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Strategic Use of Amicus Briefs in Appellate Advocacy

Drafting Effective Amicus Briefs; Soliciting and Coordinating Amici Curiae; Working With the Government as Amicus Curiae in Your Case

THURSDAY, OCTOBER 12, 2017

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Today's faculty features:

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By Lawrence S. Ebner

Amicus Brief FAQs

In-house litigation counsel often are asked whether their companies will join an amicus curiae brief, either directly or through a trade association or other business group. Or, sometimes, an in-house counsel wants to line up impressive amicus support when his or her company is involved in an appeal. Either way, here are some questions that in-house counsel—and other attorneys who do not specialize in appellate practice—frequently ask about amicus briefs.

What Is the Biggest Mistake That Amicus Briefs Make?

The most common error amicus briefs make is duplicating the legal arguments that the supported party already has made well in its own brief. Supreme Court Rule 37.1 states that an amicus brief that calls the Court's attention to "relevant matter not already brought to its attention by the parties may be of considerable help to the Court," but an amicus brief that "does not serve this purpose burdens the Court, and its filing is not favored." Along the same lines, Federal Rule of Appellate Procedure 29(b)(2) indicates that an amicus brief should be "desirable" as well as "relevant." Appellate judges or their law clerks may not read an amicus brief that merely replicates arguments contained in a supported party's brief. Repeating an argument also creates a risk of presenting the argument in a way that will undermine, rather than bolster, the supported party. Unfortunately, inexperienced amicus counsel often do not know these things, and so they will address the issues as if the amicus brief were the supported party's brief.

So What Purposes Are Amicus Briefs Supposed to Serve?

There are many reasons for filing amicus briefs. They include supplementing, but not duplicating, the supported party's legal arguments, presenting additional legal arguments not addressed in the supported party's brief, and perhaps most importantly, discussing the amicus curiae's perspective on the importance and potential impact of the legal issues involved in the appeal. Explaining why the issues are significant and transcend an appeal may be particularly beneficial when an amicus brief is filed to support granting a certiorari petition or other request for a permissive appeal.

When Should a Company Consider Filing an Amicus Brief in Its Own Name Rather than Deferring to a Trade Association or Other Business Group?

Amicus briefs have become common in the Supreme Court, federal courts of appeals, and many state appellate courts. As a result, a company usually does not have much reason to be concerned about "sticking its neck out" by filing an amicus brief in its own name, either alone or jointly with other individually named companies.

Because other companies in the same industry often share a company's interest in a legal issue, it normally makes sense for an appropriate trade association or other business group to file an amicus brief, rather than for individual companies each to file one. The main exception, however, is when a company is a party in another pending appeal, or in a trial court proceeding, involving the same issue. Under those circumstances, when the outcome of an appeal may directly affect a company's position in other pending litigation, the company should consider protecting its interests by filing an amicus brief. The "statement of interest" in the company's amicus brief then should identify the other litigation, as well as its stake in the outcome of the appeal.

How Important Is the Statement of Interest in an Amicus Brief?

The statement of interest is very important. It needs to induce a court to read a brief. That usually cannot be accomplished if a statement of interest is merely composed of a few boilerplate sentences that describe the amicus or amici curiae in general terms. Instead, a statement of interest should identify which particular legal issues the brief addresses, explain why those issues are important to the amicus or amici curiae, and concisely summarize how and why the amicus brief addresses those issues in a way that should be beneficial to a court.

What Else Makes an Amicus Brief Effective?

To increase the chances that someone actually will read an amicus brief cover to cover, it needs to be concise—especially when multiple amici curiae will file briefs in a case. The always challenging goal is to file an amicus brief that is considerably shorter than the particular appellate court's rules allow. Again, an effective amicus brief needs to say something different than the supported party's brief. In addition, an amicus brief should be written in the elevated and somewhat restrained tone that appellate courts respect—a style of writing that may be quite unlike how trial court briefs are written. They also should comply with any applicable content and format rules, for example, by including a table of authorities, and of course, they should contain proper legal citations.

What Other Sections Should an Amicus Brief Include?

Assuming that the amicus brief supports one or more of the parties, there is no reason to repeat the legal issues in the questions presented section in the supported parties' brief. Attempting to restate these legal issues in the amicus brief very well may undermine the supported parties' position. An amicus brief should include a conclusion, however.

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Are Amicus Briefs Limited to the Facts in the Record?

Dealing with the facts in the record in an amicus brief is somewhat of a gray area. An amicus brief should not refer to case-specific facts that are not in the record on appeal. However, amicus briefs that present information that is not case specific and that is not in the record, but that adds perspective to the legal issues, is generally acceptable, and indeed, fosters one of the basic purposes of amicus briefs. *See* Sup. Ct. R. 37.1.

How Much Assistance Can an Amicus Attorney Receive from the Supported Party's Attorney?

Soliciting amicus support is a common practice. It is not inappropriate for in-house or outside counsel representing a party in an appeal to contact prospective amici curiae, help organize them into one or more amicus briefs, suggest particular subjects, issues, or arguments for amicus briefs to address, provide amicus counsel with copies of non-confidential record materials, or a combination of these. Parties also sometimes recommend amicus counsel who are skilled in appellate brief writing. There also generally is no problem inviting a supported party's appellate attorney to read and to comment on a final draft of an amicus brief.

But this should be as far as input from a supported party's counsel should go. Supreme Court Rule 37.6 requires every nongovernmental amicus brief to include, as the first footnote on the first page of text, a statement indicating "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." The same rule also requires that first footnote to "identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Federal Rule of Appellate Procedure 29(c)(5) establishes virtually the same disclosure requirement for amicus briefs submitted to federal courts of appeals. These rules help to ensure the independence of amicus briefs and to deter parties from using amicus briefs as "page extensions" for their own arguments.

How Much Does It Cost to Prepare an Amicus Brief?

Producing a high-quality amicus brief requires a substantial amount of attorney thought, time, and effort. Fees, whether hourly or fixed, are generally less than, but in some cases can be comparable to, fees for preparing a party's opening brief. A lot depends on the number and complexity of the issues that the amicus brief will address and the amount of research that needs to be performed. Many trade associations and other business groups set their own "going rates" for amicus briefs. Individual companies interested in filing an amicus brief in an appeal often pool resources and share fees by combining into a single amicus brief.

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Do the Rules Require the Amicus Counsel to Obtain the Nonsupported Parties' Consent Before Filing an Amicus Brief?

Appellate rules generally require amicus counsel to seek the consent of all parties in the appeal to file an amicus brief, and they typically provide that if the counsel obtained consent, they do not need to submit a motion for leave to file. *See, e.g.*, Sup. Ct. R. 37.1 & 37.2; Fed. R. App. P. 29(a)–(b). Neither consent nor a motion for leave to file an amicus brief is required if the brief is being submitted by the United States, or on behalf of a state or local government. *See* Sup. Ct. R. 37.4. A similar rule applies in the federal courts of appeals, but only for amicus briefs filed on behalf of the United States, federal agencies or federal officers, or a state. *See* Fed. R. App. P. 29(a).

When Is Withholding Consent Appropriate?

Courts disfavor withholding consent for the filing of amicus briefs unless an applicable deadline for filing an amicus brief has passed. Further, most appellate courts routinely grant timely motions for leave to file amicus briefs, even when opposed, so withholding consent almost always is futile and may be counterproductive. A party sometimes will try to condition consent upon having an advance opportunity to review a proposed amicus brief that will support the other side. Withholding or conditioning consent based on the content of an amicus brief, or on the identity of an amicus curiae, is quite inappropriate.

Can a Company File an Amicus Brief in a Trial Court?

The vast majority of amicus briefs are filed in federal and state appellate courts. Filing an amicus brief in a federal district court or in a state trial court is possible, but left up to the discretion of the presiding judge. Under 28 U.S.C. §517, the U.S. Department of Justice can "attend to the interests of the United States" by filing a statement of interest in any federal or state trial court proceeding.

What Other Key Points Should a Company Know About Federal Government Amicus Briefs in Private Party Appeals?

At the Supreme Court level, the United States, through the Solicitor General, almost never files an amicus brief at the certiorari petition stage unless specifically invited to do so by the Court. In such cases, if the Court subsequently grants certiorari, the Solicitor General will generally file an amicus brief on the merits and also participate in the oral argument on behalf of the supported party. In the federal courts of appeals, the U.S. Department of Justice sometimes will file an amicus brief on behalf of the United States or a federal agency in a private party lawsuit that implicates important federal interests. Before filing an amicus brief, the Office of the Solicitor General, or the appropriate U.S. Department of Justice division, often will solicit the views of the parties, as well as those of interested federal departments and agencies.

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Do State Governments also File Amicus Briefs?

They do, in both the state and the federal appellate courts, and frequently they file amicus briefs jointly with other states. A state's solicitor general, attorney general, or both manage this amicus participation.

Can Amici Curiae Participate in Oral Arguments

In the federal courts of appeals, with the leave of the court, private party amicus counsel may participate in the oral argument. *See* Fed. R. App. P. 29(g). But, this rarely happens. At the Supreme Court level, the Court virtually never allows amicus participation during an oral argument unless the Court has appointed an attorney to serve as amicus counsel and present an oral argument on a particular issue.

Does DRI File Amicus Briefs on Behalf of Its Members?

Yes. DRI has an active amicus brief program. In fact, DRI has become one of the most frequent amicus brief submitters in the Supreme Court. The DRI Amicus Committee considers requests for DRI amicus support, which is generally limited to Supreme Court, federal courts of appeals, and state supreme court cases. To receive consideration, you will want to obtain and submit a timely request form to Jay Ludlam, DRI Director of Publications. IDQ

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Book Review

Supreme Ambitions

A Novel, by David Lat

David Lat's novel, Supreme Ambitions, follows a young law school graduate, Audrey Coyne, through the ups and downs of her tenure as a law clerk to the Honorable Christina Wong Stinson, an Asian-American conservative judge for the Ninth Circuit Court of Appeals, who has her sights set on the next Supreme Court nomination. The inside cover contains the usual language that the book is a work of fiction, and that any resemblance to actual persons is coincidental. However, one need only read a few pages into Mr. Lat's freshman novel to find characters that show the aforementioned disclaimer to be a pure formality. One cannot mistake the true inspiration behind Judges Polanski (a charismatic Eastern European, with a conservative bent and a history of sending clerks to the Supreme Court) and Gottlieb (a liberal lion with a history of clashing with Judge Polanski) as anyone but the well known Ninth Circuit Judges Kozinski and Reinhardt.

But perhaps it is precisely these barely-veiled references that give David Lat's freshman novel its charm. It is, in essence, an affectionate homage to the author's own clerkship experience in the guise of legal fiction. Indeed, the plot of the novel seems somewhat secondary to Lat's nostalgic descriptions of the Browning Courthouse and Pasadena landmarks that so characterize the experience of many Ninth Circuit clerks. The plot in a nutshell: As Audrey Coyne faces the trials and tribulations of clerking for a high-powered and ambitious federal judge, she rises to the task with the support of her friends, a familiar cast of characters, including Jeremy (Audrey's best friend from Harvard Law) and Harvetta (a brilliant and frequently underestimated African American woman from a third tier law school). Soon Audrey finds herself faced with an ethical dilemma that may jeopardize her chance to secure a Supreme Court clerkship and may put her entire career at risk. Will she do the right thing? Ultimately, it doesn't matter, thanks to a rather fortuitous twist of fate and the reader's willing suspension of disbelief. Nevertheless, one does find oneself invested in Audrey's journey, which is replete with emotional highs and lows and life lessons learned, but still moves along briskly from start to finish of her clerkship year.

While Lat's clean and simple prose is accessible to a broader audience, for the reasons above, the novel will more readily appeal to members of the legal profession, particularly former Ninth Circuit clerks, who can truly understand its references. The novel may also be of interest to lawyers who have not clerked, as it provides a largely accurate picture of a Ninth Circuit clerkship experience and touches on current legal issues with a side of good old fashioned gossip. In sum, Supreme Ambitions is a quick and jaunty read and a good choice for your next flight or weekend beach trip.

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Editor's Foreword

Help for litigants, help for the courts

By Benjamin G. Shatz

Benjamin G. Shatz

The initial checklist that runs through your mind at the start of litigation undoubtedly covers items like subject matter jurisdiction, personal jurisdiction, venue, statutes of limitations, and the like. And you probably also take stock of whether there's anything special about any of the parties (disabilities? juvenile? elderly?) that could trigger preferences or other unusual treatment. (See, e.g., Code Civ. Proc. § 36.) This issue's lead article should prompt you to add another checkbox to your list: Is any party in the military or a veteran? In *California Courts on Active Duty*, Justice Eileen Moore, a veteran herself, takes on the herculean task of compiling the various state and federal laws that distinguish ordinary civilian litigation from matters involving service personnel and veterans. These differences span the legal gamut from civil, criminal, family, probate, juvenile and other matters. Litigators who fail to discover the possible military histories of their own clients and other parties in a case are headed into a minefield.

On the general topic of checklists, be sure to check out a book published back in 2009, The Checklist Manifesto: How to Get Things Right, by Atul Gawande, which Malcolm Gladwell called "powerful and thought-provoking" in addressing "how professionals deal with the increasing complexity of their responsibilities." To lighten the complications of finding the article in this issue that's right for you, what follows is a quick checklist of our exciting content. But really, you'll want to read them all.

Litigation is complicated and confusing enough as it is in "plain English," but how much more frustrating can it be for millions of Californians with limited proficiency in English? Read *Language Access for All*, by Judges Steve Austin and Manual Covarrubias to learn how our courts are meeting the challenges of our polyglot populace.

In the same vein of exploring ways to help the courts work efficiently and effectively, we offer two more insightful articles of an appellate nature. First, M.C. Sungaila provides data about the importance and impact of amicus briefs. Next, Justice Elizabeth Grimes and Erica Toews address remote judging in *Working From Home*.

On the substantive law front, Khai LeQuang provides a primer on injunctions. And our ADR update continues the developing saga of arbitration law in Paul Dubow's *Follow-up to* Concepcion.

