

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

TUESDAY, APRIL 19, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Mary-Christine (M.C.) Sungaila, Partner, **Haynes & Boone**, Costa Mesa, Calif.

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STRATEGIC USE OF AMICUS BRIEFS IN APPELLATE ADVOCACY

April 19, 2016

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DISCUSSION TOPICS

- Introduction: The importance of amicus briefs in the appellate process
- Procedural requirements governing amicus briefs in the U.S. Supreme Court and other appellate courts
- Why, when, and how to solicit and coordinate amicus support
- Elements of an effective brief
- The United States as amicus curiae
- Q & A

INTRODUCTION: A BRIEF OVERVIEW OF THE HISTORY OF AMICUS ADVOCACY

Robin S. Conrad

- Amicus curiae literally means friend-of-the-court
- Amicus briefs are filed on behalf of non-parties and are deeply rooted in our legal tradition
- The first US amicus was filed in 1823 by Henry Clay in *Green v. Biddle*
- Influential groups regularly filed amicus briefs in US courts by the late 1800's
- Today, the filing of amicus briefs is an accepted and expected part of appellate litigation practice

AMICUS BRIEFS IN THE U.S. SUPREME COURT

Lawrence S. Ebner
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Supreme Court Rule 37 — Brief for an Amicus Curiae

Standard for Supreme Court Amicus Briefs [Sup. Ct. R. 37.1]:

“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.”

Translation: The Court is not interested in receiving amicus briefs that merely repeat a party’s, or other amicus curiae’s, arguments.

Rules Governing Certiorari-Stage Amicus Briefs [Sup. Ct. R. 37.2]

- Amicus briefs supporting the petitioner are due 30 days after the petition is docketed (no extensions are allowed)
- Amicus briefs supporting the respondent (rare!) are due when the respondent's brief is due
- Amicus counsel must provide written notice of intent to file to the parties' counsel of record at least 10 days before the due date for the amicus brief (unless the amicus brief is filed earlier than 10 days prior to the due date)
 - This is to allow the respondent to obtain an extension of time so that it can comment on amicus briefs in its opposition brief
- Unless the parties have provided individual or blanket consent to the filing of an amicus brief, a motion for leave to file must be incorporated into, and filed with, the amicus brief [Sup. Ct. R. 37.2(b)]
 - The Court virtually never denies leave as long as an amicus brief is filed in a timely manner and adheres to the required format
 - Leave not required for U.S., State, or local gov't amicus briefs {Sup. Ct. R. 37.4}
- Amicus brief must be printed in booklet format; cream cover; 6,000-word limit [Sup. Ct. R. 33]

Rules Governing Merits-Stage Amicus Briefs [Sup. Ct. R. 37.3]

- Amicus briefs “in a case before the Court for oral argument” are due within 7 days after the time allowed for filing the supported party’s brief (or if in support of neither party, within 7 days of the petitioner’s brief)
- 10-day notice of intent to file is not required
- Unless individual or blanket consent has been granted, a motion for leave must be incorporated into the amicus brief [Sup. Ct. R. 37.3(b)]
- Amicus brief must be printed in booklet format; light green cover; 9000-word limit [Sup. Ct. R. 33]
- Merits stage amicus briefs must be filed and served electronically as well as in booklet form

Additional Rules Governing Supreme Court Amicus Briefs

- Amicus briefs need only consist of :
 - Interest of the Amicus (or Amici) Curiae
 - Summary of Argument
 - Argument
 - Conclusion

[Sup. Ct. R. 37.5]

- Amicus briefs must 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”*

[Sup. Ct. R. 37.6]

- Purpose of this disclosure is to deter parties from using amicus briefs as “page extensions”
- Rule does not preclude parties’ counsel from coordinating with amicus counsel, or commenting on draft amicus briefs



Amicus Briefs in U.S. Federal Court: Procedural Requirements

Presented by
Averil Rothrock

Standard for Briefs [FRAP 29]

- For private parties, filing requires a motion for leave of court or consent by all parties. [FRAP 29(a)].
- A party need not provide written evidence of consent, but simply represent that it has consent. [FRAP 29- Advisory Comm.]
- Note: circuits may *require* an attempt to get consent. See Ninth Circuit Rule 29-3.

