Ethical Considerations as Counsel for Amici Curiae

By Brandon W. Maxey

Over the past several years, amicus curiae briefs have become a key part of appellate litigation. In the U.S. Supreme Court alone, any case accepted for review is likely to receive a dozen briefs from amici. While much has been written on the increasingly visible role that amicus curiae briefs are playing, ethical considerations involving the drafting and use of these briefs has received little attention. This article seeks to discuss ethical considerations in this context.

The Applicable Rules

Both the Supreme Court Rules and the Federal Rules of Appellate Procedure are directed to the proper use of amicus briefs. Namely, Supreme Court Rule 37.6 provides the following:

> Except for briefs presented on behalf of *amicus curiae* listed in 37.4, a brief filed under this Rule shall indicate 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, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Sup. Ct. R. 37.6

Similarly, Federal Rule Appellate Procedure 29(a)(4)(E) provides that any amicus brief not authored by the United States or a state must include a statement that indicates whether

1. A party's counsel authored the brief in whole or in part,
2. A party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
3. A person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Fed. R. App. P. 29(a)(4)(E).

State courts have similar rules. In Texas, for example, any amicus brief submitted must "identify the person or entity on whose behalf the brief is tendered" and "disclose the source of any fee paid or to be paid for preparing the brief." Tex. R. App. P. 11.

Coordination Between Counsel for Parties and Amici

The above-listed rules do not overtly prohibit coordination between a party and amici curiae. In fact, the advisory committee notes for Rule 29 encourage coordination between a party and amicus, "to the extent that it helps to avoid duplicative arguments." *See* Fed. R. App. P. 29, Advisory Committee's Note, 1998 Amendments. The committee notes go on to specifically state that the "mere coordination—in the sense of sharing drafts of briefs—need not be disclosed" under Rule 29. *Id.*

But, when coordination goes beyond the mere sharing of the drafts, where is the line?

For starters, we know that a party to litigation should not "underwrite" or fund the drafting of an amicus brief. In a 2003 case, for example, the 11th Circuit considered whether a prevailing party could recover attorneys' fees related to the submission of amicus briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003). In doing so, the Court stated that "we suspect that amicus briefs are often used as a means of evading the page limitations on a party's briefs" and that "[e]ven where such efforts are successful, however, they should not be underwritten by the other party." *Id.* As such, the Court held that the trial court "should not award plaintiffs any attorneys' fees or expenses for work done in connection with supporting amicus briefs." *Id.* The Court further stated that "[t]o pay a party for such work would encourage the practice, which we are loathe to do." *Id.* In short, a party to litigation should not fund the drafting of amicus briefs.

For similar reasons, while general discussions on the themes/arguments advanced by the amicus brief are legitimate and commonplace activities, a party's counsel should avoid writing any portion of a brief—such as redlining a draft. Courts have long held that an amicus curiae's purpose is to provide differing perspectives which will be helpful to the Court, or to direct the Court to non-partisan issues touching on the case. *See e.g.* Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 Suffolk J. Trial & App. Adoc. 1, n. 5 (2000). To that end, the purpose behind the disclosure

requirements of Rule 29 and Supreme Court Rule 37.6 is to allow the Court to assess the credibility of the amici curiae. Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 Colorado Lawyer 23 (April 2017) (*citing* Shapiro *et al.*, *Supreme Court Practice* 518, 755 (Bloomberg BNA 10th ed. 2013).

Engaging in drafting activities as counsel for a party would certainly trigger the disclosure requirements of Rule 29 or Supreme Court Rule 37.6. Given the longstanding role played by amici curiae in appellate courts, such conduct would (at the very least) call into question the credibility of the brief.

This is particularly an ethical issue where a party is attempting to side-step the page limitations of a brief, as discussed briefly above by the *Glassroth* opinion. Even in states which do not have similar disclosure requirements as the Federal rules, most states have disciplinary rules that would prohibit such conduct. For example, in Texas, an attorney may not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Tex. Disciplinary R. 8.04(a)(3). Thus, attempting to use amicus briefs as an end-around page limitations or other requirements—even in the absence of disclosure requirements—would potentially constitute a violation of ethics rules. *See* Sorenson, *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, 1249–51 (1999).[31] This necessarily brings us to our next potential ethical area in the context of an amicus brief.

Submission of Quality Information

Especially where amici curiae seek to educate the Court on public policy matters, these briefs are often most helpful in aiding the Court in considering the impact of its decisions. Namely, amici curiae sometimes submit "Brandeis briefs," which contain "non-legal data to aid the Court in making a legal rule." Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1770 (Dec. 2014) ("Larsen"). In providing research and data outside of the legal records, amici curiae can provide the Court with the real-world effects that its opinions and rules may have on the public at-large.

This also presents several ethical concerns, however, given that these briefs are "filed after the record is closed, and the information they present is not subject to cross-examination below." *Id.* at 1772–73. For this reason, and together with the potentially large impact that such briefs have in some circumstances, counsel should take care to make sure that facts, research, or data presented to the Court are of sound quality.

