would unncessarily burden the courts, encourage unwarranted objections by opposing parties, and create uncertainty that may deter preparation and submission of worthwhile amicus briefs.

ALF contends that if Rule 29 is to be amended at all, it should be to adopt the Supreme Court's enlightened approach of allowing timely, rules-compliant amicus briefs to be filed *without having to obtain the court's permission or even the parties' consent*.

For more on this subject, read my Law360 essay, ***Requiring Leave To File Amicus Briefs Is ABad Idea***.

Larry Ebner is founder of Capital Appellate Advocacy PLLC in Washington, DC and Executive Vice President & General Counsel of the Atlantic Legal Foundation. A graduate of Dartmouth College and Harvard Law School, he is a Fellow of the American Academy of Appellate Lawyers, Chair of the Federation of Defense & Corporate Counsel's Appellate Law Section, Immediate Past Chair of the DRI Center for Law and Public Policy, and President of the Washington, D.C. Chapter of the International Network of Boutique and Independent Law Firms.
