

Expert Q&A on Best Practices for Amicus Briefing

Amicus briefs can significantly impact appellate court decisions in certain cases, but they might not be worth the effort and expense if the briefs fail to provide useful insights. Practical Law asked *Diane McGimsey* of *Sullivan & Cromwell LLP* to discuss the hallmarks of effective amicus briefs and key considerations for companies and their counsel when enlisting the aid of an amicus in an appeal.



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What function do amicus briefs serve in appellate litigation?

Amicus curiae briefs (also known as friend of the court briefs) can play an important, and sometimes critical, role in appellate advocacy by bringing relevant facts and arguments to the court's attention that the parties have not already addressed (see, for example, Sup. Ct. R. 37.1). The precise matters raised in amicus briefs can vary substantially depending on the case, the parties, and other factors.

In a survey of former US Supreme Court law clerks on the hallmarks of effective amicus briefs, a majority of the clerks said that amicus briefs are most helpful in cases involving either:

- Highly technical or specialized areas of law.
- Complex statutory and regulatory regimes.

The clerks said that the steep learning curve in those areas and the potential industry-wide effect of any given decision made amicus briefs particularly useful. (Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 41 (Winter 2004); see also *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. Times, Feb. 17, 1998 (explaining that amicus briefs play an important role in educating judges on relevant technical matters, helping to make judges educated lay persons in scientific and technical areas).)



Search [Amicus Briefs: What Are They and When Should a Company File One?](#) for more on the purpose of amicus briefs in appellate litigation.

What are the typical uses of an amicus brief?

Amicus briefs can assist a court in several key ways, including by:

- **Presenting arguments or theories not advanced by the parties.** This might include offering alternative legal grounds for deciding the case or providing the views of experts on an issue. An amicus brief also can supplement the record with new or additional facts or data that merit judicial notice.
- **Supplementing a party's arguments or theories.** This might include furthering a party's argument on a particular issue or drawing attention to a specific issue in the case, for example, by presenting a broader survey of law from other jurisdictions or by discussing the applicable statutory framework in more detail. Additionally, an amicus brief can help ensure that a party receives adequate representation on key issues if that party:
 - is not represented by counsel;
 - is represented incompetently; or
 - files a poorly drafted brief.

more focused argument (see, for example, Federal Rule of Appellate Procedure (FRAP) 29(d); Sup. Ct. R. 33.1(g)). Even where the applicable court rules do not provide for stricter page limits, amici are still best served by keeping their brief succinct and focused on a single issue.

Because amicus briefs can provide the court with information and context that the parties cannot, amici have a unique opportunity to shape the outcome of an appeal. One of the most cited examples of an effective amicus brief in this regard is the brief submitted by retired military personnel in the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*.

A key question in *Grutter* was whether the law school's interest in student body diversity constituted a compelling state interest. In answering that question in the affirmative, Justice O'Connor's opinion for the Supreme Court quoted at length passages from the retired military personnel's amicus brief, which argued that a racially diverse officer corps is essential to the military's ability

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- **Highlighting the potential legal, economic, or social implications of a particular outcome.** This might include alerting the court to the impact of a potential holding on a certain industry, or on individuals or groups not before the court, and addressing the public policy implications of an appeal. Additionally, an amicus brief can explain why a particular ruling might be unworkable in other situations and help the court avoid potential unintended consequences of a decision.

How do amicus briefs differ from the parties' merits briefs?

Amicus briefs differ from merits briefs in both:

- **Substance.** Merits briefs are limited to the record, while amicus briefs are not. Therefore, amici can advance arguments that were not asserted in the lower courts and, more importantly, provide factual background or data that is not in the record but might offer important context to the underlying issues.
- **Form.** Unlike merits briefs, amicus briefs typically focus on a single, discrete issue rather than attempting to address all aspects of the case. Some courts give amici far fewer pages than the parties to make their arguments, requiring a tighter,

to provide national security, and because public universities and colleges are the primary sources for the US military's officer corps, those institutions have a compelling interest in diversity as well. (539 U.S. 306, 330-31 (2003).)

In what circumstances should a party consider soliciting the participation of an amicus?

