

AMICUS CURIAE BRIEFS

Presented By

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HON. NATHAN L. HECHT, *Austin*
Justice, Supreme Court of Texas

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CHAPTER 23



Justice Nathan L. Hecht

Justice Nathan L. Hecht was elected to the Texas Supreme Court in 1988 and reelected in 1994. He began his judicial service on the 95th District Court of Dallas County, to which he was appointed on September 1, 1981, elected in 1982, and reelected in 1984. In 1986, he was elected to the Court of Appeals for the Fifth District of Texas at Dallas, where he served until his election to the Supreme Court.

Justice Hecht earned his B.A. at Yale University with honors in philosophy, and graduated cum laude from the Southern Methodist University School of Law. He was a law clerk to Judge Roger Robb of the U.S. Court of Appeals for the District of Columbia Circuit. He also served as a Lieutenant in the U.S. Naval Reserve. He practiced law in the area of general litigation with the Dallas firm of Locke Purnell Boren Laney & Neely, and was a shareholder in that firm prior to his appointment of the bench.

While on the District Court, Justice Hecht was local administrative judge, presiding over all county and district judges in Dallas county and representing them before other branches of government. Throughout his tenure on the Supreme Court, Justice Hecht has been designated to oversee all changes in state court rules.

Justice Hecht is a member of the American Law Institute, the Texas Philosophical Society, and a Fellow of the Texas and American Bar Foundations. He is on the advisory board of the *S.M.U. Law Review* and was named Outstanding Young Lawyer in 1984 by the Dallas Association of Young Lawyers.

Mr Greg Coleman is a partner at Weil, Gotshal & Manges, LLP and is head of the firm's Supreme Court and Appellate Litigation Practice Group. Greg received his J.D. from the University of Texas School of Law in 1992, and his B.S., in 1987, and M.B.A, in 1989, from Texas A&M University. Greg clerked with Judge Edith Hollan Jones of the Fifth Circuit Court of Appeals and later with Justice Clarence Thomas at the U.S. Supreme Court. From 1998-2001, Greg served as the Solicitor General of Texas. Greg is married to Stephanie Coleman, and they have three sons.

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WRITING THE AMICUS CURIAE BRIEF

I. INTRODUCTION

If you only remember one thing from this paper, remember this: If you don't have some new argument or perspective to offer the court in an amicus brief, don't file one. Amicus briefs can inform courts of the impact of a case on nonparties, can offer new arguments or a different perspective on a case, and can provide courts with special expertise to aid them in making decisions. But courts expect amicus briefs to serve a different function than party briefs and present different material than party briefs. A brief that merely repeats the parties' arguments is just something else the court has to read and provides no benefit.

II. STRATEGIES FOR WRITING THE SUCCESSFUL AMICUS BRIEF.

A. If Done Properly, Amicus Briefs Can Make a Difference.

Decisions in many, if not most, appellate decisions can affect a significant number of persons and entities beyond the actual parties to the case. Although the parties to the case will frequently attempt to instruct the court about these implications, they often do so incompletely. An effective amicus brief can dramatically affect the perspective with which the court approaches the case and, not infrequently, can affect the outcome of the case. Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984) (“[A] common misconception[] about amicus briefs . . . is that [they] are not very important; that they are at best only icing on the cake. In reality, they are often the cake itself. Amicus briefs have shaped the judicial decisions in many more cases than is commonly realized.”).

More than anything else, authors of amicus briefs should understand that an amicus brief that does nothing more than repeat arguments made in party briefs is a burden to the court. As Judge Posner has commented:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term “amicus curiae” means friend of the court, not friend of a party An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case

(though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (internal citations omitted). Although Judge Posner's comment has been much criticized as overly harsh, see Luther T. Mumford, *When Does the Curiae Need an Amicus*, J. APP. PRAC. & PROC., Summer 1999, at 279, it accurately captures the hostility that some judges have developed toward amicus briefs that do not serve a useful purpose.

Most courts readily accept amicus briefs, even those that are not ultimately helpful to the court. As the quotation from *Ryan* demonstrates, however, some courts are becoming more particular about the granting of amicus briefs. The trouble with this development from the lawyer's perspective is that it is difficult to discern a standard that can be applied to determine when a proposed amicus curiae submission will be accepted. Take, for example, *Ryan's* statement that an amicus should have an interest in the outcome of the case, but not too much. See also Mumford, *supra*, at 283 (“From the practitioner's point of view, the inability to predict when leave will be granted can be the source of acute embarrassment. It is awkward, to say the least, to bill a client for a brief the court refuses to accept.”). It is better practice, as the Texas state courts do, to permit amicus filings as a matter of course as long as the brief meets the relevant filing requirements.

