Catholic University Law Review

Volume 33
Issue 3 *Spring 1984*

Article 6

1984

Effective Amicus Briefs

Bruce J. Ennis

EFFECTIVE AMICUS BRIEFS

*Bruce J. Ennis**

I. THREE MISCONCEPTIONS ABOUT AMICUS BRIEFS

Let's begin by dispelling three common misconceptions about amicus briefs. The first is that amicus briefs 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 judicial decisions in many more cases than is commonly realized. Occasionally, a case will be decided on a ground suggested only by an amicus, not by the parties. Frequently, judicial rulings, and thus their precedential value, will be narrower or broader than the parties had urged, because of a persuasive amicus brief. Courts often rely on factual information, cases or analytical approaches provided only by an amicus. A good idea is a good idea, whether it is contained in an amicus brief or in the brief of a party.

The second misconception is that amicus briefs are not filed very often, and then only in great constitutional cases. That was not true twenty years ago, and is even less true today.[1] Amicus briefs offer such enormous utility, flexibility and cost-effectiveness that their use is steadily and dramatically increasing. In the Supreme Court's 1965 Term, for example, of the 128 cases decided by opinion, 46 involved amicus briefs. Thus, even eighteen years ago, about a third of all opinion cases involved amicus participation. By the Court's 1980 Term, however, of the 137 cases decided by opinion, 97, or 71% of the total, involved amicus briefs.

Actually, the increasing and now quite common use of amicus briefs is

* Mr. Ennis is a partner of Ennis, Friedman, Bersoff & Ewing. A.B. 1962, Dartmouth College, J.D., 1965, University of Chicago. This article is a revision of remarks presented at a conference on Supreme Court Advocacy sponsored by the United States Department of Justice and held at Georgetown Law Center, Washington, D.C., October 17-18, 1983. For that reason, this article will be concerned primarily with amicus briefs in the United States Supreme Court. I wish to thank George Washington University law student Anna Dombrowski for her ideas and assistance.

1. *See generally* O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Participation*, 8 JUSTICE SYSTEM J. 35 (1983); O'Connor & Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOCIETY REV. 311 (1981-82); O'Connor & Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. OF POLITICS 479 (1983); Flaherty, *Amicus: A Friend or A Foe?* NAT'L L.J. 1 (Nov. 14, 1983).

even more dramatic than these figures suggest. 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.

These statistics indicate that if you have a case in the Supreme Court there is a good chance your opponent will be supported by an amicus brief. So it is no longer enough for you to write a first rate brief. In today's world, effective representation of your client requires that you at least seriously explore the possibility of enlisting persuasive amicus support on your client's behalf.

The third misconception is that amicus briefs are filed primarily by politically "liberal" public interest groups. That was largely true twenty years ago, but is not true today. There are now almost as many "conservative" public interest groups as liberal ones. Groups such as the Mountain States Legal Foundation, the Capital Legal Foundation, the Pacific Legal Foundation, and the New England Legal Foundation appear alongside the ACLU, the NAACP Legal Defense Fund, and the Natural Resources Defense Council in the lists of amici.

In addition, the United States frequently files amicus briefs. In fact, the Supreme Court *requests* the United States to participate as amicus "a couple of dozen" times each term.[2]

Moreover, the amicus brief is not limited to public interest groups or the United States. Professional associations such as the American Bar Association and the American Psychological Association, other governmental entities, corporations, unions, and banks now appear regularly as amici.[3]

II. Effective Cooperation Between Party and Amicus

Of course, there does not have to be any cooperation. Amici frequently

2. *See* Flaherty, *supra* note 1, at 25.

3. The ABA has recently filed amicus briefs in Pulliam v. Allen, *cert. granted*, 103 S. Ct. 1873 (1983); Illinois v. Gates, 103 S. Ct. 2317 (1983); Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

The American Psychological Association has recently filed amicus briefs in City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983); Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983); Mills v. Rogers, 457 U.S. 291 (1982); Blue Shield v. McCready, 457 U.S. 465 (1982); Youngberg v. Romeo, 457 U.S. 307 (1982).

The Association of Trial Lawyers frequently files amicus briefs. *See generally* 9 ATLA

file briefs supporting neither side, but advancing their own positions and interests. The Court will occasionally request the participation of an amicus when it suspects collusion between the parties, or when the parties do not have an adversary posture with respect to certain issues in the case.[4] Let's assume, however, as is more common (and as the Supreme Court's rules contemplate) that the amicus will support one of the parties. In that case, there is a great deal of support that can be provided in addition to filing an amicus brief. The amicus and its counsel can help the party plan the *party's* strategy, and can provide research, drafting, and editorial assistance to the party. The amicus can organize one or more moot courts, etc. This assistance is a much neglected resource that can be extremely useful.[5]

In the amicus brief itself, support for a party will usually take one of three forms:

Bar News 5 (Mar. 1983), for the guidelines used by ATLA in evaluating requests for amicus assistance. ATLA filed 12 amicus briefs in 1982-83.

