What Amici Curiae Can and Cannot Do with Amicus Briefs

by Stephen G. Masciocchi

Amici curiae play important roles in modern litigation. This article explores the functions and limitations of amici curiae, with a focus on Colorado and Tenth Circuit practice.

Amicus curiae briefs have become a fixture of high-stakes appellate litigation. The prevalence of amicus briefs is illustrated by the recent battle over President Trump's initial executive order on immigration. In *Washington v. Trump*,[1] the Ninth Circuit denied defendants' motion for an emergency stay just six days after defendants filed the motion, yet in those few days, amici filed more than three dozen amicus briefs and letters.[2] But this number pales in comparison with *Kitchen v. Herbert*, where the Tenth Circuit received "scores of amicus briefs on either side" of a case involving the constitutional right to same-sex marriage.[3] The briefs in *Kitchen* were submitted by hundreds of amici, whom the court listed in a multi-page appendix.[4] The amici included states, counties, civil rights organizations, churches, religious organizations, employers, legal advocacy groups, bar associations, law professors, academic scholars, and unaffiliated individuals.[5]

Amici curiae have moved far beyond their original role as objective third parties, and amicus briefs now serve many functions. Amici advocate legal positions, examine policy issues, provide courts with unique perspectives, and point out the consequences of a court's action or inaction. Amici's participation is not limited to supporting or opposing the parties' appellate briefs on the merits; in the process of providing their perspectives, amici often make unique arguments and offer evidence outside the appellate record. This practice is controversial, and appellate courts' consideration of such evidence has been both lauded and criticized.

This article examines what amici can and cannot do as "friends of the court," with an emphasis on Colorado and Tenth Circuit practice.

How Amici Can Participate

Amicus curiae briefs can, of course, be filed in support of a party's brief on the merits in Colorado and federal appellate courts. Amicus briefs are expressly permitted by U.S. Supreme Court Rule (SCR) 37, Federal Rule of Appellate Procedure (FRAP) 29, and Colorado Appellate Rule (CAR) 29. In the federal appellate courts, proposed amici (except certain government entities) must disclose whether a party's counsel authored the amicus brief in whole or part, and whether a party, its counsel, or any person other than the amicus, its members, or its counsel contributed money intended to fund the brief.[6] These disclosures assist the courts both in considering recusal and in assessing the amicus's credibility.[7] CAR 29, by contrast, contains no such requirements.

But amici are not limited to buttressing the parties' merits briefs. Amici arguably have the most impact in supporting requests for discretionary appellate review, and "it is difficult to overstate the value of amicus support at the certiorari stage."[8] Several studies have shown that amicus participation significantly increases the certiorari acceptance rate in the U.S. Supreme Court.[9] SCR 37.2 expressly permits amicus briefs in support of certiorari petitions and sets forth procedural requirements. The Federal Rules of Appellate Procedure and the Colorado Appellate Rules do not explicitly allow amicus briefs to be filed in support of petitions for certiorari, mandamus, and other forms of discretionary review. Yet both the Tenth Circuit and Colorado Supreme Court permit amicus participation in support of such petitions.[10] In the Tenth Circuit, amici are also permitted to file FRAP 28(j) letters, even though the rule states that a "party" may submit supplemental authorities.[11]

What about trial courts? The Federal Rules of Civil Procedure are silent on the filing of amicus briefs. Notwithstanding "the absence of a specific provision" in the rules authorizing amicus briefs, "District Courts have long been permitted to allow *amicus* appearances at their discretion."[12] Judges in the District of Colorado have frequently allowed or even solicited amicus participation in cases involving novel questions or matters of significant public import.[13]

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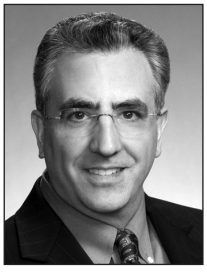

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Appellate Law articles typically discuss practice issues and opinions of interest to appellate practitioners.

Likewise, despite the lack of a Colorado Rule of Civil Procedure permitting amicus briefs, Colorado state trial courts have allowed meaningful amicus participation for decades.[14]

There are, however, limits on the scope of amicus participation. Amicus briefs generally must comply with lower page limits. For instance, amicus briefs in federal circuit courts and Colorado appellate courts are limited to one-half the maximum length of a party's principal brief.[15] Amici curiae also cannot file reply briefs or participate in oral argument without court permission.[16] Amici, in short, do not have the same rights as parties.

What Issues, Arguments, and Evidence Can Amici Present?