A Motion Must Include the Proposed Brief

The motion should state:

- (1) the movant's interest; and
- (2) the reason why an amicus brief is **desirable** and why the **matters asserted are relevant to the disposition** of the case.

Local Rules: Check Them!

They may:

- Regulate the filing of amicus briefs.
- Address or bar reply briefs.
- Address amicus curiae in support of or opposing petition for panel or en banc rehearing (see, e.g., Ninth Circuit Rule 29-2). Could be disfavored if tactical. *LaRue v. Dewolff, Boberg & Assocs.*, 458 F.3d 359 (4th Cir. 2006).
- Address participation in oral argument.

Timing [FRAP 29(e)]

- Seven days after the principal brief being supported is filed
- Seven days after appellant/petitioner's brief (if neutral)
- Or later if leave is granted by the court

Oral Argument

- FRAP 29 states that an amicus “may participate in oral argument only with the court’s permission.”
- Check local rules. See 6th Cir. L.R. 29 (state “the reason oral argument will aid the court” in motion to participate).
- Usually requires a party to share time with amicus.

District Courts: Amicus Allowed?

- No circuit court decision on point.
- According to the district courts, they have inherent authority to appoint or deny amici, which is derived from FRAP 29. *Youming Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131 (D.C. Dist. 2008) (see internal citations).



Amicus Briefs in State Courts: Procedural Requirements

Presented by
Averil Rothrock

Procedures for Amicus Briefs

Individual court rules and common law should be consulted.

Possibilities include filing amicus briefs:

1. In trial court
2. To support discretionary review
3. At merits briefing stage in appellate courts

Example as to Trial Courts: WA & CA

- Trial courts have inherent authority to allow amicus briefs. *Parsons v. State*, 118 P.3d 930 (2005) (No rule permitting “but neither is there any rule prohibiting it.”). See also *Arden-Oaks*, 2011 Cal. App. Unpub. LEXIS 4614 (Cal. App. 3d Dist. June 21, 2011) (same), citing Cal. Code Civ. Proc. Section 128(a)(3).
- Recommended to make motion for leave to file
- Recommended to follow trial court civil rules and appellate rules as appropriate.

Examples as to Discretionary Review: WA & AZ

- Wash. RAP 13.4(h) Amicus Curiae Memoranda allowed to support or oppose a pending petition for review; not later than 60 days from petition filing.
- Ariz. R. Civ. App. P. R. 16 Amicus Curiae Brief in support of or opposing petition for review may be filed; 21 days.

Example as to Merits Briefing: WA

RAP 10.2 and 10.6:

- Amicus brief not later than 45 days after the due date for last brief of respondent *with motion*.
- Answer permitted by date fixed by court.
- Motion states (1) interest, (2) familiarity with issues on review and scope of argument by parties, (3) specific issues addressed, (4) reason for additional argument on issues.
- Objection permitted within five days.

Example As to Merits Briefing: AZ

Ariz. R. Civ. App. P.R. 16 (2016): A person may file an amicus brief with written consent by all parties, if a local government, or by permission if:

- if a party has incompetent/no representation,
- amicus has an interest in another case that the decision may affect, or
- amicus can provide information, perspective or argument that can help...beyond parties' help

Strafford Webinar Program: Strategic Use of Amicus Briefs in Appellate Advocacy

Soliciting and Coordinating Amicus Support

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When to Solicit Amicus Briefs

- Amicus briefs are most appropriately and frequently filed in cases before the highest court of the state or the U.S. Supreme Court. Once a case has reached this level, it raises policy issues well beyond the concerns of the individual parties to the case, and the court tasked with deciding the case will want to know the broader implications of the case beyond the parties. Amici can provide helpful guidance to the court about the real-world impact of any decision. Amicus briefs also may be helpful in a case that raises novel issues of law before an intermediate appellate court or a case as to which broader policy concerns are otherwise at issue. If the case impacts the individual parties and raises no broader issues, however, an amicus brief will not be helpful to the court (nor are you likely to convince an amicus organization to submit one)

Tips for approaching organizations about amicus support

- Research the organization and its amicus procedures
- Respect the organization's time
- Explain the broader implications of your case
- Keep each organization in the loop about other organizations' potential interest
- Do not offer to offset the cost of the brief

Coordinating amicus support: at the discretionary review stage

- 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.



