Friendly Persuasion

Making Strategic Use of Amicus Briefs

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An effective amicus brief offers something new or different that sheds light on, or adds perspective to, the legal issues presented by an appeal. The authors explain how individual companies or their trade associations that want to become a "friend of the court" can use amicus briefs strategically.

Once an afterthought—if considered at all—deciding whether to seek the support of amici curiae should be part of every in-house counsel's and outside lawyer's litigation strategy when a case goes on appeal. Whether to solicit amicus briefs in a particular case; when, how, and from whom; which subjects amicus briefs should address; how multiple amicus briefs should be coordinated with each other and the supported party's brief; and the role that the supported party's counsel should, and should not, play, are among the questions that should be considered, even if only cursorily, at the outset of every appeal. And even when a company is not a party, whether to take the initiative to participate as an amicus curiae, either directly or through a trade association or other organization, is something to consider whenever an appeal presents an important question of law that can affect a company or industry.

The Value of Amicus Briefs

Filing amicus briefs has become an accepted and expected part of appellate litigation practice. Trade associations, business and professional organizations, individual companies, advocacy groups, legal scholars, and even foreign nations regularly file amicus briefs in a great variety of federal and state court appeals. Recent statistics confirm a steady growth in the number of amicus filings, particularly in the U.S. Supreme Court, where their absence has become increasingly rare. *See* Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for* Amicus Curiae *in Supreme Court Reflects New Norm,* Nat'l L.J. (Aug. 19, 2015) (indicating that during the Supreme Court's October 2014 Term, nearly 800 amicus briefs were filed in 98 percent of the cases in which certiorari had been granted).

The growth of amicus practice has been encouraged in part by appellate courts, which have published specific rules on amicus briefs, and the Supreme Court Jus-

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tices and other appellate judges who cite them in opinions and sometimes draw inferences from their absence. But the biggest driver of amicus practice is the opportunity that it provides to help shape the law and influence decision making in a way that can advance the strategic or policy objectives of an industry, trade association or other nonprofit organization, or individual company.

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As acknowledged by the courts themselves, amicus briefs can provide valuable assistance in judicial deliberations. Supreme Court Rule 37.1 expressly notes that "[a]n amicus 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." Conversely, the same rule also warns that "[a]n amicus brief that does not serve this purpose burdens the Court, and its filing is not favored." Similarly, Federal Rule of Appellate Procedure 29(b)(1) permits nongovernmental amicus briefs to be filed with the consent of the parties or by a motion for leave that describes why the proposed amicus brief is "desirable" and "relevant to the disposition of the case."

While relevance and helpfulness should underlie any amicus brief, the reasons for filing amicus briefs are varied. Amicus briefs can educate courts about the practicalities or ramifications of a legal issue or ruling. They can provide perspective and special knowledge or expertise to help a court make more informed decisions. They can present factual information, such as "legislative" facts or data, to assist a court in understanding the issues. Amicus briefs can offer the views of experts, such as legal scholars, policymakers, and scientists. And they can advance alternative arguments and cite different authorities not found in the supported party's briefs.

Effective amicus briefs always bring something new and interesting to a case—whether it is better or additional research, a more detailed discussion of industry practices, trends in the law, a comprehensive or historical description of the regulatory or legal landscape, a demonstrated effect that a case has on amici or other entities not parties to a case, such as the practical consequences of a decision for an industry or the public at large. Amicus briefs can provide valuable assistance to a court by explaining the effect of affirmance or reversal on an industry, or on various segments of society. They can put technical legal reasoning into pragmatic context and can be especially helpful in securing a review by a court by explaining why the questions presented by a case are important.

