

LAW WEEK COLORADO

Overuse, Underuse of Amicus Briefs

On the effective use of briefs from ‘friends of the court’ to affect appellate outcomes

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Amicus curiae briefs are fixtures of high-stakes appellate litigation. Today, amici serve many functions beyond their original roles as objective third parties. They advocate legal positions, examine policy issues and point out the consequences of a court’s action or inaction. They may even support their arguments with reliable, extra-record evidence in a so-called Brandeis Brief.

A strong amicus brief can prop up a party’s weak arguments or bolster an already persuasive presentation. Courts often rely on amici arguments and evidence, quote or reference their briefs and acknowledge the importance of their participation.

Amicus briefs, however, are both overused and underused. They are sometimes overused at the merits phase of high-profile appeals, where their persuasive value can be lost in

its. They can be particularly persuasive when amici coordinate efforts to speak with a single voice, such as when industry participants or trade associations combine efforts and file a single, compelling amicus brief. On the other hand, when many amici flock to the court at the same time and make the same point in multiple briefs, their impact can be diluted.

The recent battles over President Trump’s executive orders on immigration illustrate both the effective and ineffective use of amicus briefs on the merits. In the recent 4th Circuit appeal, *International Refugee Assistance Project v. Trump*, several hundred amici — scholars, religious groups, civil rights groups, law schools, universities, cities and nearly every state in the union — filed scores of amicus briefs. On the one hand, many like-minded amici joined together and filed a single brief and the court expressly acknowledged some of their arguments. On the other hand, many of the briefs repeat-

perhaps the most impact in supporting a party’s request for discretionary appellate review. For instance, several studies have shown that amicus participation significantly increases the certiorari acceptance rate in the U.S. Supreme Court.

At the certiorari phase, the mere filing of an amicus brief can inform the court that the issue is important to more than just the petitioner. The amicus can explain, perhaps even better than the petitioner, why the court should exercise its discretion to decide a case.

U.S. Supreme Court Rule 37.2 expressly permits amicus briefs in support of certiorari petitions. The Federal Rules of Appellate Procedure and Colorado Appellate Rules do not explicitly allow amicus briefs in support of petitions for certiorari, mandamus, and other forms of discretionary review. Yet both the 10th Circuit and Colorado Supreme Court routinely permit amicus participation in those circumstanc-



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icus briefs. Nevertheless, Colorado’s federal and state district courts have discretion to permit amicus briefs, and they have allowed amici to file briefs for decades.

In some instances, federal district court judges in Colorado have solicited amicus participation in cases involving novel questions or matters of significant public import. At the trial level, where few amicus briefs are filed, an amicus is more likely to get the court’s attention.

THE TAKEAWAY

Amicus briefs are a prevalent feature of modern litigation, and amici can make important contributions to judicial decision-making.

But lawyers and potential amici should think creatively about amicus participation.

While amici routinely participate in merits appeals, they can have as much or more impact in supporting a request for discretionary appellate review or advocating for a trial court ruling on a novel or significant issue. Amici can be effective participants at many stages of the litigation process. •

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a sea of other amicus briefs. They are also underused, particularly in support of petitions for discretionary appellate review and at the trial court level, where they might have the most impact.

OVERUSE IN MERITS APPEALS

Amicus curiae briefs, of course, can be filed in support of a party’s brief on the merits in Colorado and federal appellate courts. They are expressly permitted by U.S. Supreme Court Rule 37, Federal Rule of Appellate Procedure 29 and Colorado Appellate Rule 29. Effective amicus briefs provide courts with unique perspectives on the mer-

its. They can be particularly persuasive when amici coordinate efforts to speak with a single voice, such as when industry participants or trade associations combine efforts and file a single, compelling amicus brief. On the other hand, when many amici flock to the court at the same time and make the same point in multiple briefs, their impact can be diluted.

UNDERUSE – SUPPORTING PETITIONS FOR DISCRETIONARY REVIEW

Perhaps because appellate procedural rules expressly permit amicus briefs on the merits, lawyers and potential amici too often consider participating only when an appeal reaches the merits stage. But amici can have

ed the same argument. With so many amici participating in the same merits appeal, one wonders what real impact they could have had, particularly when many of them offered an argument that said only, in effect, “Me too.”

es. Lawyers and amici therefore should not be deterred by the lack of express authority in the rules. An amicus, however, should virtually never seek to file a brief in opposition to a request for discretionary appellate review.

The mere filing of the brief would deliver the wrong message — that the court should grant review because the matter has import beyond the dispute between the parties.

UNDERUSE IN TRIAL COURTS

What about trial courts? Both the federal and Colorado rules of civil procedure are silent on the filing of am-