Timing issues can affect the content of an amicus brief. Prior to 1999, an amicus brief in the federal courts of appeals generally had to be filed at the same time as the party's brief. That meant that an amicus had to either coordinate closely with the party or would have to file its amicus brief without having seen the party brief (increasing the risk of overlapping or repetitive arguments). The 1998 amendments gave amici an additional seven days to prepare and file their amicus briefs. The change has permitted conscientious amici to design their briefs to better fulfill their purpose, but it has also permitted some counsel additional time merely to mimic the arguments in the party's briefing.

Practitioners should keep in mind that a good amicus brief will present arguments that go beyond or are different from the arguments presented in the party briefs. This emphasis on ensuring that amicus briefs do not mimic the party's briefs should generally encourage more communication and coordination

between the party and the amicus curiae, rather than less. Different should not mean inconsistent.

It is sometimes said that a good amicus brief can support a poorly organized or written principal brief by the parties. While true, it only infrequently occurs in practice. Many amicus briefs are written pro bono by lawyers trying to squeeze a project between the demands of paying clients, and the result is a hurriedly drafted brief that does not materially add to the presentation of the case.

That realization should be a caution to parties seeking amicus support. First, a party should never indiscriminately seek amicus support. Although many believe that any amicus is better than no amicus, that is not necessarily true, and there are uncommon circumstances in which a poor amicus can weaken one's arguments. Second, to the extent possible, a party should seek to actively coordinate with amicus support. That may not always be possible, but even a conference call can help both the party and amicus get a better understanding of the amicus's role in the case and the context in which the amicus arguments are being made.

B. Recruiting Amici and Coordinating the Briefs.

1. Recruiting Amici

Parties can bolster their case by recruiting amici to support them. Because—particularly in federal court—the deadlines for filing of an amicus brief are relatively swift, it is important to recruit amici early in the briefing process. Even in Texas courts, in which an amicus brief can be filed up until the day the decision issues, it is the better practice to file an amicus brief contemporaneously with the last party brief of the side supported by the amicus. A brief that is filed with the party briefs will be circulated with them and is more likely to catch a judge's attention. Moreover, the existence of an amicus can change the contents of the party briefs; issues better suited to the amicus should be raised, but not developed, in the party briefs. It is therefore helpful to know whether and what amicus brief or briefs will be filed early on in the briefing process.

In recruiting amici, both the impact of the amicus's support and the scope of possible arguments that the amicus could develop are relevant. If several amici share a similar interest and expertise, they can jointly sponsor a single brief (this will also defray the cost for individual amici). Only when amici have different interests or areas of expertise should they file separate briefs.

Potential amici in cases include:

- Trade Organizations
- Lobbying Groups

- Public-Interest Groups, Legal Reform Advocacy Groups
- Government Units, Including State Attorney Generals and Regulatory Agencies
- Parties to other, pending litigation that could be affected by the case at issue
- Law Professors
- Corporations or Individuals with an Interest in Issues Raised by the Case

2. Coordinating with and Between Amici.

In order to fully present all the issues in a case without wasting court resources by duplicating arguments, coordination between the parties and amici is essential. When coordinating the briefs, remember that issues not raised in a party brief are deemed waived. Given the issue-pleading practice used in Texas and federal appellate courts, a party can preserve an issue with a short mention in its brief and save elaboration of the issue for the amicus. Amici should therefore work with the parties they support to ensure both that relevant issues are preserved and that there are no significant redundancies between the party and amicus briefs. Only when the party is represented by institutionally inadequate counsel—with a *pro se* litigant, for instance—should the amicus brief develop the same principal arguments the party brief does. In that rare instance, an amicus brief can be treated as a substitute party brief.

C. Writing the Amicus Brief.

Amicus briefs serve several functions. They can signal the importance of a case by expressing the interest of a prominent organization or entity, inform the court of the case's relevance to nonparties, and develop legal arguments that a party cannot. A well-written amicus brief will serve one or more of these functions.