Elements of an Effective Amicus Brief

Presented by
Averil Rothrock

Standard Elements for Merits Brief:

- Statement of interest
- Factual content: adding social science or other empirical data through reports, statistics, studies; historical information; context information; etc.
- Supplemental legal arguments
- Public policy arguments/implications of rulings

Technical Requirements: Check the Applicable Rules [e.g., FRAP 29(c)]

- (1) Disclosure statement (FRAP 26.1)
- (2) Table of contents
- (3) Table of authorities
- (4) Identity of amicus, interest, source of authority to file

(cont.)

(5) Private party: must indicate:

(A) whether a party's counsel authored the brief (not simply coordination)

(B) whether a party paid to fund \$\$ (payment of general membership dues not be disclosed)

(C) any other contributor \$\$

(6) Argument (summary and standard of review optional)

(7) Certificate of compliance (32(a)(7))

THE UNITED STATES AS AMICUS CURIAE

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- 28 USC § 517 (“Interests of the United States in pending suits”)

“The 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 the court of a State.”

- United States can file an amicus brief in the Supreme Court or in a federal court of appeals without parties’ consent or leave of court [Sup. Ct. R. 37.4; Fed. R. App. P. 29(a)]
- Solicitor General’s Office writes & files Supreme Court amicus briefs; DoJ operating divisions (e.g., Civil Division) or certain independent agencies (e.g., FTC; SEC) file amicus briefs in the federal courts of appeals
- Amicus brief word count & other format requirements apply — including statement of interest
- Filing deadlines normally apply, but “CVSG” briefs are a major exception

“CVSG” Briefs

- “CVSG” = “call for the views of the Solicitor General”
 - issued by the Supreme Court after a certiorari petition, certiorari response, and amicus briefs have been filed and the Justices meet to discuss the case
 - purpose of CVSG is to help the Court decide whether to grant certiorari
 - SG’s Office fulfills an unofficial “gatekeeper” function
 - Statistics show that SG’s recommendation is very influential
- CVSG is issued in the form of an Order “inviting” the Solicitor General to file a brief expressing the views of the United States
 - SG rarely files amicus briefs at the certiorari stage without first receiving a CVSG
- CVSG briefs discuss the merits of the questions presented, as well as whether or not certiorari should be granted
- SG’s Office will take whatever time it needs to prepare a CVSG brief, and the Court will wait
 - SG Office’s practice is to complete and submit all CVSG briefs during the term in which it is requested
- After the SG’s Office files a CVSG brief, the parties have an opportunity to promptly submit a supplemental brief responding to the SG’s brief
- In cases where the Court issues a CVSG and then grants review, the SG’s Office normally files a merits-stage amicus brief and shares oral argument time with the party that the United States is supporting

Meeting with the SG's Office After CVSG is Issued

- Before filing a CVSG brief, the SG's Office seeks early input from both sides (i.e., petitioner & respondent) as well as from all DoJ operating divisions & federal departments or agencies that have an interest in the case or the questions presented
- SG's Office meets separately with each side's counsel, usually on the same day at the SG's conference room in Main Justice
 - Discussion led by one of the Deputy SGs
 - Lawyers from interested DoJ operating divisions & interested federal departments and agencies also are in attendance
- Each side should select one very well-prepared attorney to present their side's views
 - Be prepared for a very rigorous set of questions not unlike a Supreme Court hearing
- After the each side presents, the government attorneys meet to discuss the case
- Written memoranda can be submitted to the SG's Office before and/or after the meeting (including from interested federal departments & agencies)
- SG's position is a well-kept secret until the day the CVSG brief is filed