

Make Amicus Briefs Part of Your Advocacy Program



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Most of your policy work probably takes place in Congress and state legislatures, but don't overlook opportunities to argue your position on important issues in federal and state appellate courts by filing

amicus curiae briefs. Here are some amicus basics that association executives should know.

Amicus curiae, or “friend of the court,” briefs enable your association to communicate directly with federal and state appellate courts—including the U.S. Supreme Court—about the practical impacts and policy implications of legal issues that are important to the industry or profession you represent. Strategic use of amicus briefs as an adjunct to your association’s advocacy program can provide significant value to your members.

Although appellate courts generally welcome amicus briefs, they are not supposed to repeat the legal or policy arguments presented by the parties in an appeal. Instead, when prepared properly, amicus briefs provide additional perspective on one or more legal issues, especially their practical implications. In so doing, amicus briefs may include non-case-specific factual information or non-duplicative legal arguments that may be helpful to the court.

It is important to note that filing an amicus brief does not make an association an intervenor or party in the litigation. This is true even if the association is informally referred to as an “amicus party” and files its brief in support of the parties on one side of an appeal.

Requests for Amicus Support

Associations, either alone or jointly, can take the initiative to file an amicus brief in appeals involving far-reaching legal issues. In other instances, attorneys representing a party in an appeal may contact one or more associations to request amicus support. If the party is an association member, it may choose to contact the association directly.

It is perfectly appropriate for a party’s attorney to solicit and coordinate amicus briefs and to suggest topics to be addressed, such as the repercussions of a lower court’s ruling on an industry or profession or on the public. A party’s counsel, however, may not draft an amicus brief and then “shop it around” to associations that may want to add their names, even if there is no cost to the association.

Filing Rules

Published court rules govern the timing, length, and format of amicus briefs. In federal and most state appellate courts, a motion for permission to file an amicus brief is required only if the parties refuse to consent to its filing. Courts discourage the withholding of consent and, when necessary, routinely grant timely motions for permission to file.

In the Supreme Court, amicus briefs can be filed at the petition stage (before the court decides whether to hear an appeal), the merits stage (after the court agrees to hear an appeal), or both.

Amicus briefs urging the court to review an appeal have become so frequent and numerous that it is somewhat unusual for the court to grant review unless at least one or two amicus briefs have been filed. In fact, many Supreme Court observers believe that amicus briefs have the most impact when they are filed at the petition stage and discuss why the questions presented by an appeal are important and should be addressed by the court.

Filing Solo or With Others

In most appellate courts, an association can file an amicus brief in its name alone. Or it can join together with other associations that represent different industries or professions and file a single brief as part of a group. There are pros and cons to each approach.

If an appeal involves a critical issue that directly affects an association's members, it may want to file in its name only. Doing so will ensure that the association is speaking with a singular voice on its members' behalf.

On the other hand, signing onto an amicus brief with other organizations may result in an impressive-looking cover page and send the message that many associations, even those representing a variety of industries, agree on the importance of an issue. A joint submission also may be more economical and reduce the risk of duplicative or overlapping briefs. But an association's name may be less prominent on such a brief. More important, the content of a joint amicus brief may be more diffuse and less tailored to a particular industry or profession than a brief filed by a single association.



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Description of Interest

Every amicus brief is supposed to begin with a section that discusses the interest of the association (or associations) in the questions presented by the appeal. Many associations and inexperienced brief writers make the mistake of limiting this section to a general, boilerplate description of the organization.

Instead, the Interest section should do more. It should engage the reader by explaining why the amicus brief is being filed—in other words, why the association and its members are affected by, or otherwise interested in, the issue in the case. This section also should concisely preview the subjects that the amicus brief addresses.

Mandatory Disclosure

The federal courts and some state courts require every amicus brief to indicate whether a party to the appeal, or a party's attorneys, made a monetary contribution to fund the brief or wrote all or part of it. The intent is to deter parties and their counsel from using amicus briefs as a way to present arguments they could not fit into their own briefs.

These disclosures also affect how the court will likely view the brief. Filing an amicus brief that discloses a party's funding or authorship, as it would be required to do, would immediately undermine the brief's credibility, and the court may not consider it or even read it.

Therefore, it is unwise for an association to file a brief in support of a member if that member directly funded its preparation. Similarly, an association should not submit an amicus brief written in whole or part by a member's attorneys. This would include a situation where an attorney representing a member extensively revises a draft amicus brief that the association's counsel circulates as a courtesy prior to filing.

Style and Cost

Appellate courts expect amicus briefs to be structured and written in a certain way, which is different from trial court briefs. This is why amicus briefs are often prepared and submitted by appellate specialists. Nonetheless, associations should be wary of paying hourly rates for preparation of amicus briefs. Most specialists are usually amenable to an agreed-upon fixed flat fee.

A final tip: Publicize your amicus efforts. Issue a press release about every amicus brief you file. Post the brief on your website. Send copies to interested government officials and influencers. Most of all, let your members know that you have filed an amicus curiae brief on their behalf.

Tags:

 **LITIGATION**

 **ADVOCACY**

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