

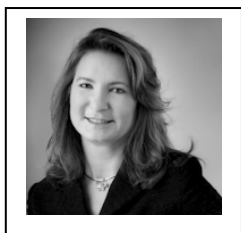
## APPELLATE PRACTICE

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### IN THIS ISSUE

*M.C. Sungaila presents statistical data revealing the prevalence of amicus briefs in the U.S Supreme Court as well as state courts, discusses the influence of such briefs on judicial decisions, and provides tips for maximizing the effectiveness of an amicus brief.*

### A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs



#### ABOUT THE AUTHOR

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## The Rise of Amicus Briefs

Once rare, amicus curiae or “friend of the court” briefs are now filed in the majority of appellate cases heard by the United States Supreme Court and various state supreme courts.

In the United States Supreme Court, amicus briefs were filed in thirty-five percent of the Court’s cases in the 1965-1966 term; by 1995, one or more amicus briefs were filed in nearly ninety percent of the Court’s cases.<sup>1</sup> An analysis of the 1999 to 2008 terms conducted by my firm showed that in civil cases the average filing rate for amicus briefs was 92.4% (with a high of 100% amicus participation in all civil cases in the 2007 term).<sup>2</sup> The number of civil cases before the Court each term ranged from thirty-nine to sixty-one; the total number of amicus briefs filed each term in those cases ranged from 344 to 627.<sup>3</sup>

“Historically, state courts were more likely than the U.S.[.] Supreme Court to limit the role of amicus participation in

appeals.”<sup>4</sup> Nonetheless, the number of amicus briefs filed in state high courts tripled in the 1980’s.<sup>5</sup> The growth in use of amicus briefs has not been uniform across all states, however. The National Science Foundation-sponsored State Supreme Court project calculated that during the 1995 to 1998 sessions, less than five percent of the cases before the Arkansas, Idaho, Iowa, South Dakota, and Texas high courts involved amici participation; however, over twenty-five percent of the cases before the California, Michigan, New Jersey, Oklahoma, and Oregon supreme courts featured amicus briefs.<sup>6</sup> The frequency of amicus participation between 1960 and 2000 was highest before the Florida, Massachusetts, North Carolina, and Washington high courts; two previous studies revealed the top five states for amicus participation to be California, Michigan, New Jersey, New York, and Ohio.<sup>7</sup>

My firm’s own survey of amicus filings in the California Supreme Court reveals high amicus participation in the last decade. The amicus filing rate was 59.7 % from 2000 to 2009 in civil cases: out of 707 civil cases decided by the

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<sup>1</sup> See Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, 8 S. Cal. Rev. L. & Women’s Studies 187, 188, nn. 4-6 (1999) (citing data from Supreme Court advocate Bruce Ennis, a respected Supreme Court practice treatise, and a news report in the ABA Litigation News).

<sup>2</sup> Law Clerk Christina Bialek gathered and analyzed this data under my direction. The data was drawn from both the Supreme Court Database funded by the National Science Foundation (<http://scdb.wustl.edu/>) and Westlaw. The data excludes memorandum opinions.

<sup>3</sup> These percentages were calculated by comparing the number of civil cases and the number of civil cases in which amicus briefs were filed, rounded to the nearest tenth of a percent.

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<sup>4</sup> Sarah F. Corbally, Donald C. Bross, & Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, 25 Just. Sys. J. 39, 43 (2004).

<sup>5</sup> *Id.* at 44.

<sup>6</sup> Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 Just. Sys. J. 243, 247, 253 (2001).