Governmental entities, particularly states, frequently file amicus briefs. A small sample of other organizations filing Supreme Court amicus briefs during the 1980 Term includes:

American Bankers' Association; Securities Industry Association; U.A.W. Legal Services Plan; National Railway Labor Conference; AFL-CIO; Allegheny-Ludlum; Cummins Engine Co.; CBS, Inc.; TWA; National Steel Co.; Centex Corp.; National Semiconductor Corp.; Merck & Co.; Cessna Air; Georgia-Pacific; Mead Corp.; Chamber of Commerce of the United States; Boise-Cascade; Owens-Illinois; Safeway Stores; Weyerhaeuser Co.; American Insurance Association; Atlantic Richfield; American Bell International, Inc.; Sperry Corp.; Sylvania Technical Systems, Inc.; American Iron & Steel Institute; American Medical Association; American Association of University Professors; and Morgan Guaranty Trust Company of New York.

4. Perhaps the first amicus to appear in the United States Supreme Court was Henry Clay, who was allowed to appear as amicus because the Court suspected collusion between the parties. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823), mentioned in O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUSTICE J. 35, 36 (1983). Another example is Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983), in which both the United States and Bob Jones University, the nominal parties, took the position that the Internal Revenue Service lacked authority to issue a regulation which effectively denied tax exemptions for religious private schools which discriminated on the basis of race. *Id.* at 2025 n.9. The Supreme Court appointed a distinguished private attorney, William T. Coleman, Jr., who successfully urged the position, as amicus, that the IRS had the authority to deny tax exemptions for private, racially discriminatory religious schools.

5. A major advantage of amicus participation is simply having another competent lawyer examine the case, review the arguments the party's counsel intends to raise, and suggest alternative approaches. This factor is particularly important if the lawyer for the party does not have substantial Supreme Court experience, but the lawyer for the amicus does. Lawyers who closely follow Supreme Court decisions will be aware of related questions expressly reserved in recent opinions, of subtle shifts in judicial philosophy, pitfalls, areas of current interest or disinterest to the Justices, and relevant pending cases on the Court's docket that may escape the attention of other lawyers.

A. Helping the Party Flesh Out Arguments the Party is Forced to Make in Summary Form

Because of page limits, or considerations of tone and emphasis, parties are frequently forced to make some of the points they wish to make in rather abbreviated form. A supportive amicus can flesh out those points with additional discussion and citation of authority. Or the amicus can support points the party is making by providing a detailed legislative or constitutional history, a scholarly exposition of the common law, or a nationwide analysis of relevant state laws.

For example, in the recent case of *Toll v. Moreno*,[6] the World Bank submitted an amicus brief urging the Supreme Court to rule, on Supremacy Clause grounds, that certain state statutes which disadvantaged alien college students were unconstitutional. The alien students touched briefly on the Supremacy Clause, but the thrust and greater portion of their brief was necessarily concerned with their equal protection and due process arguments. The Court ruled for the students, but it chose to decide the case on the basis of the Supremacy Clause theory that had been advocated primarily by the amicus.

Similarly, in the Supreme Court's latest round of abortion decisions, the plaintiffs devoted only one paragraph in their brief to the argument that nonphysicians should be allowed to engage in abortion counseling because they thought they would probably lose that issue. Instead, the plaintiffs chose to stress other important issues they thought they had a better chance to win. But the American Psychological Association, as amicus, marshaled empirical studies to show why counseling by nonphysicians would help to promote truly informed consent, and the Court agreed.[7]

B. Making Arguments the Party Wants to Make But Cannot Make Itself

It frequently happens that a party wants a particular argument to be made but is not in a position to make that argument itself. The party may simply lack credibility on that issue, or it may be unable to make the argu-

6. 458 U.S. 1 (1982).

7. City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983). In addition, amicus groups can often supply relevant but specialized information not readily available to a party. For example, the majority opinion in Roe v. Wade, 410 U.S. 113 (1973), establishing a woman's constitutional right to effectuate her decision to have an abortion, expressly referred to positions urged by amicus groups, and relied heavily on historical, social and crucial medical data presented to the Court by amicus groups. *Id.* at 148-52. In the companion case of Doe v. Bolton, 410 U.S. 179 (1973), the majority noted that "various amici have presented us with a mass of data" showing that "some facilities other than hospitals are entirely adequate to perform abortions" and expressly relied on that data to reject the state's contrary claim. *Id.* at 195.

ment for political or tactical reasons. For example, governmental entities often feel compelled, for political reasons, to argue for very broad rulings: eliminate the exclusionary rule entirely, absolute immunity for all governmental employees, etc. But courts, including the Supreme Court, are institutionally conservative and usually prefer to decide cases on narrower grounds if possible. An amicus can suggest those narrower grounds: qualify the exclusionary rule rather than eliminate it, distinguish a prior case rather than overrule it, or dismiss certiorari as improvidently granted, among others.