1. Using the Amici Brief to Signal Interest.

One function of the amicus brief is to communicate the importance of a case by expressing the interest of entities or organizations other than the parties. To a large degree, the impact of this signaling function depends on who the amicus is. A government unit, for instance, is an effective amicus for the simple reason that the government's interest will usually catch a court's attention. Party lawyers who recruiting amici should keep in mind the relative authority of the amici they are recruiting.

In some instances, amici can be used to ameliorate the fact that a party is unsympathetic, or provide the court with a more sympathetic set of facts. When a particular party—for instance, a criminal defendant—is unsympathetic, it is helpful to find amici that would be

affected by an issue before the court, but who the court will view with sympathy.

The impact of the signaling function of the amicus brief is magnified when the brief is in support of a petition for relief to a court with discretionary review. At the petition stage, it is necessary to prove not only that the decision below was wrong, but that the case is an important one. The interest of a prominent amicus can help to convince the court that a case has enough impact beyond the parties to merit review. Amici who oppose the granting of a petition for review or certiorari may therefore choose to refrain from submitting briefs at the petition stage, because the interest of the amicus can inadvertently signal the court that the case is important enough to grant review.

Although signaling the interest of entities other than the parties is an important function of the amicus brief, it is inappropriate to submit a full-length brief that does no more than that. If the only purpose of the amicus brief is to signal this party's interest, this can be accomplished in a one-page or letter brief.

2. Conveying the Effects of the Decision on Nonparties.

Perhaps the most useful function of an amicus brief is to inform the court of how a given holding can affect nonparties to the case. "Most cases before this Court," Justice Hugo Black once remarked, "involve matters that affect far more people than the immediate record parties." Amici are often uniquely qualified to serve this role. Trade organizations, for instance, can provide the court with a factual context not provided by the record, conveying the commercial consequences of the case's possible dispositions. Similarly, government and public-interest organizations with expertise in a particular field of law can contextualize a case for the court, describing the broader impact of the case on the legal system.

To do so effectively, an amicus must tie the amicus's interest to the issues presented by the case. Explaining how a change in the law would change day-to-day operations in the amicus's field can illustrate the effect of possible outcomes of the case. To the extent that transactions in the amicus's field are dependent on a body of law potentially affected by the case before the court, the amicus should explain that reliance, and specify how changes would alter the field. In some situations—when, for instance, a court's grant of review would call into question a law that commercial actors rely on—the mere uncertainty created by the court's consideration of an issue is itself threatening to the amicus's interest, and this fact should be pointed out to the court.

Nonparties may be involved in separate litigation that could be affected by the outcome of a case before the court. In that case, these nonparties may note the possible impact of the case at issue on their own

lawsuits through an amicus brief. If the only point nonparties wish to make is that their own cases could be affected by the decisions of the court in which they are filing an amicus brief, a summary brief is appropriate.

3. Developing Arguments Beyond the Party Briefs.

Amici are often in a position to add or develop legal arguments not made in a party brief. In general, amici that have special expertise or interest in an arcane or complex area of law can often make a more effective argument with regard to that area than the parties. When a case raises issues that are technically difficult for the court to grasp, a trade organization or specialty group can assist the court by explaining how the law affects the particular field. Amici that are repeat players in a legal practice area can aid the court with an explanation of that practice area.

On rare occasions, an amicus may want to argue positions that a party cannot. Governmental units, for instance, may be politically constrained from making certain arguments; amici often do not face the same constraints.

Amici may also have an interest in suggesting holdings, or even dispositions, that the parties have not considered. A party will sometimes, for tactical reasons, argue for a broad holding; an amicus can suggest a more narrow, alternative holding that protects the amicus's interest. Conversely, an amicus can suggest a broader holding when the party does not.

III. PROCEDURES FOR FILING AMICUS BRIEFS.

A. Texas Courts.¹

1. Leave to File Not Required

Leave to file an amicus brief is not required in Texas courts. TEX. R. APP. P. 11. Technically, the clerk's office does not file an amicus brief, but only receives it and forwards to the court. *Id.*

2. Filing Deadlines

An amicus brief may be filed any time before a decision issues.

3. Brief Cover

There are no special requirements for amicus briefs. Amicus briefs must comply with the rules governing party briefs, including Appellate Rules 38.1 and Rule 9.4.

4. Brief Content

Amicus briefs must:

¹ Local Texas Courts of Appeals rules may vary; be sure to check local rules before filing.