As discussed below, no matter what kind of amicus brief that you file, an amicus party and its counsel always should strive to say something different than the party being supported—otherwise, an amicus brief may be undesirable because it "burdens the [c]ourt." Sup. Ct. R. 37.1. Even when a party's treatment of the issues may call for some bolstering, using amicus briefs merely to "turn up the volume" by adding repetitive voices to the chorus could ultimately undermine the appeal. Use your amicus brief to identify a narrower ground if a party is swinging for the fences, to suggest a broader result if one would be more favorable to your interests, or to simply offer a better argument for obtaining the same result. When making similar points, however, a critical part of your amicus strategy should be to avoid at all costs filing a "me too" brief. Far too many amicus briefs are filed primarily for bragging rights to demonstrate involvement in high-profile cases, particularly in the Supreme Court. Filing an amicus brief only to show your members (or your competitors) that you are "a player" can damage an organization's credibility and is a disservice to a court.

What Types of Cases Warrant Amicus Briefs?

Despite the multitude of amicus briefs filed in the Supreme Court, not all Supreme Court or lower court appeals merit amicus filings. Organizations should be strategic about where, when, what, and how often they file. Most amicus briefs are filed at amici's own initiative in the Supreme Court, federal courts of appeals, and state courts of last resort. On occasion, appellate courts will invite a specific organization to file an amicus brief on a particular subject or issue. (DRI and the U.S. Chamber of Commerce, for example, have received such invitations.) It is good practice to consider the former seriously and never refuse the latter. An invitation from a court generally indicates its need for objective or technical expertise that the parties cannot provide. If this area is critical to your industry, association, or company, and you can be helpful, you should accept a court's invitation and file.

Questions to consider when deciding whether to file an amicus brief include the following: How important are the issues at stake to the interests of your industry or company? Is this particular case the right vehicle to advocate your position? How bad are the facts? What is the likelihood of success? How receptive is that court to amicus briefs? Who else is filing on your side and on the other side? How well represented is your side? Should you file solo, join another amicus brief, or sit this one out? Answers to these questions also will be helpful when soliciting amicus support. If you represent a party seeking amicus support, chances are the group (or groups) that you solicit for amicus support will ask them of you.

Whom to Solicit

Once a lawyer representing a party in an appeal has confirmed the strategic value of seeking amicus support in a particular appeal, careful thought should be given to whom to solicit. Are the issues in your case of nationwide significance to organizations such as DRI—The Voice of The Defense Bar, the U.S. Chamber of Commerce, the National Association of Manufacturers, or the Washington Legal Foundation? Would an industry-specific organization such as the Pharmaceutical Manufacturers Association, the Product Liability Advisory Council, the Retail Litigation Center, the Professional Services Council, the Coalition for Government Procurement, CropLife America, or the Securities Industry and Financial Markets Associa-

tion be a more appropriate candidate for filing an amicus brief on your behalf? Do your issues disproportionately affect small business, making the National Federation of Independent Business your ideal amicus, or would the voice of the country's top CEOs make the Business Roundtable the focus of your quest for amicus support? Perhaps your issues are more conducive to regional or to state-based amicus support? If so, amicus support from a state or local defense organization, or a state or local chamber of commerce, may be in your best interest.

When soliciting amicus support, keep in mind that sophisticated amicus organizations are often flooded with requests and can be very protective of their brands. As discussed below, many have adopted procedures for receiving and evaluating requests for amicus support. Organizations that frequently file amicus briefs often are very aware of who else is being pitched and may not appreciate frequent, undifferentiated, "buckshot" solicitations. Companies and counsel that seek amicus support should be solicitous of prospective amici's time and appreciative of their consideration.

Of course, if you represent a party in an appeal that presents federal issues, the most prominent amicus brief on your side would be filed by the United States. The Supreme Court often calls for the views of the Solicitor General at the certiorari stage. Public policy groups, ad hoc litigation groups, legal scholars, and like-minded companies also can make compelling individual amicus supporters. So-called strange bedfellow amicus coalitions can be even more eye-catching. A joint amicus brief filed by a consortium of civil rights, union, and business interests is highly likely to grab a court's (or at least a law clerk's) attention.

