Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

7 Tips For Writing An Effective Amicus Brief

Law360, New York (June 8, 2016, 3:33 PM ET) --

David S. Forman

A nagging doubt haunts those who file amicus briefs: Once the brief enters the black hole of the appellate court, will its arguments receive serious consideration? Indeed, will anyone even read the brief? Only a minority of appellate opinions cite amicus briefs, so it is hard to determine whether an amicus brief had an impact. Some reassurance comes from a survey of 70 former U.S. Supreme Court law clerks who screened amicus briefs for the justices.[1] Nearly all of them (83 percent) reported that they looked at every single amicus brief filed.[2] However, some briefs were only briefly skimmed, while the clerks carefully read other briefs that appeared to contribute new and useful information or arguments.[3] One former law clerk revealed that "[a]fter six months I could read amicus briefs in sixty seconds; I could make judgments as to their usefulness and dispose of them. Others were read more seriously."[4]

How can one draft an amicus brief that will be carefully considered, instead of briefly skimmed and discarded?

1. Do Not File a "Me-Too" Brief

The way courts view amicus briefs is summed up in S. Ct. Rule 37.1:

> An amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus curiae brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.[5]

Thus, an amicus brief should not simply repeat arguments of the principal brief that it supports. The court will always read the principal briefs, so repeating the same arguments will merely burden the court and its staff. There is no "strength in numbers" and repetition will irritate the court.[6] Reiteration of the arguments in a principal brief can be a fatal flaw in an amicus brief.

To know what arguments will be in the principal briefs one must consult with the parties. Some coordination is required since anyone seeking to file an amicus brief must obtain express consent from the parties,[7] which is usually freely given.[8] The party an amicus will support will usually be willing to share arguments, or even drafts. Furthermore, amicus briefs must be filed seven days after the principal briefs.[9] This delay gives the amicus drafter time to confirm there will not be duplicate arguments

between briefs. It could be difficult to prepare a high quality amicus brief in seven days unless one previously coordinated with the party, especially since the amicus brief must conform to the court's rules on format, printing and service.[10]

Nevertheless, when coordinating with a party the amicus should not let that party write any part of the amicus brief, nor to finance its preparation. Every 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.[11]

While a party is not forbidden per se to write or fund an amicus brief, the brief will lose much of its persuasive value. The court may infer that the party has written or funded the amicus brief to avoid the page limits.[12]

Other types of collaboration with a party, however, are acceptable.[13] An amicus can also be helpful to a party by critiquing the party's draft briefs, helping to prepare for oral argument, and coordinating with other amici.

2. Present Arguments Not Already Brought to the Attention of the Court

Amicus briefs should present arguments and information not already brought to the attention of the court.[14] As discussed below, several kinds of amicus briefs are particularly likely to receive careful consideration.

3. Courts Will Consider Briefs From Industry Organizations and Other Representative Groups

Amicus briefs are frequently submitted by industry and professional organizations. These are likely to be considered since they present the views and potential impact of a decision on an entire industry or interest group, something not usually fully discussed in the principal briefs.

Amicus briefs also are often submitted jointly by several corporations in an industry. Where several entities agree on the information and arguments needed for an amicus brief, joining in a single brief can be effective. One former Supreme Court clerk commented that "the more groups that come together on a brief, the more impressive it is that they hold the same view."[15] Most clerks explained they would prefer to see more collaboration because there would be fewer total amicus briefs to read, so that the clerks could dedicate more time to each individual brief. According to one, "[i]f the group is just saying the same thing, then collaboration is in everyone's interest, because 'me too' briefs are not useful. But if the amicus has a unique, idiosyncratic perspective, it should file separately."[16] Of particular interest are amicus briefs pointing out implications of a case to industries or other groups that might not be obvious to the court. For example, Bilski v. Kappos, 561 U. S. 593 (2010) considered whether a financial business method is eligible for a patent. Yet several pharmaceutical, health care and biotechnology companies and organizations submitted amicus briefs to explain how a decision might affect their own industries.

While most clerks (87 percent) were inclined to give certain groups closer attention on account of their identity (such as the solicitor general, government entities such as states, and major professional associations), a few clerks claimed to judge only the content of each amicus brief filed, and not the

name of its author or sponsor.[17]

4. Amicus Briefs Can Present Scientific and Other Factual Evidence

An important role of amicus briefs is to supply helpful materials beyond a party's reach, such as technical or scientific data. In the survey of former Supreme Court clerks the majority (56 percent) explained that amicus briefs were most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases. Some of the most frequently mentioned types of cases were those involving tax, patent, and trademark law. One clerk explained that that amicus briefs are most helpful when the subject matter is legally obscure.[18] Another clerk said that for "questions involving specialized expertise of science and medicine, groups such as the AMA can use their expertise in a way that parties cannot."[19] Another commented "[a]ny data showing real world impact is important because it shows effects that go beyond the interests of the parties. This matters to some justices."[20]

Briefs presenting factual scientific information appear to conflict with the general rule that appeals are decided entirely on the record, and a party cannot introduce new factual evidence. Nevertheless, appellate courts are often willing to consider scientific evidence in amicus briefs, including evidence from the social sciences, to help the court understand the technical issues and the ramifications that a decision may have. They can help especially because the clerks and judges are usually generalists. To be taken seriously the technical information should be from an authoritative source and be well documented. Data from peer reviewed publications can be one indicator of reliability.