Everyone loves a good war story, and in this issue's newer lawyer column, employee-side plaintiff's lawyer Tamara Freeze shares her experiences in *My First Jury Trial*. Counter-balancing youth with experience, Tom McDermott's op-ed effectively ponders a past schoolyard battle, analogizing modern litigation to an inane toddler brawl.

And finally, the curtain rises on an exclusive dramatic treat! Picking up on McDermott's theme and running to the stage, Paul Marks amuses and edifies us with a world premiere theatrical extravaganza in *The Demurrer*. On the off-chance that play's subtle-as-a-sledgehammer didactic message eludes anyone, we've included an interview with the playwright. The Stanley Mosk Courthouse in Downtown L.A. is only a block away from Broadway....

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Amicus Briefs in the California Supreme Court:

Indicia of their Importance and Impact

By Mary-Christine Sungaila

Mary-Christine Sungaila

Increased Amicus Participation Nationwide

Amicus curiae or "friend of the court" briefs are now filed in a majority of United States Supreme Court cases and various state supreme courts. In the Supreme Court's 1965–66 term, amicus briefs were filed in 35 percent of cases; by 1995, amicus briefs were filed in nearly 90 percent. (See Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study* (1999) 8 S. Cal. Rev. L. & Women's Stud. 187, 188, fns. 4-6.) Analysis of the 1999 to 2008 terms shows that in civil cases the average filing rate for amicus briefs was 92.4 percent. (See Sungaila, *A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs* (March 2010) International Association of Defense Counsel Appellate Practice Committee Newsletter.)

The Supreme Court's citation to amicus briefs has also increased. One study, covering cases from 1969 to 1981, reported such citations 18 percent of the time. (O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation* (1983) 8 Just. Sys. J. 35, 42-43.) Another study, covering 1986 to 1995, reported 37 percent, with a 15 percent figure for cases citing an amicus brief by name. (Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs* (2004) 20 J.L. & Pol. 33, 35.)

In recent years, the Court has more directly acknowledged the helpfulness of amicus briefs. On one occasion, the Court directed counsel for the parties to be prepared at oral argument to address a point made only by an amicus. In December 2014, in *Dart Cherokee Basin Operating Co., LLC v. Owens* (2014) 135 S.Ct. 547, the Court considered and rejected a jurisdictional question raised only by Public Citizen as amicus, and then embraced an argument against presumptions of removal in the Class Action Fairness Act context urged by other amici. And in *Bullard v. Blue Hills Bank*, No. 14-116, a bankruptcy case argued in April 2015, the justices expressed confusion over the fact that two of the nation's largest creditors filed amicus briefs in support of the debtor but no amicus briefs were filed in support of the banks. At oral argument, Justice Kagan told counsel for the bank, "[o]ne of the things that confused me about this case, quite honestly, is why you don't have more people on your side.... [W]here where are the amicus briefs from the creditors that think your position is important...?" (Argument Transcript at 53-54.)

"Historically, state courts were more likely than the U.S. Supreme Court to limit the role of amicus participation in appeals." (Corbally, Bross & Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000* (2004) 25 Just. Sys. J. 39, 43.) But amicus participation has expanded in state appellate courts over the last several decades as well. The number of amicus briefs filed in state high courts tripled in the 1980s. (*Id.* at p. 44.) That growth has not been uniform across all states, however. Amicus participation between 1960 and 2000 was highest in the Florida, Massachusetts, North Carolina and Washington high courts, according to one study; two previous studies revealed the top five states for amicus participation to be California, Michigan, New Jersey, New York, and Ohio. (Id. at p. 46.) According to one survey in state supreme courts, 31 percent of cases acknowledged or cited amicus briefs and 82 percent discussed arguments made by amici. (Corbally, Bross & Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000, supra*, at p. 53.) When state supreme court justices were asked to quantify the number of amicus briefs they found influential, 27 percent regarded fewer than a quarter influential, 32 percent considered between a quarter and one-half influential, and 36 percent considered between one half and three quarters influential. (Flango, Bross & Corbally, *Amicus Curiae Briefs: the Court's Perspective, supra*, 27 Just. Sys. J. at p. 185.)

— The California Experience —

Amicus filing in the California Supreme Court reveals high participation. The amicus filing rate was 59.7 percent from 2000 to 2009 in civil cases; out of 707 cases decided by the court, 422 had one or more amicus briefs, with a total of 1,868 amicus briefs being filed in those 422 cases. (Sungaila, *A Friend in Need is a Friend Indeed, supra*, at pp. 2-3.) Between 2000 and 2014, the court decided 981 cases; amicus briefs were filed in 514. The cases with the most amicus briefs during that timeframe centered on issues concerning same-sex marriage. *In re Marriage Cases* (2008) 43 Cal.4th 757, garnered 53 amicus briefs filed by law professors, religious leaders, churches, political campaigns, law clinics, law students, and bar associations, among others. This record was surpassed the follow-

ing year in another same-sex marriage case, in which 63 amicus briefs were filed. (*Strauss v. Horton* (2009) 46 Cal.4th 364.)

> *'The California Supreme Court has historically paid particular attention to the broader context and consequences highlighted by amicus briefs, and appears poised to continue this trend.'*

The California Supreme Court has recognized the "valuable role" amici play "precisely because they are nonparties who often have a different perspective from the principal litigants" and that the "availability of [] diverse views through amicus curiae participation enriches the judicial decisionmaking process." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) The court has further observed that "[a]micus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

The California Supreme Court has demonstrated its openness to amicus briefs in two ways: inviting amici to participate in cases, and discussing at length in its opinions arguments made by amici.

In some cases the California Supreme Court has expressly invited the submission of amicus briefs. For example, in deciding whether an applicant lacking legal immigration status could become a member of the state bar, the Supreme Court invited briefs from the State of California and the Department of Justice. (See *In re Garcia* (2014) 58 Cal.4th 440, 450.)

Courts of appeal, too, have invited amicus participation on occasion. In *Toyota Motor Corp. v. Superior Court* (2011) 197 Cal. App.4th 1107, 1130, the Second Appellate District was asked to determine whether California courts have the authority to require a corporate defendant's foreign officers, directors, managing agents or employees to appear for deposition in California. Recognizing that the case presented "important and novel questions," the court extended direct invitations to amicus organizations identified by the parties as being potentially interested in the outcome of the case, and set up a post-argument amicus briefing schedule. (See January 21, 2011 docket entry, B225393 <http://appellatecases.courtinfo.ca.gov> [as of Sept. 25, 2015].) That same division invited "a number of governmental and private parties to submit amicus curiae briefs" in connection with another writ proceeding in 2008 involving "the legality of, and restraints upon, home schooling in California." (*Jonathan L. v.*

Superior Court (2008) 165 Cal.App.4th 1074, 1083.)

Arguments made by amici are often expressly discussed and adopted (or considered and rejected) by California appellate courts. (See, e.g., *Lockheed Martin Corp. v. Workers Comp. Appeals Bd.* (2002) 96 Cal. App.4th 1237, 1248, & 1249, fn. 8 [discussing at length arguments made by amicus curiae]; *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 28 [in a case concerning the authority of nonprofit organizations to practice law, the Supreme Court observed: "[i]n a significant and unusual instance of unanimity across the political spectrum, [defendant Tenderloin Housing Clinic], joined by organizations as diverse as the Pacific Legal Foundation and the American Civil Liberties Union as amici curiae, urges that we reverse the judgment of the Court of Appeal" determining that the clinic was engaged in the unauthorized practice of law]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 594 [specifically considering and rejecting public policy arguments made by defendant and its amici]; *Kelly v. Methodist Hospital of Southern Cal.* (2000) 22 Cal.4th 1108, 1115-1116, 1118-1119, 1125-1126 [addressing and rejecting discrete arguments made by plaintiff's amici]; *Connecticut Indemnity Co. v. Super. Ct.* (2000) 23 Cal.4th 807, 816, 819 [addressing arguments made separately by amici for insurers]; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal. 4th 853, 872 [addressing argument made by amicus and determining that it "misses the mark"]; *Ste. Marie v. Riverside County Regional Park and Open-Space Dist.* (2009) 46 Cal.4th 282, 293-295 [taking judicial notice of documents presented by amici park districts and addressing those districts' separate arguments]; *City of Santa Barbara v. Super. Ct.* (2007) 41 Cal.4th 747, 762-765, 766-769, 774-776, 779-780 [discussing several arguments made by amici, and rejecting some of the policy arguments made by amici because the adverse impacts they suggested would occur were not borne out in states that had already adopted the rule amici opposed].)

In *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, in which the California Supreme Court determined that employers were required to make meal breaks available to employees but did not have to ensure that employees took them, the Court adopted amicus the Division of Labor Standards Enforcement's interpretation of when a wage order's meal period requirement was satisfied. In *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1099, where customers brought a putative class against Target for the refund of excess sales tax reimbursements arising out of sales of hot coffee "to go," the Court cited the Board of Equalization's amicus brief repeatedly in rendering a decision for Target.

In *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, holding that an appellate court may issue a suggestive Palma notice encouraging the trial court to take action requested in a writ petition without soliciting opposition, the lone amicus brief filed by the California Academy of Appellate Lawyers figured prominently in both the majority and dissenting opinions.

The Future of Amicus Participation in California

The California Supreme Court has historically paid particular attention to the broader context and consequences highlighted by amicus briefs, and appears poised to continue this trend. Lawyers should keep this in mind in presenting their cases, and solicit supportive amicus briefing where helpful and appropriate.

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Friendly Persuasion

Making Strategic Use of Amicus Briefs

By Lawrence S. Ebner and Robin S. Conrad

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.

An invitation from a court generally indicates its need for objective or technical expertise that the parties cannot provide.

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!

Featured Article

The Effective Amicus Curiae Brief: Making an Impact as a Friend of the Court

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Amicus curiae briefs provide an important opportunity – indeed, often the only opportunity – for non-parties to participate in appeals that may affect their interests in some way. If done well, amicus briefs can be highly influential. As one commentator observed, it is a misconception that "[amicus briefs] are at best only icing on the cake. In reality, they are often the cake itself." Bruce J. Ennis, *Effective Amicus Briefs,* 33 Cath. U. L. Rev. 603, 603 (Spring 1984).

Although amicus briefs can be as critical to the judicial decision-making process as the briefs of parties, amicus briefs differ from party briefs in important ways. This article examines the unique functions and attributes of effective amicus briefs, as well as strategies to enhance effectiveness as an amicus.

The Functions of Effective Amicus Briefs

Amicus briefs have become a common feature of both state and federal appellate litigation. Whether by invitation from a party or by their own initiative, amici increasingly seek to participate in appeals that present significant legal issues or that pose risks of establishing some harmful precedent. With the increased use of amicus briefs, however, there also have been complaints about the quality of amicus advocacy. In *NOW, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000), for example, the court observed that "amicus curiae briefs can be a real burden on the court system." Similarly, in a survey of former clerks of the United States Supreme Court, clerks complained that amicus briefs frequently were unhelpful and were "duplicative, poorly written, or merely lobbying documents not grounded in sound argument." Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & Politics 33, 44-45 (Winter 2004).

Because helpfulness is a key attribute of any persuasive amicus brief, effective amicus advocacy starts with careful evaluation of the function and benefits of the proposed amicus briefing. An amicus brief that merely serves to reiterate the arguments of a party has little persuasive value and expressly is discouraged by most appellate rules or appellate rule commentary. *See, e.g.,* Fed. R. App. P. 29, Advisory Committee Notes to 1998 Amendments ("[An amicus brief] should treat only matter not adequately addressed by a party."). If a party will do an adequate job of addressing the critical legal issues and of presenting the interests at stake in an appeal, amicus participation likely is unwarranted. In many cases, however, amicus briefs can serve useful functions and offer a highly beneficial complement to the party briefing.

One common and useful function of amicus briefs is to address the public policy implications of an appeal. Amici may have special expertise or hold positions that allow them to offer unique policy insights or to provide credible explanations of the potential ramifications of judicial rulings. Rather than focus on legal issues, this type of amicus brief seeks to highlight important policy considerations and to warn against possible unintended consequences of decisions. The amicus brief that a group of high-ranking retired military personnel filed in *Grutter v. Bollinger,* 539 U.S. 306 (2003), and *Gratz v. Bollinger,* 539 U.S. 244 (2003), about the importance of affirmative action policies often is cited as a powerful example of the effectiveness of such briefs. *See, e.g.,* Sylvia H. Walbolt and Joseph H. Lang, Jr., *Amicus Briefs Revisited,* 33 Stetson L. Rev. 171 (2003).

Amicus briefs also may highlight the practical implications of decisions by introducing non-record social science or other empirical data relevant to the appeal. Commonly called "Brandeis briefs" after the brief that Louis Brandeis filed in *Muller v. Oregon,* 208 U.S. 412 (1908), this type of amicus brief strengthens policy arguments by providing additional context for the legal issues and by offering concrete examples of the ramifications of a particular decision beyond the litigants. When done well, these amicus briefs may be as one of the most helpful forms of amicus advocacy. *See, e.g.,* Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief,* 5 J. App. Prac. & Process 523, 531-32 (Fall 2003) (opining same).

Another common function of amicus briefs is to supplement the legal arguments of a party. Particularly in cases involving technical knowledge or specialized areas of the law, amicus briefs often are useful in providing additional background information or further explanation about the issues. *See* Lynch, 20 J. L. & Politics at 41-42 (discussing same). For example, amicus briefs may provide useful information about how a specific statute operates within a larger statutory framework or about how other jurisdictions have approached similar legal issues. Amicus briefs also may add significant persuasive value by providing historical background about the roots or evolution of the legal provision at issue.

In other cases, amicus briefs may supplement the briefing of a party by focusing on different legal arguments than the party. Unlike the parties – who generally are focused on winning the case at hand – amici generally are focused on only specific legal issues and on establishing workable rules of law. Because of their different focus, amici may be interested in presenting arguments that the party has elected to minimize for strategic or practical reasons. Amici also may be interested in seeking a more limited or a broader rule of law than the rule urged by a party. *See* Schweitzer, 5 J. App. Prac. & Process at 532-33 (discussing same).