<sup>7</sup> *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, *supra*, 46.

court, 422 had one or more amicus briefs.<sup>8</sup>

The average number of amicus briefs being filed in each case is also increasing. Even twenty-five years ago, one United States Supreme Court advocate observed: “In the earlier years, a case with amicus participation would usually involve only one amicus. In recent years, however, it has become common for several amicus organizations, sometimes dozens, to file briefs in a given case. Since amicus briefs are now filed in over two-thirds of all the Supreme Court cases decided by opinion, and since it is common for more than one amicus to participate in a given case, it is quite possible that the Supreme Court now reviews more briefs from amici than from parties.”<sup>9</sup> Indeed, during the Court’s 1981 term, 231 amicus briefs were submitted.<sup>10</sup> In the California Supreme Court, 1,868 amicus briefs were filed in 422 of the 707 civil cases decided by the court between 2000 and 2009.

### Perceived Influence of Amici

“Individual briefs may be influential, if even the aggregate number filed are

not.”<sup>11</sup> Amicus briefs have repeatedly provided the United States Supreme Court with information and legal theories that have influenced the Court’s decisions. The majority opinion in *Roe v. Wade*, 410 U.S. 113, 148-152 (1973) expressly referred to positions urged by amicus groups and relied heavily on historical, social, and medical data presented by amici. In the companion case of *Doe v. Bolton*, 410 U.S. 179, 195 (1973), the majority expressly relied on data provided by amici showing that facilities other than hospitals are adequate to perform abortions, and rejected the state’s contrary argument. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld the race-based admissions policy of the University of Michigan Law School; at oral argument and in the Court’s decision, the justices referred to and relied on the amicus brief of retired military officers.<sup>12</sup>

Collectively, amicus briefs have an influential role in cases as well. “Past research on the impact of amicus briefs in the [United States] Supreme Court has indicated that the presence of amicus briefs increases the likelihood of a grant of certiorari . . . and influences litigant success on the merits.”<sup>13</sup> The

<sup>8</sup> Horvitz & Levy LLP Law Clerk and Loyola law student Christina Bialek used the following research methodology on Westlaw: Supreme/3 court/3 “of California” & DA (aft 1/1/\_\_\_ & bef 12/31/\_\_\_ % “review granted” “previously published” “withdrawn for NRS volume” “only the Westlaw.”

<sup>9</sup> Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 604 (1983-1984).

<sup>10</sup> Karen O’Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 Just. Sys. J. 35, 39 (1983).

<sup>11</sup> *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, *supra*, 41.

<sup>12</sup> See Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. App. Prac. & Process 523, 523-24 & n.4 (2003). The California Supreme Court has also discussed the argument of amici at length in its opinions. See *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965 (1993), 25 Cal. Rptr. 2d 550; *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal. Rptr. 3d 683 (2008).

<sup>13</sup> Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae*

Court's citation of amicus briefs has also increased. According to one study, United States Supreme Court justices directly mentioned at least one amicus brief in eighteen percent of the cases in which amicus briefs were filed between the 1969 and 1981 terms.<sup>14</sup> Another study reveals that, "of all [United States Supreme Court] opinions published between 1986 and 1995, approximately fifteen percent cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief" without citing or naming it.<sup>15</sup> More than sixty-five percent of the amicus briefs filed in the United States Supreme Court in 1992 contained information not found in the briefs of the direct parties.<sup>16</sup>

A survey of amicus brief filings and influence in state supreme courts showed that amicus briefs were acknowledged or cited in thirty-one percent of cases, and arguments made in amicus briefs were discussed in eighty-two percent of the cases sampled.<sup>17</sup> When they were asked what percentage range "most accurately describes the number of *amicus curiae* briefs in your court which are influential," "27 percent of the justices regarded fewer than a quarter influential, 32 percent

considered between a quarter and one half influential, and 36 percent considered between one half and three quarters influential."<sup>18</sup>

### **Standing out from the Crowd: Tips for Maximizing an Amicus Brief's Effectiveness**

*Make sure your brief adds something to the case.* Judges, clerks, advocates, and scholars agree: the first rule of merits amicus briefs is not to duplicate the parties' briefs. "Amicus briefs that repeat party positions for the purpose of taking a 'strength in numbers' approach should be avoided at all costs."<sup>19</sup> In addition to avoiding "me too" briefs, amici should collaborate on a single joint brief rather than file multiple separate briefs which cover similar points.<sup>20</sup> Such an approach limits the amount of briefs overall in a case, and correspondingly focuses the court's attention on a few select briefs instead of scattering the court's attention among many.<sup>21</sup>

There are at least three important roles an amicus can fill: "1) to amplify or supplement the legal and factual arguments presented by the parties or, in some cases, to present alternative

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participation in U.S. Supreme Court Litigation, 38 Law & Soc'y Rev. 807, 808 (2004) (citation omitted).

