

# Amicus Brief FAQs

In-house litigation counsel often are asked whether their companies will join an amicus curiae brief, either directly or through

a trade association or other business group. Or, sometimes, an in-house counsel wants to line up impressive amicus support when his or her company is involved in an appeal. Either way, here are some questions that in-house counsel—and other attorneys who do not specialize in appellate practice—frequently ask about amicus briefs.

## What Is the Biggest Mistake That Amicus Briefs Make?

The most common error amicus briefs make is duplicating the legal arguments that the supported party already has made well in its own brief. Supreme Court Rule 37.1 states that an amicus brief that calls the Court's attention to "relevant matter not already brought to its attention by the parties may be of considerable help to the Court," but an amicus brief that "does not serve this purpose burdens the Court, and its filing is not favored." Along the same lines, Federal Rule of Appellate Procedure 29(b)(2) indicates that an amicus brief should be "desirable" as well as "relevant." Appellate judges or their law clerks may not read an amicus brief that merely replicates arguments contained in a supported party's brief. Repeating an argument also creates a risk of presenting the argument in a way that will undermine, rather than bolster, the supported party. Unfortunately, inexperienced amicus counsel often do not know these things, and so they will address the issues as if the amicus brief were the supported party's brief.



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## So What Purposes Are Amicus Briefs Supposed to Serve?

There are many reasons for filing amicus briefs. They include supplementing, but not duplicating, the supported party's legal arguments, presenting additional legal arguments not addressed in the supported party's brief, and perhaps most importantly, discussing the amicus curiae's perspective on the importance and potential impact of the legal issues involved in the appeal. Explaining why the issues are significant and transcend an appeal may be particularly beneficial when an amicus brief is filed to support granting a certiorari petition or other request for a permissive appeal.

## When Should a Company Consider Filing an Amicus Brief in Its Own Name Rather than Deferring to a Trade Association or Other Business Group?

Amicus briefs have become common in the Supreme Court, federal courts of appeals, and many state appellate courts. As a result, a company usually does not have much reason to be concerned about "sticking its neck out" by filing an amicus brief in its own name, either alone or jointly with other individually named companies.

Because other companies in the same industry often share a company's interest in a legal issue, it normally makes sense for an appropriate trade association or other business group to file an amicus brief, rather than for individual companies each to file one. The main exception, however, is when a company is a party in another pending appeal, or in a trial court proceeding, involving the same issue. Under those circumstances, when the outcome of an appeal may directly affect a company's position in other pending litigation, the company should consider protecting its interests by filing an amicus brief. The "statement of interest" in the company's amicus brief then should identify the other

litigation, as well as its stake in the outcome of the appeal.

## How Important Is the Statement of Interest in an Amicus Brief?

The statement of interest is very important. It needs to induce a court to read a brief. That usually cannot be accomplished if a statement of interest is merely composed of a few boilerplate sentences that describe the amicus or amici curiae in general terms. Instead, a statement of interest should identify which particular legal issues the brief addresses, explain why those issues are important to the amicus or amici curiae, and concisely summarize how and why the amicus brief addresses those issues in a way that should be beneficial to a court.

## What Else Makes an Amicus Brief Effective?

To increase the chances that someone actually will read an amicus brief cover to cover, it needs to be concise—especially when multiple amici curiae will file briefs in a case. The always challenging goal is to file an amicus brief that is considerably shorter than the particular appellate court's rules allow. Again, an effective amicus brief needs to say something different than the supported party's brief. In addition, an amicus brief should be written in the elevated and somewhat restrained tone that appellate courts respect—a style of writing that may be quite unlike how trial court briefs are written. They also should comply with any applicable content and format rules, for example, by including a table of authorities, and of course, they should contain proper legal citations.

## What Other Sections Should an Amicus Brief Include?

Assuming that the amicus brief supports one or more of the parties, there is no reason to repeat the legal issues in the questions presented section in the supported parties' brief. Attempting to restate these legal issues in the amicus brief very well may undermine the supported parties' position. An amicus brief should include a conclusion, however.

### Are Amicus Briefs Limited to the Facts in the Record?

Dealing with the facts in the record in an amicus brief is somewhat of a gray area. An amicus brief should not refer to case-specific facts that are not in the record on appeal. However, amicus briefs that present information that is not case specific and that is not in the record, but that adds perspective to the legal issues, is generally acceptable, and indeed, fosters one of the basic purposes of amicus briefs. *See* Sup. Ct. R. 37.1.

### How Much Assistance Can an Amicus Attorney Receive from the Supported Party's Attorney?

Soliciting amicus support is a common practice. It is not inappropriate for in-house or outside counsel representing a party in an appeal to contact prospective amici curiae, help organize them into one or more amicus briefs, suggest particular subjects, issues, or arguments for amicus briefs to address, provide amicus counsel with copies of non-confidential record materials, or a combination of these. Parties also sometimes recommend amicus counsel who are skilled in appellate brief writing. There also generally is no problem inviting a supported party's appellate attorney to read and to comment on a final draft of an amicus brief.