This raises the recurring question of quantity *versus* quality of amici and their briefs. Without question—and for all the reasons stated above—amicus briefs should be of the highest possible quality. What's debatable is whether (or how much) do numbers really matter. A related question is whether it is more advantageous to have the support of multiple stand-alone amicus briefs or few joint briefs. The answer is the not so satisfying answer, "it depends." Amicus advocacy is not a numbers game, despite often misconstrued percentages such as the odds of certiorari being granted generally increasing to nearly 20 percent with one supporting private party amicus brief and to 56 percent when at least four supporting amicus briefs are filed. *See* Richard J. Lazarus, *Advocacy Matter Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1528 (2007–2008) (describing percentage increases in the October 2005 term). Whether amicus groups file solo or join with others, what should matter are the importance and quality of the advocacy, and not the quantity of briefs. If numbers really mattered, the courts would be inundated and very few briefs, if any, would be read, referred to in oral argument, or cited in majority, concurring, or dissenting opinions, an often used proxy for inferring the influence of an amicus brief.

When and How to Solicit Amicus Support

Once you have decided that amicus support would be helpful in your appeal, providing adequate time to prospective amici curiae is essential. An amicus brief, similar to any other high-quality appellate brief, requires substantial time—usually weeks—to research, draft, review, and polish.

What constitutes adequate time for soliciting prospective amici is governed, in part, by an appellate court's amicus rules. In the U.S. Supreme Court, for example, amicus briefs supporting a certiorari petition "shall be filed within 30 days after the case is placed on the docket… and that time will not be extended." Sup. Ct. R. 37.2(a). Further, an "[*a*]*micus* curiae filing [in support of a certiorari petition] shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date…." *Id.* And Supreme Court amicus briefs must be printed and submitted in the prescribed booklet format. *See* Sup. Ct. R. 33.1. For these reasons, waiting to solicit amicus support until after a certiorari petition is filed almost always precludes amicus support at the all-important certiorari stage. Along the same lines, in the federal courts of appeals, amicus briefs are due "no later than 7 days after the principal brief of the party being supported is filed." Fed. R. App. P. 29(e). Waiting until just before or just after a party's merits brief is filed to seek amicus support simply does not work.

Another timing-related factor is that many trade associations and other organizations which frequently, or even occasionally, file amicus briefs have committees that review and discuss amicus requests. For example, DRI—The Voice of The Defense Bar has an Amicus Committee consisting of 10 appointed members, as well as the DRI president, and executive director. The U.S. Chamber Litigation Center has several litigation advisory committees that review and make recommendations on requests for Chamber amicus. Further, some organizations, including DRI, have developed detailed amicus request forms that must be completed and submitted in order to facilitate committee deliberations. All this takes time, as does selection and engagement of amicus counsel, and of course, preparation of the amicus brief itself.

One way to try to avoid duplication is to discuss with amici as early as possible which issues they plan to address and which legal arguments or points they intend to make.

When there are multiple prospective amici, it often makes sense for a party's appellate counsel to prepare a "solicitation of interest memorandum," which can be sent to prospective amici as a group or tailored to an individual organization. The memorandum will summarize the legal issues involved in an appeal, provide factual and procedural background, discuss the importance of the issues to prospective amici, and indicate when amicus briefs are or would be due. In addition, party counsel sometimes will organize and conduct an in-person or telephonic meeting with prospective amici to discuss a case, suggest possible amicus topics, and answer any questions.

One more point about timing: The supported party's counsel should be sure to keep prospective amici apprised of any schedule or other changes that will or may affect the deadline for submitting amicus briefs. This may include extensions of time, a party's decision to file its brief ahead of schedule, and even the possibility that an appeal may be held in abeyance due to settlement discussions.

Coordinating with Amici

A party's in-house and outside counsel can and should play an active role in coordinating, as well as soliciting, amicus support. But there are limits, which are intended to ensure that parties are not using amicus briefs as "page extensions." More specifically, Supreme Court Rule 37.6 requires that every amicus brief indicate, in the first footnote on the first page of text,

> whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.