Before asking an amicus to participate in an appeal, a party must first assess whether the case presents an important issue that will have broader importance beyond its impact on the parties. If an appeal turns on a discrete factual dispute or a conventional but undecided legal question, an amicus brief likely will not meaningfully assist (or receive much attention from) the court. But in cases raising novel issues that might have broader legal or public policy implications, an amicus brief can be a useful tool for potentially impacted persons or groups to weigh in.

A party also must consider whether there are any aspects of the case on which a potential amicus could offer new or unique information or insight. This includes determining if there is an appropriate group to do so, beyond the typical

organizations that frequently serve as amici. Indeed, there is a vast array of groups representing virtually every interest. *Lozman v. The City of Riviera Beach, Florida* offers a good example. In that case, the Supreme Court was asked to address whether a floating home is a “vessel” under the Rules of Construction Act. Although this question did not lend itself to the expertise of the more frequent amicus filers, the petitioner in *Lozman* located two groups (the Seattle Floating Homes Association and the Floating Homes Association of Sausalito) that had relevant expertise concerning the design and structure of floating homes, and an interest in the outcome of the case because of its potential impact on their members.

The amici’s brief provided relevant information about what a floating home is, described how certain state and local regulations treat floating homes, and discussed the potential widespread implications of treating a floating home as a vessel. With those two groups’ participation, the Supreme Court sided with the petitioner in holding that a floating home is not a vessel under the Rules of Construction Act, buttressing its interpretation of the term “vessel” with the state and local regulations cited in the amicus brief. (133 S. Ct. 735, 744 (2013).)

Are there any circumstances or types of cases where it would be inappropriate or unwise to solicit the participation of an amicus?

An amicus brief that only reiterates a party’s arguments and otherwise offers nothing new has no value to the court (see, for example, 1998 FRAP 29 Advisory Committee Note (amicus briefs should address only matters not adequately addressed by a party)). A party also should consider whether soliciting the participation of an amicus will trigger the other party to do the same.

Additionally, if a party cannot find the right amicus, it might be better off having none at all. For example, an amicus brief that presents facts or social science data that are untested or easily refuted or rebutted might impact a party’s credibility or, even worse, cause a court to assume the opposite set of facts or data.

What should a party and its counsel consider when selecting an amicus?

At the outset, a party and its counsel always should consider the message a potential amicus will convey. When selecting an amicus to effectively convey that message, the party should determine which group or organization is most likely to have helpful information, beyond what has been (or can be) presented by the parties. This often means choosing a group whose interests and profile are somewhat different from those of the party.

Certain organizations or interest groups frequently serve as amici and are known to produce high-quality briefs (such as the Chamber of Commerce and the American Civil Liberties Union). But if none of the usual players have special expertise to share with the court, the party should cast a wider net. Industry and professional organizations, even if not previously known to the court, can serve as effective amici because courts often view these groups as having a special interest and expertise in the particular issues in the case.

A party and its counsel also should consider what attorney will best deliver the message on a group’s behalf. When surveyed, 88% of Supreme Court law clerks said that they would be inclined, at least initially, to pay closer attention to an amicus brief filed by an academic or a reputed attorney, such as a former solicitor general (Lynch, 20 J.L. & Pol. at 52, 54-55). Similar thinking applies if a case is pending in a state rather than federal appellate court. A former state solicitor general or a reputable appellate practitioner who frequently appears before that court might draw more attention to the brief and lend it credibility.

What are some hallmarks of an effective amicus brief?

In addition to the general hallmarks of any persuasive brief, the purpose of an amicus brief and its relevance to the case must be readily apparent from the first page. This will help the brief stand out among the numerous amicus briefs typically generated by an important case. If a cursory review of the brief, or even the table of contents, suggests that the amicus brief is duplicative of a party brief, the court may give the brief little attention or ignore it altogether.

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Tone also is important. Amicus briefs should be simple and to the point, using an even, objective tone. Amicus briefs should aid the court in its decision, but not advocate for a party. An overzealous or overly argumentative amicus brief might damage the brief's credibility.