Appellate courts liberally allow the filing of amicus briefs. A notable exception is Judge Richard Posner, who has observed that most amicus briefs merely repeat the parties' arguments, and who famously suggested that amici should be granted leave to participate only "when a party is not represented competently or is not represented at all, when an amicus has an interest in some other case that might be affected by the decision in the present case," or "when the amicus has a unique perspective" beyond that of the parties and their lawyers.[17] Before ascending to the U.S. Supreme Court, Justice Samuel Alito penned a strong retort, where he advocated that appellate courts err on the side of granting leave to submit amicus briefs to ensure disparate viewpoints and open courts.[18] Given the volume of amicus briefs filed in the Tenth Circuit and the Colorado appellate courts, those courts have plainly rejected the Posner view.

Appellate courts give amici curiae fairly wide latitude in presenting arguments on appeal. Amici can, for instance, buttress a party's legal arguments with their own.[19] They can shore up a weak merits brief and provide a more in-depth legal analysis.[20] But the core role of an amicus is to make policy arguments that explain how adopting a new rule or rendering a particular decision will benefit or harm those who are not before the court, including other litigants and society as a whole. Policy arguments thus educate courts about practical considerations that courts may decide to factor into their legal analysis.[21]

Perhaps the most impactful—yet controversial—role of an amicus is to file a so-called Brandeis brief, in which the amicus supports its policy arguments with reliable, outside-the-record evidence to influence the court's decision.[22] An informative example is the amicus brief filed in *Adarand Constructors, Inc. v. Pena*, a case involving an equal protection challenge to a race-based federal highway subcontracting program.[23] There, in support of the government's argument that it had a compelling state interest in the program, the amicus brief supplied a variety of extra-record materials, including:

- "a non-exhaustive list of congressional hearings and reports on discrimination against disadvantaged businesses";
- "disparity studies," conducted after the program went into effect, assessing actual use of minority-owned businesses; and
- "academic findings confirming disparate treatment of minority-owned businesses by commercial lenders."[24]

The first of these—hearings and government reports contained in the legislative record—were non-controversial. Courts frequently use legislative history in interpreting legislative intent and reviewing legislative action, and the plaintiff had no per se objection to the use of such materials to demonstrate whether the government had a compelling interest. But the plaintiff complained that "much of the evidence" attached to the amicus brief consisted of "after action studies" and could not prove that Congress had a compelling state interest before enacting the statutory scheme at issue.[25] The Colorado federal district court rejected this contention and ruled that even this post-hoc evidence was relevant to its strict-scrutiny analysis.[26]

Notwithstanding the general limitation of appellate review to the trial court record,[27] appellate courts regularly consider and rely on extra-record social science evidence submitted by parties and amici curiae.[28] Such evidence has become much more available now that courts and litigants can access it via the Internet.[29]

Commentators have debated the propriety of this practice. Proponents contend that courts can and should "go beyond common law and statutory sources and rely on other disciplines such as sociology, economics, and political science," particularly when deciding novel issues or constitutional questions.[30] Accordingly, when making policy arguments—which typically predict the effect of a legal ruling—amici can present "factual information" that "provides the basis for that prediction."[31] Furthermore, courts can be trusted to scrutinize the information to determine whether it is reliable and persuasive and to give it the weight it is due.[32]

Others point out that amici's use of non-record social science evidence is subject to abuse. They note that when parties submit statistical and other social scientific evidence at trial, the evidence is presented by experts and tested by cross-examination.[33] They add that such evidence is subject to scrutiny and possible exclusion under *Daubert v. Merrill Dow Pharmaceutical, Inc.*[34] or state-law equivalents to the *Daubert* test of reliability and validity.[35] As two critics put it, "Brandeis's brief would be assessed harshly as junk social science by today's standards."[36] Appellate courts nonetheless have considered and based decisions on social scientific studies and statistics for decades, and they have been increasingly receptive to arguments based on such evidence in more recent years.[37]

Limits on an Amicus Brief

There are limits, however, to what issues, arguments, and evidence amici curiae can invoke. First, amici cannot raise new issues that were not preserved for appellate review by the parties. In Colorado appellate courts, "[a]micus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae

will not be considered."[38] The same is generally true in federal appellate courts, including the Tenth Circuit.[39]

The Tenth Circuit has recognized that it has discretion to consider new issues raised by an amicus, but it will exercise that discretion only in "exceptional circumstances."[40] Those circumstances exist when "a party attempts to raise the issue by reference to the *amicus* brief" or "the issue 'involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte.'"[41] In practice, the circuit court has repeatedly declined to reach new issues raised by amici notwithstanding this discretion.[42] By contrast, the U.S. Supreme Court has relied on arguments made solely by an amicus on a number of occasions.[43]

Second, although appellate courts frequently allow parties to present verifiable extra-record evidence, especially social scientific evidence, they generally limit such presentations to "legislative facts" rather than "adjudicative facts."[44] In other words, while courts will allow amici to present empirical studies, statistics, social scientific theories, and historical information, they will not allow amici to present case-specific evidence about what the parties did, when, and how.[45] And even "legislative facts" may be subject to attack if they are disputed or improperly documented.