- (1) comply with the briefing rules for parties;
- (2) identify the person or entity on whose behalf the brief is tendered;
- (3) disclose the source of any fee paid or to be paid for the brief.
- (4) certify that copies have been served on all parties. TEX. R. APP. P. 11.

5. Page Limits

There are no specific page limits for amicus briefs. Amicus briefs must comply with Rule 38.4 governing party briefs, which means that an original amicus brief should not exceed 50 pages, and a reply amicus brief should not exceed 25 pages. An amicus brief in support of a petition for review to the Texas Supreme Court or Court of Criminal Appeals should not exceed 15 pages. *See* TEX. R. APP. P. 53.6, 68.5.

B. United States Courts of Appeals.²

1. Leave to File Is Generally Required.

The general rule is that an amicus brief can only be filed with leave of the court. But an amicus brief will be filed without leave when (1) the entity filing the brief is the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia, or (2) all parties consent to the filing of the brief and the brief contains a certificate of that consent. *See* FED. R. APP. P. 29.

If leave to file is required, a motion for leave to file should be filed with the Amicus 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 on the brief are relevant to the case. *See* FED. R. APP. P. 29(b).

2. Filing Deadlines

An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing. FED. R. APP. P. 29(e).

3. Brief Cover

The cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. FED. R. APP. P. 29(c).

4. Brief Content

An amicus brief must include the following:

- (1) a table of contents, with page references;
 - (2) a table of authorities;
 - (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
 - (4) an argument, which need not include a statement of the applicable standard of review; and
 - (5) a certificate of compliance.
- See* FED. R. APP. P. 29(c).

5. Page Limits

Except by the court's permission, an amicus brief may be no more than one-half the maximum length allowed for a party's principal brief. In most cases, this means the brief can be up to either 15 pages or 7000 words, whichever is longer. *See* FED. R. APP. P. 32(a)(7)(A); R. 32(a)(7) (B)(i). If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

C. United States Supreme Court

1. Consent of All the Parties or Leave to File Is Generally Required.

The following briefs can be filed without consent of the parties or leave of the Court: Briefs filed on behalf of (1) the United States by the Solicitor General; (2) any agency of the United States allowed by law to appear before the Court when submitted by the agency's authorized legal representative; (3) a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or (4) of a city, county, town, or similar entity when submitted by its authorized law officer. SUP. CT. R. 37.

All other briefs will only be filed if accompanied by the written consent of all parties, or if the Court grants leave to file. When a party to the case has withheld consent, a motion for leave to file an amicus curiae brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing the amicus curiae brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. *Id.*

2. Filing Deadlines

There are different deadlines for amicus briefs submitted at the petition stage (before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ), and at the merits stage.

At the Petition Stage:

For amicus briefs submitted before the Court's consideration of a petition for a writ of certiorari,

² Local United States Courts of Appeals rules may vary; be sure to check local rules before filing.

motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, the brief shall be submitted within the time allowed for filing a brief in opposition or for filing a motion to dismiss or affirm. *Id.* A brief in opposition is due within 30 days after the case is placed on the docket. SUP. CT. R. 15. There can be a significant lag time between receipt of the petition at the clerk's office and docketing of the cases, so the docket should be monitored carefully.

At the Merits Stage:

The brief shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. SUP. CT. R. 37.

3. Brief Cover

The cover shall identify the party supported or indicate whether the brief suggests affirmance or reversal. SUP. CT. R. 37. An amicus brief filed at the petition stage should have a cream cover, and one filed at the merits briefing stage should have a light green cover. SUP. CT. R. 33.

4. Brief Content

The brief must contain:

- (1) a statement indicating whether consent to file the brief was granted by all the parties;
- (2) a disclosure statement in the first footnote on the first page of text (briefs that can be filed without consent or leave do not need this disclosure statement). The disclosure statement must indicate:
 - (a) whether counsel for a party authored the brief in whole or in part;
 - (b) every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief;
- (2) the interest of the amicus curiae;
- (3) a summary of the argument;
- (4) an argument;
- (5) a conclusion. SUP. CT. R. 37.

5. Page Limits

The limit is 20 pages at the petition stage, and thirty pages at the merits stage. SUP. CT. R. 33.

IV. CONCLUSION.

Amicus briefs can have a significant impact, both by signaling interest and by providing the court with specialized knowledge that the parties lack. An amicus brief must strongly advocate for the disposition it

seeks; beyond that, a truly effective amicus brief will aid the court in its decision-making process.