<sup>14</sup> O'Connor & Epstein, *supra*, 42-43.

<sup>15</sup> Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 35 (2004).

<sup>16</sup> Victor E. Flango, Donald C. Bross, & Sarah Corbally, *Amicus Curiae Briefs: The Court's Perspective*, 27 Just. Sys. J. 180, 181 (2006).

<sup>17</sup> *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, *supra*, at 53.

<sup>18</sup> *Amicus Curiae Briefs: The Court's Perspective*, *supra*, at 185.

<sup>19</sup> Lynch, *supra*, at 67.

<sup>20</sup> See *id.* at 56.

<sup>21</sup> See *id.* at 55 (providing statistic that ninety percent of United States Supreme Court law clerks surveyed said collaboration amongst amici and a correspondingly more limited pool of amicus briefs would make a positive difference); *id.* at 44 ("A few clerks noted that, in cases where fewer amicus briefs are filed, there is a greater probability that each will be given more attention.").

arguments not raised by either party; 2) to inform the court of implications of a decision or to point out unintended consequences for people or groups not party to the suit; and 3) to communicate the importance of the case by their very presence.”<sup>22</sup> According to one survey, most state court judges and law clerks “found. . . amicus briefs useful because they provide legal citations, policy considerations, social-science data, and economic data that might otherwise not be brought to the attention of the appellate courts.”<sup>23</sup>

*Write well and succinctly.* Certainly, it is not groundbreaking to assert that an appellate brief should be well-written and as “brief” as possible. But brevity and eloquence are particularly important for amicus briefs, since they are, after all, “extra” briefs for the court to read in a case. Indeed, a well-written amicus brief is crucial, according to court clerks and justices. In response to a survey, United States Supreme Court law clerks “repeatedly emphasized that most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument.”<sup>24</sup> State supreme court justices and clerks similarly highlighted the need for a well-written and researched brief in response to an amicus brief survey.<sup>25</sup>

*Choose your amici (and amicus counsel) carefully.* One political scientist who studied the influence of amicus briefs before the United States Supreme Court concluded that *who* files an amicus brief matters as much as what the brief says. Relying on statistics demonstrating that an amicus brief by the Solicitor General’s Office is the single most influential amicus filing a party can have, Professor Paul Collins has opined that “litigation experience” of the attorneys filing the brief and “the prestige of amicus participants may be vital to success in the Court.”<sup>26</sup> Professor Collins’ findings comport with the responses of Supreme Court law clerks to one survey: “Sixteen percent of the clerks noted *who* filed a brief—the organization filing and/or the firm representing and the specific attorney authoring—when making their determinations of whether [an amicus brief] merited a closer read.”<sup>27</sup> Once the brief has the clerk’s attention, of course, it should satisfy the first rule of amicus briefs and add something to the case.

This anecdotal evidence and data suggests that amici would do well to hire experienced appellate counsel and that appellate counsel should carefully choose the constellation of amici who join the brief.

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<sup>22</sup> *Amicus Curiae Briefs: The Court’s Perspective*, *supra*, at 181.

<sup>23</sup> *Id.* at 185.

<sup>24</sup> Lynch, *supra*, at 44.

<sup>25</sup> *Amicus Curiae Briefs: The Court’s Perspective*, *supra*, at 185-87.

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<sup>26</sup> Collins, *supra*, at 827.

<sup>27</sup> Lynch, *supra*, at 43.

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