

### **Amicus Briefs in the Appellate Courts**

Amicus curiae briefs (routinely referred to as “amicus briefs”) are briefs submitted by persons or entities who are not parties to the pending appeal. Literally translated as a “friend of the court” brief, an amicus curiae brief generally serves to provide the court with a different perspective on the issues. This article discusses the goals of amicus briefs, special considerations, procedures for amicus briefs, and some pitfalls to avoid.

#### **Goals of an Amicus Brief**

Amicus briefs can serve several different purposes. First, they can provide more context—the “big picture”—for courts to consider when addressing issues with broader implications to the public. They may serve to highlight the legal, social, or economic consequences from a particular decision, or may identify unintended consequences. Second, amicus briefs may expand upon the parties’ arguments or provide a different focus. Third, amicus briefs often provide information that the court may not have before it. An amicus brief may include information about other cases addressing similar issues; legislative history or other historical information about the legal issues; social science data related to the legal issues; or information about specialized areas of the law. Finally, amicus briefs can lend credibility to a party’s position. Amicus briefs from trade groups, civil rights organizations, professional associations, or other groups may reinforce a party’s legal position. These briefs can be especially helpful when the amicus brief is in support of a party whom the court might view as less credible.

#### **Special Considerations**

Because of the unique nature of amicus briefs, there are certain issues to consider before deciding to use an amicus brief in a particular case.

It is common for parties and their counsel to solicit amicus help from outside persons or entities who may have an interest in the litigation. Counsel are cautioned against too much involvement, however. The briefs themselves should be written by counsel for the amicus—not counsel for a party. Courts commonly require that amicus briefs identify the counsel or party who authored the brief. California Rule of Court 8.200 goes even further, requiring the brief to identify persons (other than the amicus curiae or its counsel) who made “a monetary contribution intended to fund the preparation or submission of the brief.” This is also the rule in the United States Supreme Court (Rule 37). So, counsel soliciting amicus help should be careful not to become too involved in preparation of the brief.

For counsel who represent amicus curiae, there are other considerations. Counsel should determine whether other amicus groups will be submitting briefing. If so, consider submitting a

combined brief, rather than several individual amicus briefs. This will ease the burden on the court and can be more effective in presenting the arguments.

Further, amicus counsel should have discussions with the party's counsel regarding the legal issues presented in the appeal. Amicus counsel should review the record and any briefs already filed (or lower court briefs) to have a good understanding of the issues. They should independently evaluate the legal arguments and consider the best way to present the arguments persuasively from the amicus group's perspective.

#### Procedures for Submitting Amicus Briefs

In the California appellate courts, Rule 8.200 permits a person or entity to file an application for permission to file an amicus brief within 14 days after the last appellant's reply brief is filed or could have been filed. The application must state the applicant's interest and explain how the brief will assist the court in deciding the case. It must also identify any party or counsel for a party who authored the brief in whole or in part, or anyone (outside of the amicus or its counsel) who made a monetary contribution intended to fund preparation or submission of the brief. The application must be filed along with the proposed brief. Note that the cover must identify the party the applicant supports (if any). Parties are given a chance to respond to the amicus brief if the court grants the application.

The procedure is similar in the California Supreme Court for briefs on the merits. Rule 8.520 provides that the application must be filed within 30 days after briefing has been completed or was required to be completed (not counting any supplemental briefs). The same disclosures regarding authorship and funding of the brief must be made. The proposed brief must be filed along with the application, and the cover must identify which party the applicant supports.

Rule 8.500 also permits anyone "wanting to support or oppose a petition for review or for an original writ" to submit an amicus curiae letter (not a brief) to the California Supreme Court. The letter must identify the amicus curiae's interest.

The Ninth Circuit also has procedures for filing amicus briefs. Federal Rule of Appellate Procedure 29(a) permits amicus briefs to be filed with the consent of all parties or by leave of court. A person or entity seeking leave of court to file an amicus brief must identify the person's interest and "reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). The brief must be included with the motion, and the cover must identify the party supported and "indicate whether the brief supports affirmance or reversal." Fed. R. App. P. 29(c). The brief must also contain a "concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." *Id.* Note that in the Ninth Circuit, an amicus brief is limited to one-half the maximum length for a party's principal brief. Duplicative briefs are disfavored in the Ninth Circuit. *See* Ninth

Circuit Rule 29-1 Adv. Comm. Note. An amicus brief (and the motion to file it, if needed) must be filed within seven days after the principal brief of the party it supports is filed.

### Common Mistakes

There are some common errors in amicus briefs that should be avoided. First, amicus curiae are usually not permitted to raise issues that were not raised by the parties themselves. There are some narrow exceptions to this rule, but most of the time, amicus should not attempt to raise new issues in an appeal. Second, amicus curiae should avoid filing briefs that merely repeat a party's arguments. A brief that does not provide additional information or a different perspective on the issues is less likely to be accepted or effective, even if it is permitted to be filed. Third, tone is just as important in an amicus brief as in the parties' briefs. Amicus briefs should not be overly dramatic or provocative. Remember that all of the writing techniques for other appellate briefs apply to amicus briefs as well. Along those same lines, amicus counsel are cautioned against overstating or misrepresenting any additional data provided, such as social science data. Finally, when preparing an amicus brief, make sure to understand and follow all of the applicable court rules.

Amicus briefs present an excellent opportunity to provide supplemental information to the court and a different perspective on the legal issues. Used carefully, amicus briefs can be an effective way to advance a party's position by adding credibility and providing more persuasive arguments.

C. Athena Roussos is an attorney in Elk Grove, California, and is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or [athena@athenaroussoslaw.com](mailto:athena@athenaroussoslaw.com).

Peg Carew Toledo also contributed to this article. Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or [toledo@mgsllaw.com](mailto:toledo@mgsllaw.com).