As mentioned above, state disciplinary rules require that counsel be candid in their representations to a court. Similarly, the American Bar Association's Model Rules of Professional Conduct state that a lawyer "shall not knowingly… make a false statement" or "fail to disclose" opposing, controlling legal authority to any tribunal. *See* Model Rules Rule 3.3. As the comments on Model Rule 3.3 state, a lawyer not only has an "obligation to present the client's case with persuasive force," but the lawyer also has a "a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process…" *See* Model Rules Rule 3.3, cmt. 1–2, 12. Given these rules, it is clear that counsel for an amici must not only present its brief in a manner consistent with zealous advocacy, but must also present the brief "within the ambit of reasonable lawyering." Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 Fordham Urb. L.J. 1605, 1631–32 (May 1999).

In a 2014 law review article, Professor Allison Orr Larsen of William & Mary Law School discussed her findings of "troubling patterns" in such briefs, including: (1) no citations to sources by amici, (2) amici citing to sources "created in anticipation of litigation," and (3) citations by amici to "minority views" in their field. *See* Larsen, *supra* at 1784–99. Professor Larsen's article also discusses potential reforms to address these issues. For our purposes, basic ethical rules should also prevent these types of issues from occurring. It is important that counsel—so that the Court can be supplied with quality information—apply the same standards to amicus briefs that they would other use in any other filing in litigation. This means that counsel should strongly consider the veracity of the information being provided to the Court through an amicus brief, both from factual and legal standpoints.

Conflicts of Interests

On a more specific note, conflicts of interest have become an ethical issue for counsel. And, given the increasing

[31] Though, in her comment, Sorenson argues that commenting or reviewing a draft "could be equated to authoring the brief in part," which would require disclosure under Rule 29. *Id.* Certainly, given the ambiguous nature of what it means to be an "author" Rule 29 or Sup. Ct. Rule 37.6, there is a legitimate concern as to *how much* coordination may occur until the disclosure requirements in the federal appellate courts are triggered.

participation of firms and clinics in the amicus practice, this will likely be of continued concern. The New York State Bar Association ("NYSBA"), in fact, recently issued its *Ethics Opinion 1174* in October 2019 that considered a conflicts-of-interest matter.[32]

In that matter, as part of its *pro bono* program, a law firm's attorney sent around a proposal to other attorneys in the firm to prepare an amicus brief advocating a specific position for submission to the Supreme Court of the United States. In response, some associates in that program favored one side of the issue before the Court, while others wanted to advocate the opposing view. As such, the firm proposed having the two groups draft and submit two opposing briefs. The firm asked the NYSBA for its opinion on whether "attorneys from a single firm [may] submit amicus briefs on opposing sides of the same issue" to the Supreme Court of the United States. In its opinion, NYSBA came to the following conclusion:

> Attorneys at the law firm representing clients may not submit amicus briefs on opposing sides of an issue before the Supreme Court of the United States, but attorneys at the firm may in their individual capacities submit amicus briefs for opposite sides of an issue pro se.

In considering this matter, the NYSBA first assumed that the firm would be representing two retained clients with opposing views. Citing to state ethics rules and past opinions, the NYSBA stated that a law firm may not represent clients on both sides of the same litigation and is a "nonconsentable conflict." Further, the NYSBA stated that this nonconsentable conflict would possibly present itself in this situation, if the law firm had established an attorney-client relationship with its own lawyers for the purposes of the amicus briefs.

However, the NYSBA went on to state that the conflict would not be present if the lawyers were simply representing their own *pro se* interests. Absent any rule in the firm's governing documents, there would be "no ethical reason why attorneys may not appear in their own name (rather than in the name of the firm) as pro se amici on opposing sides of a question before the Court." The Opinion did caution that such an arrangement may trigger the disclosure requirements of the Supreme Court.[33]

In sum, counsel for amici curiae should be aware of ethical issues surrounding conflicts-of-interest. While the above Opinion relates to a specific set of circumstances, it does demonstrate that state bars (and likely the federal bar) would apply the same ethical rules to counsel in the amici context.

Conclusion

In today's appellate practice, amicus briefs will continue to play an important role. There has been little ethical oversight on these briefs, however, and the information contained therein. As appellate counsel continue to advocate for their client's interests through amicus filings, it is important for counsel to apply the same ethical standards that they would otherwise provide as to any other brief.

Both the Supreme Court and Federal Rules of Appellate Procedure, as well as rules in state courts, provide for ethical assurances related to the drafting and funding of amicus briefs. Considering these rules, general coordination on the overall arguments and themes of an amicus brief is likely appropriate. Specific drafting or editing by a party's counsel, however, would trigger the disclosure requirements of the rules—and would likely be inappropriate.

Further, counsel have a general duty of candor in their representations and filings to courts. This doesn't change simply because a brief is on behalf of a third-party. Therefore, when drafting Brandeis-type amicus briefs, counsel should take great care to ensure that the information, facts, and data being provided are of a high-quality nature.

Finally, as demonstrated by the above ethics opinion from New York, standard ethics rules and obligations apply to representation of amici curiae. This includes issues of conflicts-of-interest, among other issues. In short, lawyers have well-established ethical obligations to their clients, the courts, and the public in general, which should be applied to amicus representation.

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[32] The opinion is publicly available at https://nysba.org/ethics-opinion-1174/

[33] This is may be of particular interest to the Court if the law firm is "funding" the briefs by, for example, allowing the hours spent on the briefs count towards "billable hour" requirements within the firm.