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The Amicus Curiae Brief: Its Increasing Role and Impact on Appellate Court Decisions

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Since the start of the twentieth century, the role of amicus curiae ("friend of the court") briefs has changed dramatically. At the start of the twentieth century, amicus briefs were filed in only about ten percent of the U.S. Supreme Court's cases[1] and were typically used to provide an impartial observer's viewpoint on the case.[2] Since then, there has been a steep rise in the filing of amicus briefs before the U.S. Supreme Court, as well as a shift in the function of the briefs.[3] Today, amicus briefs are commonplace and are increasingly influential on matters of public concern. Although most high-profile amicus briefs continue to be filed with the Supreme Court, there is a significant opportunity for amicus impact on other federal appellate courts as well as state appellate courts, where amicus participation is less common.

The use of amicus briefs

The rise of the use of the amicus brief has been largely credited to the pivotal role that the amicus brief played in the U.S. Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).[4] In *Mapp*, the American Civil Liberties Union (ACLU) argued that the Fourth Amendment[5] protected against unreasonable searches and seizures, and that it applied to the states through the Fourteenth Amendment. The Supreme Court found the ACLU's argument to be persuasive, and largely based its decision on the arguments of amici.[6] Following the Supreme Court's decision in *Mapp*, the use of amicus briefs increased significantly.[7]

During the 2014-2015 term, ninety-eight percent of U.S. Supreme Court cases had amicus filings (meaning all but one case).[8] In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court's landmark marriage equality ruling, a record 148 amici filed amicus briefs.[9] That broke the previous record of 136 amici briefs filed in the companion health care cases challenging the Affordable Care Act in 2012.[10] By contrast, amici averaged approximately one brief per case in the 1950s, before the *Mapp* case was decided.[11]

Amicus participation

Historically, the United States government has played a large role as amicus in appellate matters, particularly at the highest appellate level.[12] The most common governmental representatives that file amicus briefs include the United States Solicitor General, attorneys general of the states, counsel of federal agencies, and counsel for county and municipal governments.[13] As amicus, the Office of the Solicitor General,

which represents the United States before the Supreme Court, is particularly active in Supreme Court cases. During the 2014-2015 term, the Solicitor General appeared as an amicus in thirty-three of the sixty-six argued cases.[14] One of the reasons for the prevalence of governmental representation as amici is that the Supreme Court rules, along with the rules governing the courts of appeals, afford more discretion to the government when serving in the role of amicus.[15] For example, the government, as amicus, is permitted to file without the consent of the parties, in contrast to all other types of amici.[16]

Increasingly, a growing number of legal observers have perceived amici as interest group lobbyists representing private interests.[17] Although the Supreme Court and federal appellate rules require private persons or organizations to obtain the consent of both parties to file an amicus brief, such consent is often granted.[18] The top amicus participants during the 1976-2006 terms include the ACLU, the National Association of Criminal Defense Lawyers, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the International City Management Association, the Washington Legal Foundation, the Council of State Governments, the Chambers of Commerce, the National Conference of State Legislatures, and the AFL-CIO.[19] Thus, while the federal government continues to participate as amicus in federal appeals, non-governmental entities are increasing amici participants.

The role of amici

The amicus brief has also shifted in function over the past several decades. Judge Richard Posner of the Seventh Circuit Court of Appeals once famously quipped that the role of an amicus should be a "friend of the court," not a "friend of the party."[20] Although amicus briefs still serve to assist and inform the court, more frequently, they are actually written by a "friend of a party."[21] In other cases, the amicus briefs represent distinct interests altogether, acting almost as a third party. However, while the amicus brief has evolved in function, a compelling amicus brief should still fulfill its original role as a helpful resource and respectful adviser to the court. But amicus briefs also serve to inform the court regarding competing policy issues, provide specialized or unique perspectives on issues, interest group endorsements, and supplement a party's brief, among other functions. Because amici may serve a variety of functions and represent a variety of interests, it is customary for parties at the Supreme Court to file blanket consent to amicus briefs.[22]

Counsel for parties in high-profile cases before courts that can experience a deluge of amicus filings should think strategically about amicus contributions. More is not always better. Courts overwhelmed by high volumes of amicus briefs may be less inclined to spend substantial time considering those that make the most compelling or helpful points. It may therefore be in the parties' best strategic interests to sometimes turn down certain amici who may wish to file amicus briefs. For example, in the high-profile U.S. Supreme Court case, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Solicitor General Neal Katyal chose to accept only 37 amicus briefs out of a proposed 150 briefs because he did not want repetition and wanted to avoid blunting

the impact of the strongest, most diverse amici.[23] Surveys of Supreme Court law clerks seem to lend support to such strategies: one survey of Supreme Court law clerks reveals that the more amicus briefs that are filed on the merits, the greater the chance that the valuable ones will get lost in the shuffle.[24]

Today, amicus briefs are also used to affect whether petitions for certiorari are granted, in addition to influencing the court's decision on the merits.[25] Amici commonly write amicus briefs both in furtherance of and in opposition to the granting of a writ of certiorari.[26] Based on studies of the effect of amici filings at the cert level, it is clear that the interest of amici can be a factor in the court's decision to grant review. For example, during the 2005-2006 term, the presence of at least one amicus brief supporting a cert petition increased the odds of cert being granted by twenty percent.[27] The odds of review jumped to fifty-six percent if four or more amicus briefs supported the petition.[28] At a time when the number of cert petitions is increasing, while the number of cases the Supreme Court actually accepts is decreasing, it is imperative to find ways to elevate a cert petition to the Court, and amicus briefs may provide an effective solution.[29]