But this should be as far as input from a supported party's counsel should go. Supreme Court Rule 37.6 requires every nongovernmental amicus brief to include, as the first footnote on the first page of text, a statement indicating "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." The same rule also requires that first footnote to "identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Federal Rule of Appellate Procedure 29(c)(5) establishes virtually the same disclosure requirement for amicus briefs submitted to federal courts of appeals. These rules help to ensure the independence of amicus briefs and to deter parties from using amicus briefs as "page extensions" for their own arguments.

### How Much Does It Cost to Prepare an Amicus Brief?

Producing a high-quality amicus brief requires a substantial amount of attorney thought, time, and effort. Fees, whether hourly or fixed, are generally less than, but in some cases can be comparable to, fees for preparing a party's opening brief. A lot de-

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pends on the number and complexity of the issues that the amicus brief will address and the amount of research that needs to be performed. Many trade associations and other business groups set their own "going rates" for amicus briefs. Individual companies interested in filing an amicus brief in an appeal often pool resources and share fees by combining into a single amicus brief.

### Do the Rules Require the Amicus Counsel to Obtain the Nonsupported Parties' Consent Before Filing an Amicus Brief?

Appellate rules generally require amicus counsel to seek the consent of all parties in the appeal to file an amicus brief, and they typically provide that if the counsel obtained consent, they do not need to submit a motion for leave to file. *See, e.g.,* Sup. Ct. R. 37.1 & 37.2; Fed. R. App. P. 29(a)–(b). Neither consent nor a motion for leave to file an amicus brief is required if the brief is being submitted by the United States, or on behalf of a state or local government. *See* Sup. Ct. R. 37.4. A similar rule applies in the federal courts of appeals, but only for amicus briefs filed on behalf of the United States, federal agencies or federal officers, or a state. *See* Fed. R. App. P. 29(a).

### When Is Withholding Consent Appropriate?

Courts disfavor withholding consent for the filing of amicus briefs unless an applicable deadline for filing an amicus brief has passed. Further, most appellate courts routinely grant timely motions for leave to file amicus briefs, even when opposed, so withholding consent almost always is futile and may be counterproductive. A party sometimes will try to condition consent upon having an advance opportunity to review a proposed amicus brief that will support the other side. Withholding or conditioning consent based on the content of an amicus brief, or on the identity of an amicus curiae, is quite inappropriate.

### Can a Company File an Amicus Brief in a Trial Court?

The vast majority of amicus briefs are filed in federal and state appellate courts. Filing an amicus brief in a federal district court or in a state trial court is possible, but left up to the discretion of the presiding judge. Under 28 U.S.C. §517, the U.S. Department of Justice can "attend to the interests of the United States" by filing a statement of interest in any federal or state trial court proceeding.

### What Other Key Points Should a Company Know About Federal Government Amicus Briefs in Private Party Appeals?

At the Supreme Court level, the United States, through the Solicitor General, almost never files an amicus brief at the certiorari petition stage unless specifically invited to do so by the Court. In such cases, if the Court subsequently grants certiorari, the Solicitor General will generally file an amicus brief on the merits and also participate in the oral argument on behalf of the supported party. In the federal courts of appeals, the U.S. Department of Justice sometimes will file an amicus brief on behalf of the United States or a federal agency in a private party lawsuit that implicates important federal interests. Before filing an amicus brief, the Office of the Solicitor General, or the appropriate U.S. Department of Justice division, often will solicit the views of the parties, as well as those of interested federal departments and agencies.

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### **Do State Governments also File Amicus Briefs?**

They do, in both the state and the federal appellate courts, and frequently they file amicus briefs jointly with other states. A state's solicitor general, attorney general, or both manage this amicus participation.

### **Can Amici Curiae Participate in Oral Arguments**

In the federal courts of appeals, with the leave of the court, private party amicus counsel may participate in the oral argument. *See* Fed. R. App. P. 29(g). But, this rarely happens. At the Supreme Court level, the Court virtually never allows amicus participation during an oral argument

unless the Court has appointed an attorney to serve as amicus counsel and present an oral argument on a particular issue.

### **Does DRI File Amicus Briefs on Behalf of Its Members?**

Yes. DRI has an active amicus brief program. In fact, DRI has become one of the most frequent amicus brief submitters in the Supreme Court. The DRI Amicus Committee considers requests for DRI amicus support, which is generally limited to Supreme Court, federal courts of appeals, and state supreme court cases. To receive consideration, you will want to obtain and submit a timely request form to Jay Ludlam, DRI Director of Publications. 