Lastly, brevity is key. In most cases, an amicus can achieve its purpose in far fewer pages or words than the applicable rules afford. The court undoubtedly will appreciate an amicus brief that uses only the space needed to accomplish its goal.

To what extent should a party be involved in the drafting of an amicus brief?

Appellate court rules typically require parties to disclose whether a party's counsel authored an amicus brief in whole or in part (see, for example, FRAP 29(c)(5)(A); Sup. Ct. R. 37.6). The obvious implication of these rules, as well as rules requiring an amicus to disclose whether counsel or a party made any monetary contributions toward funding or preparing the brief, is that the more involved a party is in drafting an amicus brief, the less credibility it might have.

That is not to say that a party should not be involved in the process. Collaboration with any amici with aligned interests, particularly in a case that will involve multiple amicus briefs, is critical and does not trigger the disclosure requirements (see 2010 FRAP 29 Advisory Committee Note (noting that parties do not need to disclose mere coordination, such as sharing drafts of briefs)). Because amicus briefs often are due shortly after the supported party files its principal brief, coordination during the drafting process helps avoid duplicative arguments. More importantly, a party might find it useful to get input from an amicus on the arguments in the principal brief, and evaluate the positions the amicus intends to take to ensure that they are persuasive and likely to aid the party's position. Additionally, if multiple amicus briefs are submitted in support of a party, coordination is necessary to ensure that those briefs are not duplicative, overreaching, or somehow conflicting.

Are there any common pitfalls that counsel should avoid when preparing an amicus brief?

When preparing an amicus brief, counsel should ensure that the brief does not:

- Repeat the supported party's arguments or analysis.
- Provide background information that the parties already covered.
- Fail to support factual assertions with citations to the record or to authoritative academic works or studies.
- Overstate or exaggerate the potential unintended consequences of a particular outcome, although courts appreciate amici pointing out those consequences.
- Present a biased or slanted view of the issues.
- Fail to acknowledge or address countervailing arguments, which can suggest that counsel has not fully analyzed the issues.

How receptive have courts been to the involvement of amici in appellate proceedings?

The likelihood that a court will grant a motion for permission to appear as an amicus curiae largely depends on the court. The Supreme Court grants nearly all motions for leave to appear as amicus, even when a party denies consent (see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 762 & n.58 (2000)). Amicus participation in certain state appellate courts has grown (see Corbally, Bross & Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, 25 Just. Sys. J. 39, 44-46 (2004)). However, a brief survey of orders from state and appellate proceedings over the past few years shows that courts continue to deny permission for amici participation, often citing a lack of relevance to, or interest in, the proceedings.

Whether courts are receptive to the arguments and positions set forth by amici is more difficult to measure and also appears to depend on the court where the case is pending. Scholars tend to look to the number of times amicus briefs are cited in court opinions as evidence of their influence, although the extent of this influence is impossible to determine. According to one recent study of signed Supreme Court opinions issued in the 2014-2015 term, the justices cited amicus briefs in 55% of the cases. This would suggest that at least some justices are highly receptive to the involvement of amici in Supreme Court proceedings. Yet that number is misleading because many of those citations were to amicus briefs filed by the Solicitor General's Office, not so-called "green briefs" (non-government amicus briefs). (See Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, The Nat'l L.J. (Aug. 19, 2015).)

By contrast, a survey of Sixth Circuit cases published in 2015 showed far less influence in that court. The Sixth Circuit discussed or referenced the positions of amici in only five of the 44 cases where amicus briefs were filed, and only one of those appeared to have positively influenced the court (Justin Jennewine, *The Effect of the Amicus Brief*, Sixth Circuit Appellate Blog (Jan. 28, 2016), available at sixthcircuitappellateblog.com).

The results of a survey of state courts of appeals fell somewhere in between. When state appellate justices and clerks were asked what percentage of amicus briefs they found influential, 27% said fewer than a quarter, 32% said between a quarter and one-half, and 36% said between one-half and three quarters (Bross, Corbally & Flango, *Amicus Curiae Briefs: The Court's Perspective*, 27 Just. Sys. J. 180, 185 (2006)).

Ultimately, this data demonstrates that parties and their counsel should know the court and its practices before soliciting amicus involvement in an appeal.