Another reason for amicus participation arises in cases where there is concern about the strength of a party's briefing about important legal issues. In cases with an unrepresented or a poorly represented party, an amicus may seek to ensure that the legal issues simply are briefed adequately. In such cases, the amicus brief effectively may function as a substitute for the party brief. *See, e.g., NOW, Inc.*, 223 F.3d at 616 (citing inadequate representation of a party as an appropriate circumstance for amicus participation). In other cases, an amicus may have a different view of the legal issues or may wish to address authorities or arguments that a party has elected to ignore. Depending on the importance of the legal issues, amicus participation may be most helpful and essential in these types of cases.

Other examples of useful amicus advocacy certainly exist. The effectiveness and usefulness of any approach depends on the nature of the legal issues, the focus of the party briefing, and the posture of the appeal. Whatever the substantive approach, the essential attribute of any effective amicus brief is that the brief adds to, rather than merely duplicates, the arguments of the parties.

The Attributes of Effective *Amicus* Briefs

In addition to serving a helpful function, the effectiveness of an amicus brief depends on careful drafting and an organized presentation. Rigorous analysis, polished writing, and cogent arguments are essential to any persuasive appellate brief. But those qualities are particularly essential for amicus briefs. Because amicus briefs are extraneous, poor quality amicus briefs are unlikely to receive much attention and, even worse, may be viewed as burdensome to the appellate court. *NOW, Inc.*, 223 F.3d at 616 (stating that amicus briefs can be burdensome).

To be effective, the function and quality of the amicus arguments must be readily apparent from even a cursory review of the brief. In one survey, 30 percent of former United States Supreme Court clerks reported that they stopped reading or only quickly scanned an amicus brief if they found that the brief was poorly written or duplicative. Lynch,20 J. L. & Politics at 44. Poor quality amicus briefs are destined to receive the same treatment from other appellate courts.

Brevity and focus also are essential for effective amicus briefs. As a practical matter, page limits for amicus briefs usually are considerably shorter than the page limits for the parties' principal briefs, and amici generally do not have the opportunity to file reply briefs or participate in oral arguments. *See, e.g.,* Fed. R. App. P. 29(d), (f), and (g) (so providing). Even aside from the constraints imposed by appellate procedural rules, a short and strongly focused amicus brief is far more likely to receive serious attention from busy appellate courts.

Finally, an even and thoughtful tone is particularly important for amicus briefs. Amici – particularly organizations that regularly file amicus briefs – should be careful to protect their credibility. Because amicus briefs are "friend of the court" briefs, a strident or overly argumentative tone only serves to undermine the amicus arguments. Amici also should avoid distorted or one-sided use of social science or other empirical data and should introduce data only from reputable sources. If the court lacks faith in the trustworthiness of an amicus, the amicus arguments will add little value.

Additional Strategies to Enhance Effectiveness as an *Amicus Curiae*

Along with thoughtful briefing, the unique role of an amicus calls for strategic planning that may be unnecessary in other appeals. As an initial procedural matter, non-governmental amici generally must have the consent of all parties or leave from the court to file amicus briefing. *See, e.g.,* Fed. R. App. P. 29(a) (so providing). Consent should be sought early in the appellate process and, if given orally, should be confirmed in writing.

Aside from that procedural issue, effective amicus advocacy depends on strong cooperation and collaboration with any parties aligned with the interests of the amicus. Because an amicus brief generally is due shortly after the principal brief of the party that the amicus is supporting, early collaboration is important to determine if amicus participation is necessary and to avoid duplication of arguments. *See, e.g.,* Fed. R. App. P. 29(e) (amicus brief is due seven days after principal brief of party that *amicus* is supporting). Early collaboration also is essential to determine the form of amicus briefing that will be most useful and persuasive in a particular appeal.

In addition to informing the approach of the amicus briefing, early collaboration is essential to enable an amicus to provide input about the arguments and points that the party should raise in its principal brief. Along with strengthening the brief of the party, that input is critical because, absent exceptional circumstances, an amicus cannot expand the scope of an appeal by raising issues that the parties did not raise. *See, e.g., Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998) (stating same); *Christopher M. v. Corpus Christi Indep. School Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) (same).

Effective amicus advocacy also depends on early cooperation and collaboration with other potential amici. In addition to avoiding duplication in the *amicus* briefing, collaborative briefs often are viewed more favorably than briefs by single amicus. A survey of former United States Supreme Court clerks reported that 90 percent of clerks expressed a preference for collaborative amicus briefs, with

one clerk commenting that "the more groups that come together on a brief, the more impressive it is that they hold the same view." Lynch,20 J. L. & Politics at 57-58. The persuasiveness of collaborative amicus briefs is particularly strong if the various collaborating amici usually have different interests or come from different ideological perspectives. An impressive 86 percent of surveyed former United States Supreme Court clerks reported that a collaborative brief from diverse amici would be noteworthy and would merit closer consideration. *Id.* at 63-64.

Although collaboration with aligned parties and other amici is essential to effective amicus advocacy, such collaboration should have limits. Effective December 1, 2010, the Federal Rules of Appellate Procedure now require – like Supreme Court Rule 37.6 – that an amicus must disclose whether a party's counsel authored the amicus brief in whole or in part, as well as whether a party, a party's counsel, or any other person contributed money that was intended to fund the preparation or submission of the amicus brief. *See* Fed. R. App. P. 29(c)(5) (so providing). Mere collaboration between a party and an amicus – such as sharing drafts or discussing arguments – does not trigger the disclosure requirements. *See, e.g.,* Fed. R. App. P. 29, Advisory Committee Notes to 2010 Amendments ("mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(5)"). More extensive involvement, however, must be disclosed and should be avoided because an amicus brief prepared or funded by a party will lose much of its persuasive value.

Finally, aside from briefing, the effectiveness of amicus participation may be enhanced by other efforts at cooperation and collaboration with the party. In an important appeal, an amicus may want to take an active role in the overall case preparation and strategic planning. For example, an amicus may be helpful in assisting the party with oral argument preparation or moot oral arguments. An amicus also may provide useful assistance in recruiting other amici or in organizing the amicus strategy.

No matter the level of involvement, amicus participation is a rewarding – and often fun – form of appellate advocacy. An amicus can make an important difference in an appellate outcome, and any amicus effort should be approached with the same vigor and care as any other appellate effort.

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The United States as *Amicus Curiae*: Making Uncle Sam Your New Best Friend

by Lawrence S. Ebner

The United States can be a party's best friend—or worst foe—when it enters an appeal as *amicus curiae*. This article provides attorneys with some practical guidance about interacting with the U.S. Department of Justice when it is engaged in the process of deciding whether to participate in an appeal and/or what position to advocate on behalf of the United States as *amicus curiae*.

A. Attending to the Interests of the United States

The United States is not bashful about participating as *amicus curiae* in appeals that implicate important federal interests. Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State." In other words, Congress has authorized the Department of Justice to appear in any suit, including private party litigation, to express and protect the interests of the federal government, including the interests of most federal departments and agencies.

The Office of the Solicitor General, which is comprised of the most select group of attorneys within the Justice Department and probably the entire federal government, represents the United States in Supreme Court proceedings. *See* 28 U.S.C. § 518; 28 C.F.R. § 0.20(a). This includes authoring Supreme Court *amicus* briefs and participating in oral arguments as *amicus curiae.* In the federal courts of appeals, the Justice Department's operating divisions (e.g., Civil Division; Environment and Natural Resources Division) usually take the lead in representing the United States as *amicus curiae*, but the Solicitor General must authorize all such *amicus* participation. *See* 28 C.F.R. § 0.20(c).

B. Playing By the Rules

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When the United States decides to file an *amicus* brief in an appeal, neither the parties nor the court has a choice in the matter. Sup. Ct. R. 37.4 provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General." Similarly, Fed. R. App. P. 29(a) indicates that "[t]he United States or its officer or agency . . . may file an amicus-curiae brief without the consent of the parties or leave of court." State appellate courts have similar rules.

Although the United States can appear in an appeal as *amicus curiae* whenever and wherever it wishes, the Justice Department normally must adhere to the rules regarding the timing, length, and format of *amicus* briefs. For example, unless enlarged, a Supreme Court *amicus* brief on the merits is limited to 9,000 words, *see* Sup. Ct. R. 33.1(g)(xi) & (xii), and an *amicus* brief in a federal court of appeals may be no more than half the maximum length allowed for a party's principal brief (i.e., generally no more than 7,000 words), *see* Fed. R. App. P. 29(d). These rules apply to *amicus* briefs filed on behalf of the United States as well as by other *amici*.

One important but unwritten exception relates to the Solicitor General's submission of an *amicus* brief at the Supreme Court's invitation during the certiorari petition stage (i.e., prior to the Court's decision on whether to grant review). In the vast majority of cases, the Solicitor General will not file an *amicus* brief relating to a pending certiorari petition unless the Court issues an order "inviting" the Solicitor General to submit a brief expressing the views of the United States. Such an order is commonly referred to as a "CVSG"—a "call for the views of the Solicitor General." Each term the Supreme Court issues CVSGs in a number of private party cases where a certiorari petition presents legal questions that appear to implicate important federal government interests. The Court issues a CVSG to obtain the Solicitor General's views not only on the legal issues in a case, but also on whether to grant review.In this way the Solicitor General serves an important, case-screening "gatekeeper" function for the Supreme Court. The Office of the Solicitor General posts such "invitation briefs" online. *See* *http://www.justice.gov/osg/briefs/index.html#filingtype*.

A CVSG is issued after the parties complete briefing on a certiorari petition, all other *amicus* briefs supporting or opposing the petition have been filed, and the Justices have held an initial private conference to discuss the petition. After a CVSG is issued, the Court, as a matter of practice, affords the Solicitor General as much time as needed to prepare and file the *amicus* brief. No further consideration is given to the certiorari petition until the Solicitor General files the brief, normally by the end of the term in which the CVSG is issued. As discussed below, the period during which the Office of the Solicitor General formulates and prepares an invited *amicus* brief on a pending certiorari petition affords the parties a crucial opportunity to provide input.

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The United States also is subject to appellate rules governing *amicus* participation in oral argument. In the federal courts of appeals, "[a]n amicus curiae may participate in oral argument only with the court's permission." Fed. R. App. P. 29(g). Thus, if the Justice Department wishes to argue as *amicus curiae* at a court of appeals hearing, it first must file a motion seeking the court's permission to do so. Although such motions when filed on behalf of the United States are routinely granted, the Justice Department attorney appearing before the court of appeals, and counsel for the party that the United States is supporting, must share the time allotted to their side in the appeal.

Similarly, when the Supreme Court hears a case, the Solicitor General (or a member of his or her office) may participate in oral argument on behalf of the United States as *amicus curiae.* The Solicitor General first files a motion for permission to participate and for divided argument. *See* Sup. Ct. R. 28.4 & 28.7. As a matter of practice, the Supreme Court routinely grants such motions when filed by the Solicitor General's office,but almost always denies permission for non-federal government *amici* to stand up and argue before the Court.

C. When Uncle Sam Speaks, Appellate Courts Listen

Statistical analyses repeatedly confirm that the Solicitor General's influence in the Supreme Court would be difficult to overstate, including when he or she represents the United States as *amicus curiae.* According to one recent law review article, "[w]hen the Solicitor General is participating as amicus at the petition stage—almost always at the Court's invitation—the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases." Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev., 1323, 1333-34 (2010). And when the United States participates as *amicus* on the merits after the Supreme Court agrees to hear a case, the Solicitor General's office "wins 70-80% of the cases, regardless of which side it supports." *Id.* at 1335. Indeed, "the Solicitor General's presence as amicus has a powerful effect on outcome: a petitioner's likelihood of winning increases approximately 17% when the Solicitor General comes in on its side and decreases approximately 26% when the Solicitor General supports the respondent." *Id.*

Although not as easily quantifiable, the influence that the United States wields as *amicus curiae* in the federal courts of appeals also is quite significant, but probably less impressive than in the Supreme Court. The arguments presented by the Justice Department on behalf of the United States as *amicus curiae* in the courts of appeals represent advocacy views, and even if not afforded "*Chevron* deference," are entitled to a level of

judicial respect commensurate with their persuasiveness. *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (discussing the degree of deference afforded to federal government "litigating positions"); *see also United States v. Mead*, 533 U.S. 218, 221, 228 (2001).

D. What is the *Federal* Interest?

The U.S. Department of Justice is fiercely independent when it participates in an appeal on behalf of the United States as *amicus curiae*. This does not mean, however, that the Justice Department is indifferent to the parties' views. Instead, there are opportunities for both sides in an appeal to provide the Office of the Solicitor General and/or Justice Department operating divisions with timely and meaningful input. Thoughtful and well presented insights from parties' appellate counsel regarding the legal issues in an appeal are generally not only welcome, but also carefully considered.

The most effective input that a party can provide will directly address the Justice Department's constant, overarching concern in each and every appeal where the United States is appearing, or may appear, as *amicus curiae*: What is the *federal* interest at stake in the appeal? The federal interest may be fundamental, such as judicial respect for the separation of powers. Or it may be more practical, such as judicial interpretation or application of a federal regulatory statute. But in every case where Justice Department attorneys are contemplating *amicus* participation, they will be closely examining the federal interests that should be identified, advocated, and protected.

E. Presenting Your Views To the Office of the Solicitor General

Regardless of whether you represent the petitioner or respondent, or the appellant or appellee, your fundamental objective should be to explain persuasively why the federal government's interests coincide, or at least are consistent, with your party's interests in the legal issues raised by an appeal.