A good example of this type of cooperation is *Metromedia, Inc. v. San Diego*,[8] in which San Diego sought to exclude most billboards from designated sections of the city, on grounds of traffic safety and aesthetics. The billboards carried primarily commercial messages, but they occasionally carried political messages as well. The billboard owners were represented by an experienced and extremely sophisticated Supreme Court advocate. He knew the Court would be closely divided, and would be more troubled by the regulation's prohibition of political speech than by its prohibition of commercial speech. The billboard owners, however, were not in a position to argue credibly on behalf of political speech because they did not themselves engage in political speech; they simply leased billboard space, primarily to commercial speakers. Their lawyer decided it would be important to demonstrate to the Court that organizations traditionally concerned with the protection of political speech were opposed to the San Diego ordinance, so he asked the ACLU if it would file an amicus brief emphasizing the political speech aspects of the case, and the ACLU agreed.

The Court, as expected, was closely divided. Although a majority of the Court agreed to a judgment striking down the San Diego ordinance, only three other Justices joined in Justice White's plurality opinion. Those four thought the ordinance was constitutional insofar as it regulated only commercial speech, but they struck down the entire ordinance because it unconstitutionally regulated political speech, and the commercial and political regulations were not severable.[9] Given the closeness of this decision, it seems clear that the billboard owners advanced their interests by enlisting amicus support.

8. 453 U.S. 490 (1981).
9. *Id.* at 512.

C. Informing the Court of the Broader Public Interests Involved, or of the Broader Implications of a Ruling

One of the most common forms of amicus support is to inform the court of interests other than those represented by the parties, and to focus the court's attention on the broader implications of various possible rulings. Governmental entities are uniquely situated to define and assert the "public interest," and their views as amicus will, therefore, carry substantial weight. If a governmental entity is already a party, amicus support from other governmental entities will enhance the credibility of the party's arguments.

III. PRINCIPLES OF EFFECTIVE AMICUS BRIEF WRITING

First, amicus briefs, like all briefs, should be concise, well organized, and carefully written.

Second, as directed by Supreme Court Rule 36.3, the amicus should clearly inform the court of its interest in the case and should indicate why the factual or legal arguments it intends to present will not adequately be presented by the parties. As this rule suggests, the amicus should avoid duplicating the work of the parties. It is an improper use of the amicus role, and an imposition on the Court, to file a "me too" amicus brief. There is one exception to the rule against "me too" amicus briefs, however. Before certiorari has been granted, when the Court is deciding whether a case has sufficient national importance to warrant review, it may be appropriate for several amici to file amicus briefs simply informing the Court that, in their opinion, the case warrants review. At this stage, the *fact* of amicus support may be relevant to the Court's deliberations, particularly if the amicus urging review is the United States.

Third, amici should keep in mind that a terrific law review article is usually a terrible brief. Amicus briefs, like all briefs, should not be written to be read by an abstract entity known as "a court." They should be written to appeal to and persuade individual judges, with individual predispositions and widely varying judicial philosophies. Particularly at the Supreme Court level, it is important for amici (and for parties) to try to predict which Justices are likely to be the "swing votes" on particular issues. It is a waste of time for an amicus to preach to the already converted, or to urge individual Justices to adopt positions they have squarely rejected in earlier decisions. Once the "swing vote" Justices have been identified, the amicus brief should be drafted to catch *their* attention, to anticipate and respond to *their* likely concerns, and to urge positions that are likely to attract *their* votes.

This "tailoring" of amicus briefs can be achieved in hundreds of subtle and not-so-subtle ways, ranging from stressing prior opinions of the "swing vote" Justices to enlisting as amicus organizations particular professional associations, trade associations, or other entities whose views the swing vote Justices are likely to find persuasive.

Depending on the issue involved, it may be useful for an amicus to retain as its lawyer or co-counsel a former Solicitor General, a distinguished law professor with recognized expertise on the issue involved, or an experienced Supreme Court advocate whose previous briefs have earned the respect of the Justices. Of course, it is essential that amicus briefs conform to the Court's rules.[10]

10. *See generally* SUP. CT. R. 36. A motion for leave to file an amicus brief "prior to consideration of the jurisdictional statement or of the petition for writ of certiorari" is "not favored" unless "accompanied by written consent of the parties." SUP. CT. R. 36.1. The motion must be accompanied by the proposed brief, which shall not exceed 20 pages. *Id.* Consent need not be obtained when the amicus is a state or a political subdivision of a state. If such a governmental entity finds it necessary to file an amicus brief before the Court has set the case for oral argument, however, it would be expedient for it to indicate its awareness that amicus briefs at that stage are not favored, and to state the reasons why it has nevertheless chosen to file. *See id.* at 36.4; *see also* SUP. CT. R. 33, 34, 38 & 42 which govern the size of amicus motions and briefs, the type of printing, the color of covers, the page limits, the requirements for contents and organization, the number of copies to be filed, oral argument by amicus, and the other requirements of amicus briefs.