5. Amicus Briefs Can Remedy Deficient Legal Briefs by the Parties

In special cases, amicus briefs can be helpful where the parties lack good quality legal representation. The most obvious situation is where a pro se brief is poorly written yet presents an important legal question.

6. File Amicus Briefs at the Circuit Courts of Appeal

At the Supreme Court there are often many amicus briefs competing for attention. For example, in Bilski v. Kappos, 561 U. S. 593 (2010), 75 amicus briefs were submitted. As a result, the ability of each amicus brief to make impactful arguments to the Supreme Court may be decreased. There is less amicus participation in the federal circuit courts of appeals. If an appeals court decision is likely to create important precedent and affect others besides the parties, amicus participation at a circuit court can be useful. If there are only a few amicus briefs, they are likely to get more careful consideration than when there are large numbers.[21]

In addition, the courts of appeals may be the last chance to weigh in on an issue, since the Supreme Court grants certiorari for only a small number of cases. For most appellate decisions, the circuit court decisions will be precedential law in that circuit and often (for example, the U.S. Court of Appeals for the Federal Circuit) for the entire nation. Furthermore, even if the Supreme Court grants certiorari, the issues that go to the Supreme Court may be different than ones that interest a particular amicus.

In the regional courts it is important to know and follow the local rules. Several circuits have additional local rules regarding amicus briefs. Briefs must also conform to all other local rules, such as those regarding the format of the briefs.

7. Format and Quality Legal Writing Are Important for a Good Amicus Brief

The main points of an amicus brief should be clearly evident in the table of contents and section headings, and in the summary of the argument, because law clerks and judges rely on those features to screen briefs and decide whether to read further.[22] The mandatory certificate of interest is another opportunity to show why the brief presents material not otherwise before the court.

An amicus brief must be well written and carefully proofread. While a court may feel obligated to slog through a brief from a party even if the writing is mediocre or it contains spelling or grammatical errors, it may give short shrift to an amicus brief with similar flaws. Once a clerk noticed that an amicus brief was either poorly written or duplicative, 30 percent only scanned the remainder very quickly, or simply moved on to the next brief.[23] One dominant theme from the interviews of former Supreme Court clerks is that close consideration of amicus briefs is highly dependent on quality.

Furthermore, an amicus brief should be succinct. The party's briefs must cover all of the issues on appeal, but an amicus filer should focus only on arguments or information corresponding to its specific organizational interests. It is counterproductive to submit additional text that distracts from the important information the amicus seeks to convey.

Conclusion

For an amicus brief to get serious consideration it should be clear on its face that it presents the court with relevant arguments or information that have not already been brought to its attention by the parties. Keeping these considerations in mind can maximize the likelihood that an amicus brief will be considered seriously, rather than only briefly skimmed and then discarded.

—By David S. Forman, Osha Liang LLP

David Forman, Ph.D., is senior counsel in Osha Liang's Alexandria, Virginia, office. Among other work, he has assisted in drafting amicus briefs to the Federal Circuit and Supreme Court regarding patent-eligible subject matter relevant to pharmaceuticals and diagnostic methods.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] K.J. Lynch, Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J. L. & Politics 33 (2004).

[2] Id. at 43.

[3] Id.

[4] Id.

[5] See also Fed. R. App. P. 29, Advisory Committee Notes to 2010 Amendments (same).

[6] Lynch, supra note 1, at 69.

[7] Fed. R. App. P. 29; S. Ct. Rule 37.1.

[8] If consent is refused, the rules provide for filing a motion asking leave of the court to file the amicus brief. Fed. R. App. P. 29(b); S. Ct. Rule 37.2(b)

[9] Fed. R. App. P. 29(e); S. Ct. Rule 37.3(a).

[10] Fed. R. App. P. 29; S. Ct. Rule 37.1.

[11] S.Ct. Rule 37.6; see also Fed. R. App. P. 29(c)(5).

[12] See e.g. Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs").

[13] 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)”).

[14] Fed. R. App. P. 29, Advisory Committee Notes to 2010 Amendments (same).

[15] Lynch, supra note 1, at 57-58.

[16] Lynch, supra note 1, at 57.

[17] Lynch, supra note 1, at 56.

[18] Lynch, supra note 1, at 41 and Table 1 at 43.

[19] Id.

[20] Lynch, supra note 1, at 67.

[21] Lynch, supra note 1, at 45.

[22] Lynch, supra note 1, at 44.

[23] Id.

All Content © 2003-2016, Portfolio Media, Inc.