The best—and most important—opportunity to do so probably is when a certiorari petition has been filed and the Supreme Court, after meeting in conference, has requested the Solicitor General to submit an *amicus* brief expressing the views of the United States. This is the time for a party to take full advantage of its most experienced and skilled appellate advocates. As soon as a CVSG is issued, appellate counsel should prepare a Memorandum for the Office of the Solicitor General. Because the memorandum is intended for the federal government's Supreme Court counsel, who are among the most sophisticated appellate lawyers (and best brief writers) in the nation, it should be of Supreme Court quality both in terms of substance and style.

If you are representing the petitioner (i.e., the party that

lost in the court of appeals), your memorandum should focus on why the United States should support the granting of review. The memorandum should not be just a retread of your certiorari petition, which the Solicitor General's office will have studied. Instead, your memorandum should supplement the certiorari petition by elaborating upon the important federal jurisprudential, policy, and/or practical interests implicated by the questions presented for review. Although you are acting as an advocate, your memorandum should summarize the judicial landscape relating to the questions presented as thoroughly and forthrightly as possible, discussing both favorable and unfavorable decisions, and of course, identifying any inter-circuit conflicts. The memorandum also should address the merits by explaining as succinctly as possible why the court of appeals decided the case incorrectly. If the lower court's ruling will have a broad adverse impact beyond the parties in the case, that too should be emphasized, as well as why from both a postural and factual perspective, the case is an appropriate, if not excellent, vehicle for Supreme Court review.

When you are representing the respondent (i.e., the party that prevailed in the court of appeals), your goal should be to draft a memorandum that explains why the Solicitor General should recommend against certiorari. The memorandum should supplement the certiorari opposition brief that you filed with the Court, and focus on the reasons why denying review would be consistent with federal interests. Your memorandum should explain why the court of appeals decided the case correctly, and to the extent possible, why the lower court's ruling does not conflict with any decisions of the Supreme Court or other circuits. If the legal issues involved are narrow, the memorandum should discuss why they are not likely to recur, and if they are novel, why further percolation of those issues in the lower courts is desirable. And if the case in any way from a postural or factual perspective is a less-than-perfect vehicle for Supreme Court review, your memorandum should explain why the case is not certworthy.

In addition to submitting your memorandum to the Solicitor General, you can and should request an in-person meeting to further advocate your party's views. In many cases the Solicitor General's office often will be amenable to holding such a meeting, but be forewarned that both sides will be invited to appear in succession, probably on the same day. When such a meeting is held, normally in one of the Solicitor General's ornate conference rooms at the Main Justice building in the Federal Triangle, key attorneys from cognizant divisions of the Justice Department, and also from potentially interested federal departments and agencies, may be present.

Do not expect to engage in some sort of casual give-and-take chat about the case. This type of meeting is more like a moot court session, with the Solicitor General or one of the Deputies presiding, and joined by several of his

or her assistants. Each side in the appeal presents separately, outside the presence of the other, and usually is afforded no more than an hour.

A party should select a single, experienced, federal appellate advocate, who is thoroughly steeped in the appeal and relevant case law, to take the lead in presenting the party's views to the Solicitor General and other assembled government attorneys. The party's counsel should be prepared for some tough and pointed questioning. After each side's presentation has been made, the Solicitor General and his or her colleagues, joined by the other government attorneys in attendance, will deliberate among themselves. The Solicitor General reveals the government's final position only when the brief for the United States as *amicus curiae* is filed with the Supreme Court.

F. Additional Opportunities for Input

When a case is before a circuit court of appeals, a federal department or agency with a significant interest in the issues may request the appropriate division at the Department of Justice to consider filing an *amicus* brief to express the government's views. As indicated above, the Solicitor General must approve any such request. *See* 28 C.F.R. § 0.20(c). Or a court of appeals panel may *sua sponte* request the Justice Department to file an *amicus* brief. But unlike the Supreme Court's issuance of a CVSG invitation, which the Solicitor General always accepts, the Justice Department feels no compulsion to file an *amicus* brief when requested by a court of appeals. (The same is true at the district court level, where the Justice Department may file, either on its initiative or at the court's request, a Statement of Interest—essentially an *amicus* brief—under § 517.) Again, the Solicitor General must approved *amicus* participation. When the Justice Department does file an *amicus* brief, it also may request the court's permission to participate in oral argument alongside the attorney for the side that it is supporting.

If a party knows that the Justice Department is considering *amicus* participation in a court of appeals case, it can prepare and send to the appropriate Assistant Attorney General and/or his or her appellate staff, a memorandum discussing the issues and the party's perspective on the significant federal interests, if any, that are at stake. It is also possible to request a meeting, but obtaining one may be less likely than when a CVSG has been issued. When and if a meeting is held, counsel for the other side in the appeal will be afforded the opportunity to express their party's views. Although meetings at the Justice Department regarding possible *amicus* participation in the courts of appeals normally are held with, and conducted by, the cognizant departmental division, a representative of the Solicitor General's office, as well as counsel from interested departments or agencies, are present. Again, a party would be wise to rely upon experienced appellate counsel to prepare a pre-meeting memorandum and take the lead at any meeting with Justice Department officials.

G. Conclusion

The presence of the United States is a powerful factor in any appeal. The government's participation as *amicus curiae* almost always reflects the fact that there are important federal interests involved in the case. A party's appellate counsel should endeavor to persuade the Department of Justice that the federal government's interests and his or her client's interests are closely aligned. Although Uncle Sam, even when supporting a party as *amicus curiae*, may be reluctant to create the impression that he is either side's new best friend, a party should to try to make him, at the very least, a very welcome kissing cousin.

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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.

—By Lawrence S. Ebner and Robin S. Conrad, McKenna Long & Aldridge LLP

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The IADC Amicus Brief Program: Its Increasing Success and Influence

By Mary-Christine Sungaila

An appellate partner at Snell & Wilmer L.L.P. in California, Mary-Christine Sungaila has chaired the IADC Amicus Curiae Committee since 2010. Under her leadership, the committee has prevailed in every merits case in which it has participated. Ms. Sungaila also chairs the Appellate Practice Committee of the IADC, is a member of the Board of the Foundation of the IADC, has served on Annual CLE committees and the IADC Nominating Committee, and lectured on appellate record preservation at the IADC Trial Academy on multiple occasions. She also co-chairs the ABA's Litigation Section Committee on Amicus Curiae Briefs and was appointed by the ABA President to the seven-member Standing Committee on Amicus Curiae Briefs, which reviews and approves all amicus briefs filed in the name of the ABA.

ONCE rare, amicus curiae or "friend of the court" briefs are now filed in the majority of appellate cases heard by the United States Supreme Court and various state supreme courts.

In the United States Supreme Court, amicus briefs were filed in thirty-five percent of the Court's cases in the 1965–66 term; by 1995, one or more amicus briefs were filed in nearly ninety percent of the Court's cases.[1] An analysis of the 1999 to 2008 terms showed that in civil cases the average filing rate for amicus briefs was 92.4% (with a high of 100% amicus participation in all civil cases in the 2007 term).[2] The number of civil cases before the Court each term ranged from thirty-nine to sixty-one; the total number of amicus briefs filed each term in those cases ranged from 344 to 627.[3]

"Historically, state courts were more likely than the U.S[.] Supreme Court to limit the role of amicus participation in appeals."[4] Nonetheless, the number of amicus briefs filed in state high courts

[1] See Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, 8 S. Cal. Rev. L. & Women's Stud. 187, 188, nn. 4–6 (1999) (citing data from Supreme Court advocate Bruce Ennis, a respected Supreme Court treatise, and a news report in the ABA Litigation News).

[2] See Mary-Christine Sungaila, *A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs*, IADC Appellate Practice Committee Newsletter (March 2010).

[3] *Id.*

[4] Sarah F. Corbally, Donald C. Bross, and Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000*, 25 Just. Sys. J. 39, 43 (2004).

tripled in the 1980s.[5] The growth in use of amicus briefs has not been uniform across all states, however. The frequency of amicus participation between 1960 and 2000 was highest, according to one study, before the Florida, Massachusetts, North Carolina and Washington high courts; two previous studies revealed the top five states for amicus participation to be California, Michigan, New Jersey, New York, and Ohio.[6]

My own survey of amicus filings in the California Supreme Court reveals high amicus participation in the past decade. The amicus filing rate was 59.7% from 2000 to 2009 in civil cases; out of 707 cases decided by the court, 422 had one or more amicus briefs.[7] The average number of amicus briefs filed in each case is also increasing. In the California Supreme Court, 1,868 amicus briefs were filed in 422 of the 707 civil cases decided by the court between 2000 and 2009.[8] Indeed, the California Supreme Court has even invited the submission of amicus briefs in some cases.[9]

With increased amicus participation has come increased amicus influence. Amicus briefs have repeatedly provided the United States Supreme Court with information and legal theories that have influenced the Court's decisions. The majority opinion in *Roe v. Wade*[10] expressly referred to positions urged by amicus groups and relied heavily on historical, social, and medical data provided by amici. In the companion case of *Doe v. Bolton*,[11] the majority expressly relied on data provided by amici showing that facilities other than hospitals are adequate to perform abortions, and rejected the state's contrary argument. In *Grutter v. Bollinger*,[12] the Court upheld the race-based admissions policy of the University of Michigan Law School; at oral argument and in the Court's decision, the justices referred to and relied on the amicus brief of retired military officers.[13] And, in the 2013 term, the Court advised counsel for parties in a case in advance of oral argument that they should be prepared to address an argument made in an amicus brief filed in the case.

The Court's citation of amicus briefs has also increased. According to one study, United States Supreme Court justices directly mentioned at least one amicus brief in eighteen percent of the cases in which amicus briefs were filed between the 1969 and 1981 terms.[14] Another study reveals that, "of all [United States Supreme Court] opinions published between 1986 and 1995, approximately fifteen percent

[5] *Id.* at 44.

[6] *Id.* at 46.

[7] *A Friend in Need is a Friend Indeed*, *supra* note 2, at 2–3.

[8] *Id.* at 3.

[9] *Cf. High Profile Cases*, California Courts: The Judicial Branch of California (Sept. 27, 2013, 3:11 PM), available at http://www.courts.ca.gov/2964.htm.

[10] 410 U.S. 113, 148–152 (1973).

[11] 410 U.S. 179, 195 (1973).

[12] 539 U.S. 306 (2003).

[13] See Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. App. Prac. & Process 523, 523–524 & n.4 (2003). The California Supreme Court has also discussed the argument of amici at length in its opinions. *See* Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 991–992 (1993); *In re* Marriage Cases, 43 Cal.4th 757 (2008).

[14] Karen O'Connor and Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 Just. Sys. J. 35, 42–43 (1983).

cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief" without citing or naming it.[15] More than sixty-five percent of the amicus briefs filed in the United States Supreme Court in 1992 contained information not found in the briefs of the direct parties.[16]

A survey of amicus brief filings in State supreme courts showed that amicus briefs were acknowledged or cited in thirty-one percent of cases, and arguments made in amicus briefs discussed in eighty-two percent of the cases sampled.[17] When they were asked what percentage range "most accurately describes the number of amicus curiae briefs in your court which are influential," "27 percent of the justices regarded fewer than a quarter influential, 32 percent considered between a quarter and one-half influential, and 36 percent considered between one half and three quarters influential."[18]

I. The IADC Amicus Program

Against this backdrop, beginning in the mid-2000's, the IADC formalized its amicus program and began to increase its amicus participation. Under the leadership of Texas appellate lawyer Lauren Harris, the Amicus Curiae Committee began participating in cases before State supreme courts. The IADC has since grown the program to include cases before the United States Supreme Court and some courts of appeal. As the Appendix to this Article shows, since 2007, the IADC has participated in twenty-three cases: thirteen cases at the merits and/or certiorari stage, and ten cases at the review or certiorari stage alone.

The IADC has an overall record of prevailing in 70 percent of the merits cases in which it has participated, and a 100 percent win rate in merits cases it has participated in during the last four years. In the process, the IADC has helped shape the law surrounding product liability, arbitration, class actions, attorney client privilege, punitive damages, civil discovery, standing, jurisdiction, and tort reform. The IADC has also built alliances with other organizations, often joining briefs alongside PLAC, the American Chemistry Council, the National Association of Manufacturers, the Washington Legal Foundation, and the Atlantic Legal Foundation.

This Article reviews two State appellate court decisions and one U.S. Supreme Court decision to demonstrate the depth, breadth, and influence of IADC amicus briefs in cases in which it participates.

II. Case Studies: State Appellate Court Victories

At the Court of Appeal's invitation, the IADC participated as amicus curiae in a California case with a broad impact on discovery against corporate defendants.[19] Plaintiffs in the case filed a product liability action arising from an accident

[15] Kelly J, Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 35 (2004).

[16] Victor E. Flango, Donald C. Bross, and Sarah Corbally, *Amicus Curiae Briefs: the Court's Perspective*, 27 Just. Sys. J. 180, 181 (2006).

[17] Corbally, Bross & Flango, *supra* note 4, at 53.

[18] Flango, Bross & Corbally, *supra* note 16, at 185.

[19] Toyota Motor Corp. v. Superior Court (Stewart), 197 Cal.App.4th 1107 (Cal. App. Ct. 2011).

that took place in Idaho, and sought to depose in California five employees of Toyota who were Japanese residents.[20] They were designated as individual employees, not as corporate representatives. Toyota responded that the depositions could take place in Japan, but not California, and cited a California statute that limits the power of California trial courts to compel the attendance of nonresidents at deposition and trial. The trial court granted the motion to compel. Toyota filed a writ petition. The Court of Appeal agreed to hear it on the merits, held argument, invited amicus briefing from interested parties (including the IADC), and then granted the petition and remanded to the trial court to vacate the order compelling the depositions to take place in California.[21]

"Code of Civil Procedure section 1989," the appellate court observed, "provides that a nonresident of California is not obliged to attend as a witness in this state. After a careful review of the relevant statutes and related legislative history, we conclude that this residency limitation applies not only to trials, but also to discovery. As a result, the trial court has no authority to compel Japanese residents to come to Los Angeles to attend depositions. Neither the legislative history nor the meager case authority on this issue persuasively provide otherwise."[22] The appellate court unanimously concluded that "[t]he plain language of the statutory scheme and the legislative history of that language fully support the conclusion that a trial court cannot order a non-resident to appear at a California deposition. This conclusion is not limited to individual witnesses, but also applies to a court order directing that a party produce for deposition a specifically named non-resident witness (e.g., an employee, office, or director of a corporation)."[23]

Nor could California courts independently gain authority to compel in-state depositions of nonresidents. As the IADC pointed out in its amicus brief,[24] while the California Supreme Court has recognized that courts have "fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them,"[25] that power "may only be exercised to the extent not inconsistent with the federal or state Constitutions, or California statutory law."[26] Moreover, while the matter

[20] *Id.* at 133–134.