The impact of amici on appellate courts

Over the past several decades, the role of amici has transformed appellate practice. The filing of amicus briefs is now commonplace in federal and state appellate courts and is particularly prevalent in matters of public concern. Although the effects of amicus submissions are difficult to evaluate, appellate courts, particularly the Supreme Court, cite to amicus briefs with increasing regularity.[30] Amicus briefs can present arguments not found in the parties' briefs and can play a critical role in appellate courts' rationale for a decision.[31] In some cases, courts will base its decision solely on arguments presented in an amicus brief.[32]

As a byproduct of the changing role of amicus briefs, the workload of appellate courts has increased significantly.[33] Amicus briefs were filed in ninety-six percent of all Supreme Court cases during the 2013-2014 term, and in ninety-eight percent of all cases decided during the 2014-2015 term.[34] Although perspectives within the legal community about the utility of amicus briefs vary, the most common reaction among judges is supportive based on the assistance they can provide to the court in its deliberations.[35] For example, Justice Black wrote that "most of the cases before [the Supreme] Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs."[36] Others consider such filings as imposing unwarranted burdens on judges and their staffs.[37] For example, Judge Posner has argued that the court should be more restrictive towards amicus submissions because "judges have heavy caseloads . . . . and [therefore] wish to minimize extraneous reading."[38] Surveys also reveal that former Supreme Court clerks believe that most amicus briefs are duplicative, and find that a truly useful amicus brief was like finding "diamonds in the rough."[39] Although amicus briefs may have increased appellate courts' workloads, most judges remain supportive of amici participation.[40]

Takeaways

The participation of amici and the function of amicus briefs have changed dramatically in the past century. Amicus briefs have clearly become an important phenomenon in appellate litigation. Despite the increased burden placed on courts due to increased amicus filings, amicus briefs continue to be requested and allowed in appellate courts because of the ultimate benefit that such briefs confer on the court.[41] The fact that justices routinely cite amicus briefs suggests that they serve a helpful purpose in the court's decisionmaking.[42] Appellate practitioners are well served to consider a role for amici in appellate matters, particularly in matters of public concern, and look for opportunities to invite amicus participation that could be impactful not only before the U.S. Supreme Court but in other federal appellate courts and state appellate courts as well.

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[1] Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 (2000).

[2] Nancy Bage Sorenson, Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 St. Mary's L. J. 1219, 1220 (1999).

[3] *See* Sorenson, *supra*, at 1230.

[4] *See* Sorenson, *supra*, at 1229.

[5] *See* Sorenson, *supra*, at 1229; Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 Int'l & Comp. L.Q. 1017, 1036 (1967).

[6] *See* Sorenson, *supra*, at 1229.

[7] *See* Sorenson, *supra*, at 1229; Kearney & Merrill, *supra*, at 743.

[8] Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, Nat'l L. J. (Aug. 19, 2015).

[9] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. R. 1901, 1911 (2016).

[10] Larsen & Devins, *supra*, at 1911.

[11] Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, Nat'l L.J. 11 (Sept. 8, 2014).

[12] *See* Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 1–2 (2008); Sorenson, *supra*, at 1231.

[13] Sorenson, *supra*, at 1231–32.

[14] *See* Larsen & Devins, *supra*, at 1932.

[15] *See* Sup. Ct. R. 37.4; Fed. R. App. P. 29(a); Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 Just. Sys. J. 35, 37 (1983).

[16] Sup. Ct. R. 37.4.

[17] *See* Kearney & Merrill, *supra*, at 783.

[18] Sup. Ct. R. 37; Fed. R. App. P. 29.

[19] *See* David Hooper Scott, *Friendly Fire: Amicus Curiae Participation and Impact at the Roberts Court*, Diss., Univ. Tenn. 22 (2013).

[20] *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); Larsen & Devins, *supra*, at 1912.

[21] Sorenson, *supra*, at 1231; John Howard, *Retaliation, Reinstatement, and Friends of the Court: Amicus Participation in* Brock v. Roadway Express, Inc., 31 How. L.J. 241, 256 (1988).

[22] *See* Larsen & Devins, *supra*, at 1925.

[23] *See* Jonathan Mahler, *The Challenge:* Hamdan v. Rumsfeld *and the Fight over Presidential Power* 231–32 (2008); Larsen & Devins, *supra*, at 1925.

[24] Larsen & Devins, *supra*, at 1907; Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 44–45 (2004)

[25] *See* Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. App. Prac. & Process 175, 176–77 (2007).

[26] Sorenson, *supra*, at 1230.

[27] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1528 (2008).

[28] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1528 (2008).

[29] Timothy S. Bishop et al., *Tips on Petitioning for Certiorari in the U.S. Supreme Court*, The Circuit Rider 28 (2007).

[30] *See* Larsen & Devins, *supra*, at 1907.

[31] Kearney & Merrill, *supra*, at 745.

[32] *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368 n.3, 382 (1977); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961); *see also* Kearney & Merrill, *supra*, at 745.

[33] Sorenson, *supra*, at 1230.

[34] Larsen & Devins, *supra*, at 1911.

[35] Kearney & Merrill, *supra*, at 745.

[36] John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 Case W. Res. 667, 677 (2005); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 715 (1962).

[37] Kearney & Merrill, *supra*, at 745.

[38] *National Organization for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000); Harrington, *supra*, at 677.

[39] Lynch, *supra*, at 45.

[40] *See* Kearney & Merrill, *supra*, at 745.

[41] Sorenson, *supra*, at 1230.

[42] Kearney &Merrill, *supra*, at 757.

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