Since 2010, Federal Rule of Appellate Procedure 29(c)(5) has required amici to make an essentially identical disclosure. The advisory committee note explains that the rule "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." Fed. R. App. P. 29(c)(5) advisory committee note (2010). In short, the rules strongly discourage a party or its counsel from paying for and/or drafting an amicus brief.

The Federal Rule of Appellate Procedure 29(c)(5) advisory committee note indicates, however, 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." *Id.* Indeed, as explained above, Supreme Court Rule 37.1 states that "[a]n 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" (emphasis added), but that "[a]n amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored." So one of the most important coordination roles that a party's counsel can play is to discourage amici from too closely replicating the supported party's, or each other's, legal arguments. One way to try to avoid duplication is to discuss with amici as early as possible which issues they plan to address and which legal arguments or points they intend to make. Party counsel also should suggest topics that would be helpful for amici to address, and even which amici should address particular issues or subjects. Another way to avoid duplicating arguments whenever multiple amici are involved is to suggest that they join as co-amici in a single brief.

In addition, whenever possible, party counsel and amicus counsel should exchange drafts. In fact, the advisory committee note for Federal Rule of Appellate Procedure 29(c)(5) states that "mere coordination—in the sense of sharing drafts of briefs—need not be disclosed." This does not mean, however, that an amicus brief should shy away from addressing the same *legal issues* as the supported party. Amicus briefs can be very helpful by augmenting the supported party's legal arguments on a particular issue, and as discussed above, by providing additional perspective on the significance and/or ramifications of the legal issues on a particular industry, the public, or the civil justice system.

Thus, insofar as possible, party counsel should request (or be offered) a reasonable opportunity to read and comment on a draft of each amicus brief to be submitted in its support. At a minimum, in addition to seeing whether a draft amicus brief too closely tracks the party's own brief (or petition), such pre-filing review also helps to ensure that an amicus brief does not conflict with the positions being advocated by the party in whose support the amicus brief is being filed. It is fine for party counsel to comment and make suggestions on a draft amicus brief. But in view of the disclosure rule deterrent against party counsel "authoring" an amicus brief even "in part," party counsel should not rewrite arguments or add sentences, paragraphs, or sections to a draft amicus brief.

The supported party also can facilitate preparation of amicus briefs by providing copies of nonconfidential appendix or record materials that amicus counsel may need, and by answering any questions about the facts or course of proceedings below, or concerning format or filing requirements.

Effective Amicus Briefs

Amicus briefs are different not only from trial court briefs, but also from the review petitions or merits briefs that they support. Attorneys who write amicus briefs usually are afforded the luxury of not being burdened by the minutiae of the facts in an appeal, and instead, can approach the issues—their merits, their potential ramifications, and their overarching significance—in a way that bolsters, but is not necessarily tethered to, the supported party. Unlike party briefs, statements and counterstatements of facts are not required, and should not be included, in an amicus brief, which normally should address only the legal questions presented and should rely upon the supported party's fact statement (or the trial court's findings of facts).

Compared to party briefs, the structure of amicus briefs is considerably more flexible. Aside from required disclosures, the content of amicus briefs typically consists only of four main sections: (1) "Interest of the Amicus Curiae"; (2) "Summary of Argument"; (3) "Argument"; and (4) "Conclusion." *See* Sup. Ct. R. 37.5; Fed. R. App. P. 29(c). The statement of interest is extremely important. It should not merely describe the amicus organization in general terms. Instead, the interest statement should preview the amicus brief by explaining, as specifically as possible, why the amicus brief is being filed and the importance of the legal issues to the amicus curiae.

In terms of style, amicus briefs need to be concise. They need to look professional—no typos or misspellings, proper grammar and punctuation, and correct citation format. And although the arguments in an amicus brief should be spirited, they should be written in an elevated tone that is unequivocally respectful of the appellate court, and generally not as aggressive as a trial court brief or even the supported party's appellate brief. Although amicus briefs normally are filed to support a particular party, when writing an amicus brief just remember what the term amicus curiae means: friend of the court!