[21] *Id.* at 145–146.

[22] *Id.* at 133.

[23] *Id.* at 145–146.

[24] The IADC and the National Association of Manufacturers jointly filed an amici brief in the case. Amici Curiae Brief in Support of Petitioners Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales, U.S.A., Inc. ("Amicus Brief"), *Toyota Motor Corp. v. Superior Court*, 197 Cal.App.4th 1107, No. B225393, 2011 WL 1360169 (Cal.App. Ct. 2011). The amicus brief showed that (1) California courts lack inherent authority to compel nonresidents to attend depositions within state borders because English courts of equity, from which California courts' inherent powers are drawn, ordered depositions to be taken abroad rather than force a foreign deponent to come to England and (2) even if the trial court did have discretionary authority under Code of Civil Procedure section 2025.260 to order Toyota's individual Japanese employees to attend depositions in California, that discretion must be exercised consistent with principles of international comity as well as the factors enumerated in section 2025.260 itself. *Id.* at 3–6, 6–12.

[25] *Id.* at *3 (citing Rutherford v. Owens-Illinois, Inc. 16 Cal.4th 953, 967 (1997)).

[26] *Id.* (citing Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal.App.4th 736, 762 (2007)).

of taking depositions was a frequent proceeding in courts of equity in England, those courts routinely issued commissions to depose foreign witnesses abroad, rather than requiring them to come to England. Accordingly, even absent the statutory scheme, the traditional power of equity courts was consistent with the method urged by Toyota and followed by the appellate court: taking the deposition of foreign witnesses in their home country, rather than compelling them to visit the United States to provide testimony.

A year later, the Illinois Supreme Court issued an attorney-client privilege ruling that appeared to track many of the arguments made in the brief filed by the IADC in the case. At the heart of *Center Partners, Ltd. v. Growth Head GP, LLC*,[27] was whether the attorney-client privilege would survive the extrajudicial subject-matter waiver doctrine. In a case of first impression,[28] the Illinois Supreme Court was faced with choosing between two alternative approaches: one that limited subject-matter waiver to judicial disclosures and another that expanded waiver to include disclosures made outside of litigation.[29]

Defendants (Center Partners) were independent real estate companies that owned and operated retail shopping malls throughout the United States.[30] In 2001–2002, Defendants negotiated to jointly purchase a majority interest in Urban Shopping Centers, L.P. ("Urban").[31] The Plaintiffs were minority limited partners in Urban.[32] During the course of the purchase, the Defendants conducted negotiations with each other, sharing financial and legal documents concerning the transaction.[33] The attorneys for each of the Defendants also shared with each other their legal concerns and legal conclusions about the structure of the partnership agreement and how it would operate.[34]

The Plaintiffs first brought suit in 2004, alleging that Defendants had breached fiduciary and contractual duties to Urban and the Plaintiffs as limited partners.[35] Plaintiffs filed motions to compel production of documents and information associated with the transaction, arguing that any attorney-client privilege had been waived.[36] The Plaintiffs' third motion to compel became the motion at issue upon appeal. This motion sought over 1,500 documents identified in the Defendants' privilege logs.[37] Plaintiffs argued that Defendants could not both disclose some legal advice with each other outside of any confidential relationship and then object during litigation that the advice was privileged.[38] Defendants argued in response that disclosure of privileged attorney-client communications in a business negotiation does not result in a "subject matter waiver" of all other

[27] 981 N.E.2d 345 (Ill. 2012).

[28] *Id.* at 359.

[29] *See generally* Mary-Christine Sungaila and Andrew Kopon, *The Perils of Oversharing: Can the Attorney-Client Privilege be Broadly Waived by Partially Disclosing Attorney Communications During Negotiations?*, 79 Def. Couns. J. 265 (2012).

[30] *Ctr. Partners*, 981 N.E.2d at 349.

[31] *Id.*

[32] *Id.*

[33] *Id. at* 350.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 350–351.

[37] *Id.* at 351.

[38] *Id.* at 353.

undisclosed communications a party has with its attorney.[39] After conducting an in camera review of some of the documents, the trial court granted the motion to compel.[40]

The intermediate appellate court affirmed the trial court's ruling on the motion to compel, finding that there was "no reason to distinguish between a waiver occurring during the course of litigation or during a business negotiation."[41] The court held that when, in 2001 and 2002, defendants "disclosed privileged attorney-client communications among one another regarding the purchase [of the shopping centers]. . . those disclosures resulted in a subject-matter waiver of all privileged communications regarding the purchase."[42]

Defendants then sought review from the Illinois Supreme Court, arguing that the "subject matter waiver doctrine should not apply to compel production of undisclosed, privileged communications where the disclosed communications were extrajudicial in nature and were not used to gain an advantage in litigation."[43] The court granted leave to appeal.[44] It then allowed the IADC and Illinois Association of Defense Counsel to file a joint amici curiae brief. The Illinois State Bar Association and Association of Corporate Counsel also filed amicus briefs.

The IADC brief sought a Supreme Court holding that extrajudicial disclosure of attorney-client communications does not waive the privilege as to the undisclosed communications.[45] The brief emphasized the importance of the doctrine and reviewed how courts have historically found the privilege to be waived, noting that Illinois in particular "has carefully preserved the privilege by circumscribing the scope and circumstances under which it may be waived."[46]

The brief also explained the logical underpinnings of the subject-matter waiver doctrine, and why the doctrine should be limited to judicial disclosures: the doctrine is meant to prevent a litigant from using the doctrine as both a "sword" and a "shield" in litigation.[47] Thus, extension of the subject-matter waiver doctrine to disclosures prior to any litigation ignores the distinctions between the litigation process and other circumstances under which a client may seek legal advice,[48] such as a collaborative business deal, in which parties are expected to share certain information.[49] If disclosing any attorney-client communications during negotiations could waive all such communications in later litigation, this could stifle negotiations and prevent deals from being reached. The brief surveyed approaches taken by courts in other jurisdictions and concluded that a distinction between judicial and extrajudicial disclosures was consistent with the weight of precedent.[50]

[39] *Id.*

[40] *Id.* at 353–354.

[41] *Id.* at 354.

[42] *Id.* (quoting Ctr. Partners, Ltd. v. Growth Head GP, LLC, 957 N.E.2d 496, 502 (Ill. App. Ct. 2011)).

[43] *Ctr. Partners*, 981 N.E.2d at 349.

[44] Ill. S. Ct. R. 315 (eff. Feb. 26, 2010).

[45] Brief of the International Association of Defense Counsel and Illinois Association of Defense Counsel as Amici Curiae in Support of the Defendants/Appellants ("Brief of the IADC"), 2012 WL8264363 at *4-5 (Ill. 2011).

[46] *Id.* at *6.

[47] *Id.* at *9.

[48] *Id.* at *10.

[49] *Id.* at *11.

[50] *Id.* at *13–18.

The brief then discussed relevant policy considerations – including whether expansion of the subject-matter waiver doctrine might threaten to swallow the attorney-client privilege and impede matters in a variety of settings, including settlement negotiations, business and other negotiations, grand jury investigations, public/media disclosures, patent disputes, and compliance with SEC filing requirements. Each of these settings involves circumstances in which clients may be called upon to make "limited or partial disclosures of privileged information for purposes other than to gain a tactical advantage in litigation."[51] At the very least, the IADC brief argued, if the court were to find that the subject matter waiver doctrine applied, the court should place clear limits on the scope of that waiver and identify a test that would safeguard the bounds of the attorney-client privilege.

In a unanimous opinion, the Illinois Supreme Court agreed. The organization of the opinion, as well as its coverage of policy considerations and the development of the law, tracked arguments made only in the IADC brief. The Illinois Supreme Court addressed the history, scope, and purpose of the attorney-client privilege.[52] The Court then explained that under the subject-matter waiver doctrine, once a client offers testimony as to a specific communication to the attorney, it acts as a waiver as to all other communications to the attorney on the same matter.[53] Once a client offers testimony as to part of any communication to the attorney, the whole of that communication is waived, "on the analogy of the principle of completeness."[54] The purpose behind the doctrine of subject matter waiver is to prevent partial or selective disclosure of favorable material while sequestering the unfavorable.[55]

Recognizing that this was a case of first impression in Illinois, the Supreme Court reviewed two federal cases[56] that limited subject-matter waiver strictly to judicial disclosures. Notably, these were the same two cases the IADC brief analyzed in depth to support its conclusion that other jurisdictions recognized a distinction between judicial and extrajudicial disclosures. The Court rejected the plaintiffs' contention that the subject-matter waiver doctrine should apply only to extrajudicial disclosures.[57] The Court found the "line of cases declining to extend subject matter waiver to extrajudicial disclosures more persuasive."[58] The Court held that "subject matter waiver does not apply to the extrajudicial disclosure of attorney-client communications not thereafter used by the client to gain an adversarial advantage in litigation."[59]

[51] *Id.* at 18.

[52] *Ctr. Partners*, 981 N.E.2d at 355–356.

[53] *Id.* at 356–357.

[54] *Id.* at 357 (quoting 8 John Henry Wigmore, Evidence § 2327, at 638 (McNaughton rev. ed. 1961)).

[55] *Ctr. Partners*, 981 N.E.2d at 357 (quoting Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, 1995 WL 360590 (N.D. Ill. June 14, 1995)).

[56] *In re* von Bulow, 828 F.2d 94 (2d Cir. 1987); *In re* Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16 (1st Cir. 2003).

[57] *Ctr. Partners*, 981 N.E.2d at 361–362.

[58] *Id.* at 362.

[59] *Id.*

III. Case Study: U.S. Supreme Court

The IADC has been an increasingly robust participant in U.S. Supreme Court cases as well, particularly in the areas of class certification and arbitration. For example, the IADC participated in one of the most closely watched cases of the 2010 term, *Wal-Mart v. Dukes*,[60] in which the U.S. Supreme Court rejected a nationwide Title VII class action filed by more than 1.5 million current and former female Wal-Mart employees. The IADC brief explained why, given the level of organizational and cultural change plaintiffs claimed was needed, a class action was unlikely to provide the kind of sustained structural change plaintiffs were seeking.

The decision in Wal-Mart was a landmark. In a 5-4 majority ruling, the Court held that plaintiffs failed to provide proof of a common company-wide policy of discrimination necessary to certify a class under Rule 23(a)(2). Justice Scalia, writing for the majority, concluded that the necessary "glue holding the alleged reasons" for all of the individual employment decisions at issue together was missing.[61] A separate unanimous ruling by the Court held that the plaintiffs' claims for back pay were also improperly certified.

Although decided in the context of a Title VII claim, the *Wal-Mart* holding applies with equal force to other types of class actions. It also provides important guidelines for companies defending against class actions, as well as bases for decertifying federal class actions that might run afoul of the standards set by the case.

Betty Dukes started her career at Wal-Mart as a cashier and was later promoted to a customer service manager. When she was subsequently demoted, Dukes contended the demotion was the result of gender discrimination. She filed suit on behalf of a purported class of female employees against Wal-Mart in the U.S. District Court in San Francisco in June 2001, claiming a pattern and practice of discrimination in pay and promotion of female workers. The proposed class, which encompassed a projected 1.6 million current and former Wal-Mart employees, sought, among other things, declaratory relief, injunctive relief, and monetary relief in the form of back pay.

The district court certified the class and a three-judge panel of the Ninth Circuit affirmed. In turn, a divided Ninth Circuit, sitting en banc, affirmed the district court's certification of this nationwide class of female workers. As Judge Kozinski, dissenting from the en banc determination, pointed out, the class posed a number of concerns about class representation and commonality of issues. The class included members who "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment."[62] The U.S. Supreme Court agreed with Judge Kozinski's assessment, in the process clarifying the commonality standards under FRCP 23(a) and the

[60] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[61] *Id.* at 2552.

[62] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010).

standards for certifying classes under FRCP 23(b)(2), the injunctive and declaratory relief provision.

In determining that the necessary commonality requirements for FRCP 23(a) had not been met, the majority also made clear that, in determining commonality, courts will necessarily have to engage in some analysis of the merits of the claims. Here, proof of commonality necessarily overlapped with the plaintiffs' contention that Wal-Mart engaged in a pattern or practice of discrimination: "[w]ithout some glue holding the alleged reasons" for "literally millions of employment decisions together," Justice Scalia wrote, "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[63]

Certainly, Wal-Mart is the nation's largest employer, which made the class in this case particularly unwieldy. Even more detrimental to the class was the lack of evidence tying the allegedly discriminatory hiring practices together at a company-wide level, as required in a pattern and practice discrimination case like the one the plaintiffs had filed.

Moreover, because plaintiffs were proceeding under a "policy of discrimination" theory, they were required to present "significant proof" of the policy's existence. Plaintiffs presented three methods of proving there was a pattern or practice of discrimination. First, plaintiffs presented experts to show that regionally Wal-Mart's pay and promotion decisions disproportionately favored men and that Wal-Mart promoted fewer women as compared with its competitors. The experts said the only explanation was bias. But the regional pay disparities were at most attributable to a small set of Wal-Mart stores and therefore could not establish the existence of a general policy that affected the entire company.

Second, plaintiffs offered anecdotal evidence in the form of 120 affidavits of class members who detailed their experiences of discrimination. The affiants represented one for every 12,500 class members and worked in 235 of Wal-Mart's 3,400 stores. Operations in 14 of the fifty states were not represented at all in the affidavits. The majority found that this evidence could not demonstrate that the entire company operated under a general policy of discrimination. "A few anecdotes selected from literally millions of employment decisions prove nothing at all," the majority concluded.[64]

Third, the plaintiffs presented a sociological expert who opined that Wal-Mart's culture was vulnerable to bias using a "social framework analysis," but the majority dispensed with this evidence regardless of its reliability or admissibility under *Daubert*. The sociologist could not determine with any specificity how often bias played into pay or promotion decisions. Specifically, he could not opine whether bias played a role in one-half percent or 95 percent of the pay or promotion decisions implicated in the lawsuit. Since the expert "admittedly ha[d] no answer to that question," the majority felt they could "safely disregard what he ha[d] to say" because it was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[65]

A unanimous Court held that claims for *individualized* damages—such as the

[63] *Dukes*, 131 S.Ct at 2552.

[64] *Id.* at 2556 n.9.

[65] *Id.* at 2545.

back pay claims sought—could not be certified as part of a (b)(2) class. Rather, claims for individualized monetary relief may only be certified as a (b)(3) class, which includes due process safeguards not available in a (b)(2) class. These safeguards included notice, an opt-out procedure and the additional requirements of predominance and superiority.

The Court also rejected the "Trial by Formula" method endorsed by the Ninth Circuit, citing due process concerns. Under the Rules Enabling Act, the full Court observed, the Federal Rules of Civil Procedure can neither expand, nor restrict, substantive rights. The Court noted that Wal-Mart must be allowed to present its defenses to individual class member claims and the proposed statistical sampling would deprive it the right to due process.

While the Court did not cite to the IADC's amicus brief in its opinion, court observers took note of the brief. The National Law Journal showcased the IADC brief (one among several amicus briefs filed in the case) and defendants in subsequent high-profile class action cases have contacted the IADC about amicus participation in their cases based on the strength of the IADC's *Wal-Mart* brief.

IV. Conclusion

The IADC Amicus Program continues to grow and gain influence. In so doing, it plays an important role in the practices of IADC members and our clients and, much like the Trial Academy, may soon be perceived as another "jewel in the crown" of the IADC.

Appendix: IADC Amicus Curiae Briefs

Case	Court	Brief Issue	Win/Loss	Stage of Decision
Sears, Roebuck & Co. v. Butler; *Whirlpool Corp. v. Glazer*, Nos. 13-430 and 130-431	US Supreme Court	Supporting the first issue in the petitions: Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported "efficiency" of a class trial on one abstract issue, without consideration of the host of individual issues that would need to be tried in order to resolve liability and damages, and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.	Petitions pending	Cert Stage
Novo Nordisk A/S v. Werner No. 13-214.	US Supreme Court	Whether a U.S. court can exercise personal jurisdiction over a foreign corporation based solely on product sales in the forum state by the foreign corporation's indirect U.S. subsidiary.	Certiorari denied.	Cert Stage
Liu v. Superior Court, 2013 Cal. LEXIS 6790 (Cal. Aug. 14, 2013)	CA Supreme Court	Whether expert opinion opposing summary judgment that is found to be inadmissible at trial may be used to defeat summary judgment.	Petition for Review Denied.	Petition Stage
Bostic v. Georgia-Pacific Corp., 2013 Tex. LEXIS 99 (Tex. Feb. 15, 2013).	Texas Supreme Court	Whether a showing of "but for" causation is required in asbestos mesothelioma litigation.	Awaiting Decision.	Merits Stage
Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).	US Supreme Court	Whether the Federal Arbitration Act permits courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.	Win Judgment for Petitioners. Reversed Second Circuit decision 5-3.	Merits Stage
Tincher v. Omega Flex, Inc., 64 A.3d 626 (Pa. 2013).	Pennsylvania Supreme Court	Whether Pennsylvanian courts will adopt the Restatement, Third Torts: Products Liability in design defect cases to replace the strict liability standard of the Second Restatement.	Awaiting Decision.	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
Garrett v. Stryker Howmedica Osteonics Corp., 2013 Cal. LEXIS 4892 (Cal. June 12, 2013).	CA Supreme Court	Whether parties may oppose summary judgment with evidence that would not be admissible at trial.	Petition for Review Denied.	Petition Stage
Hoosier Racing Tire Corp. v. Race Tires Am., Inc., 133 S. Ct. 233 (2012)	US Supreme Court	How to resolve emerging split among the circuits on the scope of recovery of e-discovery costs.	Certiorari Denied.	Cert Stage
Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).	US Supreme Court	Whether certification of class was proper under Federal Rule of Civil Procedure 23(b)(3), because the Third Circuit erred in refusing to decide whether the class's proposed damages model could show damages on a classwide basis.	Win Judgment reversed in 5-4 Decision.	Merits Stage
Std. Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).	US Supreme Court	Whether stipulation by a class-action plaintiff that he and the class that he purports to represent will seek damages that are less than the threshold for jurisdiction under the Class Action Fairness Act of 2005 does not defeat federal jurisdiction under the Act.	Win 9-0 Decision for Petitioner. Judgment vacated and remanded.	Merits Stage
Toyota Motor Corporation and Toyota Motor Sales USA, Inc. v. Certain Economic Loss Plaintiffs. No. 11-57006	US Court of Appeals for the Ninth Circuit	Whether a district court may grant Plaintiffs both Article III and statutory standing to assert various "unfair competition" claims under California law.	Settled	Merits Stage
Center Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107 (Ill. 2012)	Illinois Supreme Court	Whether the subject matter waiver doctrine applies to compel production of undisclosed, privileged communications where the disclosed communications were extrajudicial in nature and were not used to gain an advantage in litigation.	Win Judgments reversed. Cause remanded.	Merits Stage
Centocor, Inc. v. Hamilton, 372 S.W.3d 140 (Tex. 2012).	Texas Supreme Court	Whether a direct-to-consumer advertising exception applies to the learned intermediary doctrine in Texas.	Win Reversed Court of Appeal's judgment (in part).	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012).	US Supreme Court	Whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.	Granted, but later Dismissed as Improvidently Granted	Merits Stage* (But Dismissed)
Pippins v. KPMG LLP, 279 F.R.D. 245 (S.D.N.Y. 2012)	US District Court – Second District of NY	Whether order to preserve thousands of hard-drives in purported class action was in error.	Motion Denied.	Merits Stage
Toyota Motor Corp. v. Superior Court, 197 Cal. App. 4th 1107 (Cal. App. 2d Dist. 2011).	CA Court of Appeals, Second District	Whether the court can order a corporation to bring out-of-state employees to California for deposition	Win Petition granted and remanded with directions.	Merits Stage
Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).	US Supreme Court	(1) Whether class certification was consistent with the requirements of Federal Rule of Civil Procedure rule 23(a); (2) Whether claims for monetary relief, as opposed to injunctive relief, can be certified at all under Federal Rule of Civil Procedure rule 23(b)(2).	Win Judgment for Petitioner. Reversed Ninth Circuit 5-4.	Merits Stage
British Am. Tobacco (Invs.) Ltd. v. United States, 2010 U.S. LEXIS 5450 (2010).	US Supreme Court	Whether the presumption against extraterritoriality applies when foreign conduct has domestic effects.	Petition for Certiorari Denied	Cert Stage
Saller v. Crown Cork & Seal Co., Inc., 187 Cal. App. 4th 1220, (Cal. App. 2d Dist. 2010).	CA Supreme Court	When the "consumer expectations" test should be applied in a design defect case.	Petition for Review Denied	Cert Stage
Shell Oil Co. v. Hebble, 131 S. Ct. 822 (2010).	US Supreme Court	Whether a $53 million punitive damage award in light of a $750,000 breach of contract award is unconstitutional.	Petition for Certiorari Denied	Cert Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
Shell Oil Company v. United States of America Consolidated with: *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 129 S. Ct. 1870 (2009).	US Supreme Court	Whether Petitioner is an "arranger" under an expanded liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).	Win (Cert Granted) Win(Merits) Judgment for Petitioners. 8-1 on Merits	Cert Stage and Merits Stage
Jamison v. Morris, 385 S.C. 215, (S.C. 2009).	South Carolina Supreme Court	Whether a franchisor-franchisee relationship alone creates agency liability.	Win Directed Verdict in favor of Appellant, Texaco.	Merits Stage
Kedy v. A.W. Chesterton Co., 946 A.2d 1171 (R.I. 2008).	Rhode Island Supreme Court	Whether *forum non conveniens* is recognized in Rhode Island.	Win Formally recognized *forum non conveniens*; Ordered Superior Court to dismiss case	Merits Stage
Bullock (Jodie) v. Philip Morris USA, Inc./(Piuze), 2008 Cal. LEXIS 4848 (Cal. Apr. 30, 2008).	California Supreme Court	Whether a substantial punitive damages award can be justified based on the wealth of the defendant.	Petition for Review Denied.	Petition Stage
Jennings v. Baxter Healthcare Corp., 331 Ore. 285 (Or. 2008)	Oregon Supreme Court	Whether allowing opinion testimony of plaintiff's expert witness on the issue of causation was reversible error.	Loss Affirmed Court of Appeal's Judgment.	Merits Stage
Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, (Ohio 2007).	Ohio Supreme Court	Whether two recent tort reform statutes enacted by the General Assembly violate the constitutional rights of plaintiffs in personal injury lawsuits.	Win Statutes Upheld as Constitutional	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
Brown v. Crown Equip. Corp., 2008 ME 186 (Me. 2008).	Certified Question from First Circuit of Appeals to Maine Supreme Court	Whether there is a post-sale duty to warn customers regarding a product that was not defective when made, and whether such a duty extends to remote purchasers.	Loss Entry of Certified Question Against Petitioner Crown	Merits Stage
Starrh & Starrh Cotton Growers v. Aera Energy LLC, 2007 Cal. LEXIS 12027 (Cal. Oct. 24, 2007).	CA Supreme Court	Whether a nuisance or trespass may be found to be continuing for the purpose of applying the statute of limitations, but permanent for purposes of calculating damages.	Petition for Review Denied	Petition for Review Stage

(http://ads.insidecounsel.com/RealMedia/ads/click_lx.ads/www.insidecounsel.com/wipl/751147025/Position3/default/empty.gif/4e34686b524663507a33634143753045?x)

The ins and outs of amicus briefing: Fitting the puzzle of amicus briefs together in a case

Amicus briefs can fill in important aspects of the story on a case and help obtain discretionary review as well as a victory on the merits

BY MARY-CHRISTINE (M.C.) SUNGAILA (/AUTHOR/MARY-CHRISTINE-MC-SUNGAILA)
MARCH 5, 2015

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In this series, we have examined the increasing influence of amicus briefs and what makes an attractive amicus brief request to organizations who file such briefs regularly. In this final piece of the series, we will examine how to align the various amicus briefs in a case to tell the most effective story.

At the petition or discretionary review stage: In order to convince a Supreme Court to grant review in a case, the most important factor amici-wise is to alert the court that groups well beyond the parties have an interest in the case and urgently need clarity and guidance on the law in that area. This may mean it is helpful for amici to further explore a circuit split on an issue and describe the real world impact of that continuing split. It may also mean, in a case where there is an issue of industry-wide importance but not yet a split of authority on the issue within a jurisdiction, having industry weigh in to explain the importance of and urgent need for clarity on the issue.

One example, from my own practice: Taylor Patterson claimed that Domino's, as the franchisor of thousands of pizza stores across the nation, should be held responsible for sexual harassment she experienced from a fellow employee over a two-week period when she worked at a Thousand Oaks Domino's store owned and run by franchisee Sui Juris. The trial court granted summary judgment in favor of Domino's Pizza LLC, Domino's Pizza Franchising and Domino's Pizza, Inc. (collectively, Domino's), on the grounds that Domino's did not have the power to control day-to-day operations at Sui Juris; rather, Sui Juris, as the franchisee, had the power to hire, fire and train employees, and therefore Domino's could not be vicariously liable for the alleged harassment. The court of appeal reversed.

Domino's sought review from the California Supreme Court, asking the court to determine whether a franchisor can be held vicariously liable for the acts of a franchisee's employee where the franchisor did not exercise control over the day-to-day details concerning the type of conduct giving rise to the plaintiff's claims. The California Supreme Court had never decided a franchise case before, and there was no active, ongoing split between California appellate courts concerning the standard — only the Patterson case and an older court of appeal case that appeared to take different approaches to the issue. However, the issue of franchisor vicarious liability was being decided in other courts across the nation, which weighed in favor of the California Supreme Court providing guidance as well. Amicus letters from the International Franchise Association, National Council of Chain Restaurants, and individual companies such as Jack in the Box, however, were able to demonstrate the industry's keen interest in having the court decide the issue now, rather than waiting for it to percolate through the intermediate appellate courts.

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Supreme Court takes on Sarbanes-Oxley Act in Yates v. United States (http://www.insidecounsel.com/2015/03/04/supreme-court-takes-on-sarbanes-oxley-act-in-yates?t=decisions-settlements)

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On the merits: The need to avoid overlap and repetition is as important among amicus merits briefs as it is between amicus briefs and the party brief it is supporting. It is not helpful to have three amicus briefs that say exactly or nearly the same thing, even if it may be helpful to have the three organizations filing the briefs appear in the case.

There are two ways to prevent repetition among amicus briefs. First, counsel for the party may suggest areas for amicus support to potential amici at the outset, either individually or collectively, then keep track of which amicus plans to argue which points. If there appears to be potential for repetition, party counsel can alert other amici to that before the briefs have been drafted and encourage communication between the two overlapping amici. Second, if there is no way to avoid overlap, amici can consider joining forces on a brief.

Party counsel may have an idea of the different voices and concepts she would like to have presented by amici at the outset. This may mean that she will reach out to a constellation of amici and solicit support expressly to buttress particular policy points that could be better made by a group beyond the parties.

In the *Patterson v. Domino's* case, the International Franchise Association (IFA) (whose members include both franchisors and franchisees) and individual franchisees filed amicus briefs explaining how a rule of expanded liability would lead to unwelcome changes in the franchise relationship, and reduce franchisor advice and support for franchisees, which was an important part of the bargain for franchisees.

Ultimately, the Supreme Court, in a 4 to 3 opinion, agreed that summary judgment was properly granted in favor of Domino's, and clarified the scope and application of the "means and manner of control" test for franchisor vicarious liability.

The Court flatly rejected the contention that the existence of a comprehensive franchise operating system alone establishes the kind of relationship that can give rise to franchisor vicarious liability for the conduct of a franchisee's employee, concluding that "a contrary approach would turn business format franchising on its head." The amicus briefs from the IFA and franchisees lent important support to that reasoning.

Amicus briefs, carefully crafted and designed to intertwine but not overlap with either the party's brief or other amici, can fill in important aspects of the story on a case and help obtain discretionary review as well as a victory on the merits.

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The ins and outs of amicus briefing: What do organizations look for in deciding to lend amicus support?

Five tips for obtaining amicus support, gleaned from interviews with some of the most respected amicus-filing organizations nationwide

BY MARY-CHRISTINE (M.C.) SUNGAILA (/AUTHOR/MARY-CHRISTINE-MC-SUNGAILA)
FEBRUARY 5, 2015

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Amicus support is increasingly critical to success (http://www.insidecounsel.com/2015/01/05/the-ins-and-outs-of-amicus-briefing-the-increasing) on appeal, particularly at the discretionary review or petition stage. But in an era of shrinking budgets and multiple amicus solicitations, how can you make your case stand out from the pack? Here are five tips for obtaining amicus support, gleaned from interviews with some of the most respected amicus-filing organizations nationwide, including the Washington Legal Foundation, Atlantic Legal Foundation, U.S. Chamber of Commerce, National Association of Manufacturers, Product Liability Advisory Council, International Association of Defense Counsel and the American Bar Association.

1. Research the organization and its amicus procedures

This seems obvious, but those of us on amicus selection committees receive many inquiries about cases that are not within our bailiwick or are submitted without regard to our procedures or our "mandate." In the best practices category: search online databases to determine what kinds of cases the group you are soliciting has filed in before (if you have a class action case and the group has filed in cases involving similar cases before, be sure to allude to those in your pitch), and check the organization's web site for the relevant forms to submit.

Some organizations, such as the ABA, require that an amicus request be made to the organization-wide Standing Committee on Amicus Curiae Briefs by a section or division of the ABA (not an individual), and that the ABA file a brief only in matters that implicate an existing ABA policy. Others, such as the Product Liability Advisory Council, have thorough, detailed case solicitation forms to complete (which many other amicus organizations thereafter ask to see). Some will file more readily at the petition stage, or in state court; others rarely file at the petition stage, and largely only in the U.S. Supreme Court. Some organizations welcome joining with other amici on a brief; others prefer to file in their name alone. Some have priority issue areas in which they tend to focus their amicus efforts; others are more broadly supportive of issues facing corporate defendants. Some have a mixed membership (of insureds and insurers, for example) and would therefore tend not to wade into cases in which their members might take different positions. Do your homework before approaching an organization, but if you have any doubt about whether a case falls within an organization's mandate, err on the side of inviting the group to participate.

2. Respect the organization's time

Do not call the chair of the amicus committee to "chat" about the interesting issues in your case; if you are calling the chair of a bar association committee, he or she has a busy law practice and is likely fielding three or four other amicus requests in other cases at the same time. A more welcome approach would be a two or three page memo describing the importance of the case, the pertinent deadlines, the issues raised, the arguments of both sides as to those issues and how amicus can add to the discussion, together with a copy of the underlying opinion and petition sought to be supported. Do not submit an amicus request at the last minute; the preferred timing is generally no later than three weeks, but preferably a month or more, before the amicus brief is due.

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M&A volume is expected to be high in 2015 (http://www.insidecounsel.com/2015/01/26/ma-volume-is-expected-to-be-high-in-2015?t=commercial-financial)

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3. Explain the broader implications of your case

This case may be institutionally important to your company or involve a multimillion dollar judgment, but neither of these will compel an organization to lend amicus support. With limited budgets, and the ability to file in perhaps 10 to 20 cases a year, organizations are generally looking for impact beyond the case at hand. They, like the appellate courts themselves, are interested in the policy implications of a decision. If you can explain how the issues in your case reverberate well beyond the case at hand, you have a better chance of capturing an organization's attention.

4. Keep each organization in the loop about other organizations' potential interest

Amicus-filing organizations have their own network; we often will confer with sister organizations about their decision to file in a case. We do this both to get confirmation of whether there may be a vehicle problem in a case and to determine whether we might be able to pool resources and join together on a brief. The savvier appellate litigators know this and keep each organization in the loop about other potential amici.

5. Do not offer to offset the cost of the brief

All this talk of tight budgets might cause you to consider offering to pay for the preparation of an amicus brief, or to have your counsel draft part of it. Resist that temptation. Many courts, including the U.S. Supreme Court, require amicus counsel to assert in the brief that the brief was neither prepared by nor paid for by anyone other than the named amicus and their counsel. Experienced appellate counsel in other jurisdictions generally use the U.S. Supreme Court rules as a guide for filing amicus briefs, even if those jurisdictions do not have any such an express disclosure requirement. Having a party pay for or ghostwrite the brief compromises its independence, as well as its influence with the appellate court, and should be avoided for those reasons alone, notwithstanding ethics concerns and court rules. Amicus organizations can be more generally supported in other ways, however.

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The ins and outs of amicus briefing: The increasing influence of amicus briefs

What makes an amicus brief more effective? The chair of the International Association of Defense Counsel's Amicus Curiae Committee examines

BY MARY-CHRISTINE (M.C.) SUNGAILA (/AUTHOR/MARY-CHRISTINE-MC-SUNGAILA)
JANUARY 5, 2015

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Once rare, amicus curiae or "friend of the court" briefs are now filed in the majority of appellate cases heard by the U.S. Supreme Court and many state supreme courts.

In the U.S. Supreme Court, amicus briefs were filed in 35 percent of the Court's cases in the 1965–66 term; by 1995, one or more amicus briefs were filed in nearly ninety percent of the court's cases. An analysis of the 1999 to 2008 terms showed that in 90 cases the average filing rate for amicus briefs was 92.4 percent, for a total of 344 to 627 amicus briefs filed each term. Meanwhile, in the states' highest courts, the number of amicus briefs tripled in the 1980s. The frequency of amicus participation was highest, according to one study, before the Florida, Massachusetts, North Carolina and Washington high courts; two previous studies revealed the top five states for amicus participation to be California, Michigan, New Jersey, New York and Ohio.

The courts' citation of amicus briefs in their opinions has also increased. One study reveals that of all U.S. Supreme Court opinions published between 1986 and 1995, approximately 15 percent cited at least one amicus brief by name, and 37 percent referred to at least one amicus brief without citing or naming it. A recent example of amicus briefs' increasing influence is *Dart Cherokee Basin Operating Co. v. Owens*, in which the Court considered and rejected a jurisdictional question raised only by Public Citizen as amicus, and then embraced an argument against presumptions of removal in the Class Action Fairness Act context urged by amici Washington Legal Foundation, International Association of Defense Counsel, and the Federation of Defense and Corporate Counsel.

The rise in the number of amicus briefs, and their importance to the highest courts' consideration of a case on the merits (as well as to the decision to grant discretionary review in the first place), heightens the importance of parties obtaining solid amicus support for their petition and merits briefing, as well as in-house counsel understanding how to most effectively approach outside groups about providing support in their cases. What makes an amicus brief more effective? And what do advocacy groups — with increasing requests for support and limited budgets — look for in a proposal for amicus support? We will tackle the first question now and the second in a forthcoming piece in this series.

First, make sure an amicus brief adds something to the case. It should not repeat arguments made by the parties (a so-called "me too" brief). More briefs are not necessarily better either. If the briefs add little to the parties' or other amici's arguments, and just add more pages of reading material for the judges and their clerks without offering additional assistance, they will not be well-received.

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Second, distinguish between amicus briefing at the petition stage and the merits stage. Amicus support at the petition stage is most helpful in demonstrating the widespread importance of the issue and need for immediate guidance from the court. The best amicus group to deliver this message depends on the case. In a case in the franchise context, for example, briefs from the International Franchise Association and individual franchisors may be most useful in highlighting the importance of the issue to the industry and the lower court decision's

widespread impact on franchisor-franchisee relationships. In a case involving an aspect of appellate procedure, however, the American

widespread impact on franchisor-franchisee relationships. In a case involving an aspect of appellate procedure, however, the American Academy of Appellate Lawyers may be more appropriate. At the petition stage, three to five supporting letters or briefs from a range of interested groups is generally sufficient to demonstrate the need for review without overwhelming the court.

At the merits stage, an amicus can fill one of three important roles: amplifying or supplementing the legal and factual arguments of the parties, or presenting an alternative argument not raised by any party; pointing out unintended consequences of a decision or rule on people or groups not party to the case; and communicating the importance of the case by their very presence. Amicus briefs often cite additional legal citations, policy considerations and social science data that courts find helpful. Amicus briefs, judges and court staff agree, should also be short (generally, 20 pages or less). It is important not to overstay one's welcome as an amicus.

Consider, too, the possibility of "strange bedfellows," or groups that ordinarily do not agree or ordinarily might be on opposite sides of an issue, joining together in a brief. If, in an environmental case, an environmental group and a real estate development association jointly argue for the same legal approach in a case, that would be notable.

Pay attention to the experience of both the amicus party and amicus counsel. Both the appellate experience and reputation with the court of the counsel filing the brief and the prestige and reputation of the amicus participants may be vital to success. An amicus party known for submitting high quality, thoughtful and helpful briefs, prepared by appellate counsel with a similar reputation, can catch a law clerk's attention. Once the brief has the clerk's attention, it should of course satisfy the first rule of amicus briefs and add something to the case.

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Strategies for Appellate Litigation

Leading Lawyers Examine the Unique Differences between Appellate and Trial Practice

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Representing *Amici Curiae*

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Introduction

Preparation and submission of *amicus curiae* briefs is an important part of appellate litigation practice. This is especially true for us appellate lawyers in the nation's capital, where a plethora of trade associations and other organizations want to be heard on significant legal issues affecting their industries and members. *Amicus* briefs that support certiorari petitions, as well as those that address the merits of an appeal after the Supreme Court has granted review, are commonplace and often considered essential. Most federal courts of appeals and state appellate courts also welcome the well-presented views of *amici curiae*.

Let me clear up one point at the outset: In most cases, an *amicus curiae* does not purport to be some sort of neutral advisor to a panel of appellate judges. While "friend of a party" (*amicus litigatoris*) might be a more apt description than "friend of the court," those terms are not mutually exclusive. A concise, well-written, non-repetitive *amicus* brief not only can bolster a litigant's case, but also deepen an appellate court's understanding of legal issues and their significance.

This chapter offers some practical insights on the drafting and use of *amicus curiae* briefs. It is not intended to be a treatise on the subject, but for lawyers who spend most of their time in trial courts, or who want to develop a full-service appellate practice, the following guidance should be helpful.

Why File an *Amicus* Brief?

The typical reasons why private party *amicus* briefs are filed include the following:

- A trade association, business or professional organization, or public interest group wants to convey directly to an appellate court its perspective and views on legal issues that are important to its members. This frequently involves educating the court about the impact or ramifications of an issue on the *amicus curiae*, its members, and/or a broader segment of industry or the public. When an *amicus* brief is filed for this purpose, it often is submitted

on behalf of several *amici curiae* that have common or related interests in the questions presented. This not only signals the broad significance of the issue, but also increases the chances that the brief will be considered by the appellate court.

- A party's appellate brief needs bolstering. There may be one or more legal or policy arguments that a party's brief does not address, or *amici curiae* believe that a party's brief does not adequately present or respond to, certain legal arguments. *Amicus* briefs are not supposed to duplicate legal arguments contained in the supported party's brief. Appellate courts generally appreciate, however, an *amicus* brief that presents, in a significantly better way, legal arguments that are not well articulated in the supported party's brief.
- An *amicus curiae* wants to urge the Supreme Court to grant certiorari or a federal court of appeals to grant rehearing en banc.
- The outcome of an appeal may directly affect an *amicus curiae*'s position in another pending appeal or trial court proceeding. In this type of situation, the *amicus curiae*—which typically is an individual company—essentially has a direct stake in the issues presented for review and needs to be heard to protect its litigating position, financial interests, or other interests.
- An appellate court invites submission of a private party *amicus* brief. This is fairly unusual, but sometimes happens when the court needs objective expert or technical information that the parties themselves cannot provide. This probably comes closest to what purists would describe as an *amicus curiae* brief.

Government *Amicus* Briefs

When the United States, a federal department or agency, or a state (or local) government or agency has an interest in a private party appeal, it can file an *amicus curiae* brief. The parties' consent is normally not required.[1]

The most prominent example of a governmental *amicus* brief is when the Supreme Court issues an order inviting the Solicitor General to file an

[1] *See* SUP. CT. R. 37.4; FED. R. APP. P. 29(a).

amicus brief expressing the views of the United States on a certiorari petition before the Court decides whether to grant review. Because the Supreme Court follows the solicitor general's certiorari recommendation in a high percentage of cases, it is important for both sides' appellate counsel to meet with the Office of the Solicitor General as soon as possible after a Call for the Views of the Solicitor General (CVSG) is issued.[2]

Federal courts of appeal sometimes invite the United States to participate in private party appeals where important federal interests are implicated, or the United States can do so on its own initiative.[3] Similarly, a state, through its attorney general or solicitor general, can, and often does, participate in private party state court appeals where the state's interests are implicated.

In most cases, the federal or state *amicus curiae* will support one side or the other in an appeal. Sometimes, however, governmental *amicus curiae* will not align itself with either side if the government's interests are distinct.

The Rules

Counsel should take care, of course, to study and comply with all federal and local rules applicable to preparation and submission of *amicus* briefs. There are several potential pitfalls that counsel should note in particular:

Supreme Court (SUP. CT. R. 37)[4]

R. 37.2(a)[5]

An *amicus* brief supporting a petition for writ of certiorari must be filed within thirty days of when the case is placed on the Supreme Court docket or a response is called for by the Court, and this period will not be

[2] *See* Lawrence S. Ebner, *The United States as Amicus Curiae: Making Uncle Sam Your New Best Friend*, CERTWORTHY (Oct. 11, 2011) *available at* http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=7340&id=867.

[3] *See* 28 U.S.C. § 517 (2011) (authorizing the Attorney General to send the Solicitor General or other Department of Justice representative to any federal or state court "to attend to the interests of the United States").

[4] SUP. CT. R. 37.

[5] SUP. CT. R. 37.2(a).

extended. A motion for leave is not required if all parties consent in writing. A minimum of ten days prior to the due date, the *amicus curiae* must provide written notice of intention to file to counsel of record for all parties, unless the *amicus* brief is filed earlier than ten days before the due date. This notice requirement enables the respondent to decide whether to seek an extension of time so that it can review any *amicus* briefs prior to filing its brief in opposition, which also is due thirty days after a case is placed on the docket.

R. 37.3(a)[6]

If certiorari is granted, *amicus* briefs on the merits are due within seven days after the brief for the party supported is filed. There is no advance notice requirement. Again, a motion for leave is not required if the parties provide written consent to the filing of the brief. Counsel of record sometimes will file blanket consents with the Clerk of the Court.

Also, in cases before the Court for oral argument, an electronic version (e.g., pdf version) of an *amicus* brief must be transmitted to the clerk and the parties' counsel of record, as well as being submitted in printed, booklet form.[7]

R. 37.6[8]

The first footnote on the first page of text in every private party *amicus* brief must "indicate 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." The primary purpose of this disclosure rule is to preserve the integrity of *amicus* briefs by deterring a party or its counsel from using *amicus* briefs as page/word extensions. The rule does not prevent a party's counsel and *amicus* counsel from conferring about the content of a prospective *amicus* brief.

[6] SUP. CT. R. 37.3(a).
[7] *See also* SUP. CT. R. 33 (booklet format; word limits, etc.).
[8] SUP. CT. R. 37.6.

Federal Courts of Appeals (FED. R. APP. P. 29 & any corresponding circuit rule)[9]

R. 29(a)[10]

Unless modified by local rule, a motion for leave to file an *amicus* brief is not required if the brief states that all parties have consented to its filing.

R. 29(c)(5)[11]

Private party *amicus* briefs filed in the federal courts of appeal must now contain a disclosure statement similar to the statement required by Sup. Ct. R. 37.6.[12] Again, the purpose is to preserve the credibility of *amicus* briefs by preventing parties' counsel from using *amicus* briefs as their own supplemental briefs.

R. 29(e)[13]

In the courts of appeal, *amicus* briefs are due no later than seven days after the principal brief of the party being supported is filed.

Circuit Rules

Most federal circuits have their own supplemental rules regarding preparation and submission of *amicus* briefs. It is essential that counsel review the local circuit rules, as well as the federal rules.

Some Practical Considerations

Solicitation of Prospective Amici Curiae

Consolidating the views of multiple *amici curiae* into a single brief is often beneficial and sometimes necessary since most trade associations and other nonprofit organizations have limited budgets for judicial advocacy. Prospective *amici curiae* can be solicited by a party—either directly or

[9] FED. R. APP. P. 29.
[10] FED. R. APP. P. 29(a).
[11] FED. R. APP. P. 29(c)(5).
[12] SUP. CT. R. 37.6.
[13] FED. R. APP. P. 29(e).

through counsel—seeking *amicus* support, or by an *amicus* or counsel desiring to organize an *amici* brief.

The best way to proceed is for one organization to take the lead on the brief and to solicit others to join. This is frequently accomplished by circulating an *amicus* solicitation memo, which *amicus* counsel, and sometime a party's counsel, prepares to provide information about the case, the issues, the need for *amicus* support, the schedule, and the estimated legal fees and costs. A meeting or conference call among *amici* (or prospective *amici*) should follow. Cost-sharing arrangements are common, although some organizations will agree to lend their names to a brief only if they can get a free ride or make only a minimal financial contribution. Ground rules need to be set early, especially regarding matters such as the order in which *amici* will be listed on the brief, any information required to be provided by *amici*, which attorney will take the lead in drafting the brief, and the schedule for reviewing and providing comments on drafts.

Obtaining Consent

This is usually, but not always, a non-issue. Withholding consent to submission of *amicus* briefs is strongly disfavored by most appellate courts.[14] Some trial counsel, especially those who have not had much exposure to appellate practice, will withhold consent, or even proactively object, simply because they do not like the idea that the opposing party will be receiving *amicus* support. Few appellate courts will deny permission to file a timely *amicus* brief simply because the opposing party objects. Other counsel will try to make their consent contingent upon an opportunity to review the proposed *amicus* brief in advance. Such a request is entirely inappropriate and should be flatly rejected.

Coordination with the Supported Party's Counsel

At a minimum, counsel for *amicus curiae* should provide the supported party's counsel a reasonable opportunity to comment on a final draft of the brief before it is submitted. This is more than a courtesy; it is important from the viewpoint of ensuring consistency of position, and also because the party's counsel will be much more familiar with the issues and facts and

[14] *See* SUP. CT. R. 37.2(b).

may be able to make helpful suggestions. There are limits, however, to the type of input that the supported party's counsel should provide. Any sort of major editing or revision by the party's counsel—albeit merely in the form of a "suggestion"—would be inappropriate, and if extensive, could trigger disclosure requirements.

Of course, coordinating in advance with the supported party's counsel is desirable. It not only is appropriate, but usually helpful, for *amicus* counsel to contact the supported party's counsel to solicit ideas on what issues or points to address, and/or types of information to provide, in the *amicus* brief. In appeals where more than one *amicus* brief will be filed, it is common for the supported party's counsel to organize an *amicus* meeting to ensure that all counsel have a common understanding of the case background and posture, and also to identify issues or subjects that might be covered in the *amicus* briefs. *Amici* may want to decide how to allocate subjects among their briefs.

Structure, Approach, and Style

Although *amicus* briefs must adhere to appellate courts' rules regarding corporate and authorship/sponsorship disclosures, length, and typography, *amicus* counsel have considerable flexibility in deciding how to structure their brief.[15] Many *amicus* briefs include only a statement of interest, argument, and conclusion.

One component that normally does not appear in private party *amicus* briefs is a separate statement of the issues or questions presented. There is no reason to replicate the statement contained in the supported party's brief and any deviation from the way that the supported party has framed the issues creates the risk of inconsistency. Merely trying to reword or improve the supported party's statement of issues, or attempting to spin the issues in a way more favorable to the *amici curiae*, is normally insufficient justification for including a separate issues statement in an *amicus* brief. The exception, however, would be if the supported party's brief truly does not articulate the issues concisely, clearly, or accurately.

[15] *See* FED. R. APP. P. 29(c).

Statement of Interest

Every *amicus* brief must include a statement explaining the interest of the *amicus* or *amici curiae*. This is a vital part of the *amicus* brief and should not be approached in a perfunctory manner. For example, if the brief is being submitted on behalf of trade associations, it should not merely recite the general descriptions of the associations contained on their websites.
While a general description of each *amicus curiae* should be included, it should be short—as a rule of thumb, no more than a few sentences for each *amicus curiae*. More importantly, the statement of interest should not stop there. In no more than three or four paragraphs, the statement of interest should:

1. Explain what the *amici*'s common or related interests in the appeal and its issues are;
2. Highlight why those issues are important to the *amici* and/or the public; and
3. Provide a short and general overview of the arguments and/or information presented in the brief.

This approach makes the brief relevant from the outset, serves as a preview of the argument or discussion to follow, and hopefully piques the judges' (or their law clerks') interest enough to read the entire brief. An example of a statement of interest submitted on behalf of trade associations in a product liability case that the Supreme Court accepted for review appears in Appendix C to this book.

Argument

Amicus curiae briefs should enhance an appellate court's understanding of, or illuminate its perspective on, one or more of the appeal's legal issues and their potential implications. Probably the most common mistake made in *amicus* briefs is to repeat the legal arguments contained in the brief of the supported party. This is what the Supreme Court Rules say on this subject:

> 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.[16]

Somewhat more indirectly, the Federal Rules of Appellate Procedure require an *amicus* brief to be "desirable" as well as "relevant."[17]
An *amicus* brief is not desirable if it merely replicates legal arguments that are adequately presented in the supported party's brief. Instead, an *amicus* brief should:

1. Expand on legal arguments not fully briefed by the supported party (e.g., discuss the purpose and legislative history of the statutory provision at issue; discuss additional case law that addresses the issue; cite law review articles on the issue);
2. Raise additional legal arguments relevant to the issues but not presented by the supported party (or considered by the lower court);
3. Discuss the broader impact (e.g., on an industry; on consumers or another segment of the public) if the lower court's ruling is affirmed/reversed; and
4. Present additional, relevant, but non-case specific, factual information.

Conclusion

In most cases, the conclusion of an *amicus* brief should be the same as the conclusion in the supported party's brief (e.g., grant the certiorari petition; affirm/reverse the district court's decision; vacate the agency's regulation and remand it for further consideration; and grant the petition for rehearing en banc).

Style

Writing an *amicus* brief is a somewhat liberating experience. Unlike a party's brief, it does not need to include components such as a statement of jurisdiction, statement of the case, statement of facts, or standard of review.

[16] SUP. CT. R. 37.1.
[17] FED. R. APP. P. 29(b)(2).

Indeed, an *amicus* brief does not need to be bound by the facts of the case at all. In other words, an *amicus* brief should transcend the parties, the facts, and the case.

An *amicus* brief submitted to the Supreme Court, a federal court of appeals, or a state appellate court should be written by an appellate attorney. Unlike lawyers who spend most of their time in trial courts, or who draft briefs that are primarily factual in nature, attorneys who specialize in appellate litigation possess a particular combination of knowledge, skills, and experience that enable them to produce the types of briefs that appellate courts yearn to read. This includes *amicus* briefs, which need to be concise, sharply focused, and written in an elevated, informative, and somewhat restrained style.

Oral Argument

Amici curiae are invariably required to express their views to appellate courts through the submission of written briefs. In the Supreme Court, *amicus* counsel is almost never allowed to participate in oral argument by sharing time with the supported party's counsel.[18]

There are two exceptions: When the United States participates in an appeal as *amicus curiae*, the solicitor general routinely requests, and the Court almost always allows, a "divided argument" (i.e., an opportunity for the Solicitor General's Office to share in the oral argument time allotted to the supported party). The other exception—which is quite rare—is when the Court requests a member of the Supreme Court Bar to submit an *amicus* brief and participate in oral argument on an issue that neither party has addressed. This occurred, for example, during the Court's October 2011 term in connection with the health care cases.

At the federal court of appeals level, Fed. R. App. P. 29(g), as amended in December 2010, states that "[a]n *amicus curiae* may participate in oral argument only with the court's permission."[19] Even though the United

[18] *See* SUP. CT. R. 28.7 (allowing *amicus curiae*, who have not obtained a supported party's consent, to participate in oral argument "only in the most extraordinary circumstances").
[19] FED. R. APP. P. 29(g).

States, or a state government, does not need consent to submit an *amicus* brief, it must request permission to participate in oral argument. Such permission is usually granted. Private *amici curiae*, however, rarely present oral argument, and when they do, it is almost always when the supported party cedes some of its allotted time.

When *amicus curiae*—including a governmental *amicus*—is going to participate in oral argument, it is essential that counsel for the supported party and the *amicus curiae* confer in advance to coordinate their presentations. Conducting a moot court in which both counsel participate is highly desirable.

Conclusion

Amicus support can be highly beneficial to a party involved in a federal or state court appeal, especially in cases involving issues that have impact beyond the immediate litigants.

One of the first questions that an attorney representing a party in an appeal should consider is whether it is a case where *amicus* support is desirable. If so, that attorney, in consultation with his client, should promptly begin identifying and contacting potential *amici curiae*. Trade or business associations, professional groups, and even individual companies should seriously consider participating in an appeal as *amicus curiae* if its interests, or those of its members, may be significantly affected by the outcome.

Equally important, a well-written, non-duplicative *amicus* brief can be a significant aid to an appellate court seeking to gain a deep understanding of the legal issues and to comprehend the breadth of their implications and potential impact. Attorneys who are skilled in appellate brief writing are in the best position to prepare *amicus curiae* briefs that achieve this objective.

Key Takeaways

- Remember that a concise, well-written, and non-repetitive *amicus* brief not only can strengthen a litigant's case, but also help the appellate court to understand the legal issues at hand and their significance.

- Be sure to study and comply with all rules, including local circuit rules, for the preparation and submission of *amicus* briefs and avoid the common pitfalls.
- When it makes sense, work with other organizations to consolidate views of multiple *amici curiae* into a single brief. This can be helpful to those organizations that may have limited budgets for judicial advocacy. You should be sure to provide the supported party's counsel with the final draft of the brief to comment on before it is submitted. This allows them to ensure consistency of position and accuracy of information.
- An *amicus* brief should include a statement of interest, argument, and conclusion. The supported party's statement of issues normally does not need to be replicated in an *amicus* brief. The arguments presented should be in sync with the supported party's brief, should be concise, sharply focused, and written in an elevated, informative, and restrained style.

Lawrence S. Ebner founded and leads the nationwide appellate litigation practice at McKenna Long & Aldridge LLP. Resident in the firm's Washington, D.C. office, Mr. Ebner has authored dozens of high-impact *amicus curiae* briefs on behalf of national business organizations and individual companies that want to express their views on important legal issues directly to the Supreme Court of the United States, U.S. courts of appeals, and state appellate courts. Much of his legal work focuses on complex legal issues involving federally regulated or procured products or services. Mr. Ebner is a graduate of Harvard Law School (1972) and Dartmouth College (1969).

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ASPATORE

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.*

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.

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.