Third, counsel for an amicus cannot, of course, violate the Colorado Rules of Professional Conduct or other applicable ethics rules. Among other things, amicus counsel must comply with the duty of candor and must not "make a false statement of material fact or law to a tribunal," "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," or "offer evidence that the lawyer knows to be false."[46] Likewise, counsel may not make an argument or contest an issue "unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[47]

In one study, the authors analyzed the use of social science in a series of cases involving constitutional due process challenges to punitive damage awards. While they "discovered no outright fabrications," they identified "quotes from social scientific research taken out of context, misleading statistical presentations, denigration of studies whose results conflicted with the argument, and anecdotes masquerading as social science findings."[48] Amicus counsel plainly must take care to cite reputable sources and portray them accurately. Counsel is on more solid ground citing government statistics and independent academic studies rather than evidence manufactured by the amicus for litigation purposes.

Finally, courts will not permit amici to interrupt the efficient adjudication of matters before them. The U.S. Supreme Court, for example, will not extend the time for an amicus to file a brief in support of a certiorari petition.[49] And the Tenth Circuit has cautioned that it will not grant leave to file an amicus brief if doing so would trigger the recusal of one or more judges hearing the appeal.[50]

Conclusion

Amicus briefs are a prevalent feature of modern litigation, particularly in high-stakes appeals. They serve important roles by promoting open courts, providing courts with the benefit of different perspectives from a variety of stakeholders, and educating courts about the potential consequences of their rulings on non-parties and society as a whole. Amici often bolster their policy arguments with studies, statistics, and other legislative facts. While appellate courts routinely accept and consider such submissions, amicus counsel must take care to present extra-record evidence from credible and verifiable sources, particularly given that this evidence has not been tested by the usual rigors of pre-trial motions and cross-examination.

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Notes

1. *Washington v. Trump*, No. 17-35105, 2017 WL 526497 (9th Cir. Feb. 9, 2017).

2. *See United States Courts for the Ninth Circuit, Washington v. Trump*, www.ca9.uscourts.gov/content/view.php?pk_id=0000000860.

3. *Kitchen v. Herbert*, 755 F.3d 1193, 1240 (10th Cir. 2014) (Kelly, J., dissenting).

4. *See id.* at 1240–53.

5. *See id.*

6. Sup. Ct. R. 37.6; F.R.A.P. 29(a)(4)(E).

7. Shapiro et al., *Supreme Court Practice* 518, 755 (Bloomberg BNA 10th ed. 2013).

8. *Id*. at 515.

9. *See id.* (citing and discussing studies).

10. *See, e.g.*, *School Dist. No. 1 v. Masters*, No. 2015SC1062 (Colo.) (multiple amicus briefs filed June 6, 2016 in support of certiorari petition); *Bank of Am., N.A. v. El Paso Nat. Gas Co.*, No. 16-610 (10th Cir.) (multiple amicus briefs filed Dec. 22–30, 2017 in support of petition for discretionary review). *See also* F.R.A.P. 29(b)(1) and 10th Cir. R. 29.1 (addressing the submission of amicus briefs in support of petitions for panel rehearing or rehearing en banc).

11. *See Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1115 (10th Cir. 2010).

12. *Vigil v. AT&T*, 1969 WL 118, at *1 (D.Colo. Sept. 9, 1969).

13. *See, e.g.*, *United States v. Strandlof*, 2009 WL 5126540, at *3 (D.Colo. Dec. 18, 2009) (given inadequate briefing on novel issue of First Amendment law, court decided to "invite amicus curiae briefs" subject to certain procedural and disclosure requirements); *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556, 1558, 1573–76 (D.Colo. 1997) (noting participation by amici curiae in suit challenging race-based preferences in federal contracting), *rev'd on other grounds sub. nom. Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

14. *See, e.g.*, *In re Special Assessments for Paving Dist. No. 3*, 95 P.2d 806, 807–08 (Colo. 1939) (counsel for the bondholders "asked permission to appear as amicus curiae, which request was accorded by the district court"; "the trial court took the matter under advisement and in due course announced his opinion in general accord with the position of amicus curiae"); *Lobato v. Taylor*, 13 P.3d 821, 828 (Colo.App. 2000) ("On appeal, plaintiffs and their amici argue, as they did in the trial court, . . .), *rev'd on other grounds*, 71 P.3d 938 (Colo. 2002); *Oborne v. Bd. of Cty. Comm'rs of Douglas Cty.*, 764 P.2d 397, 399 (Colo.App. 1988) ("[T]he Commission, the State Board of Land Commissioners, and the Independent Petroleum Association of Mountain States were allowed to appear before the trial court as amici curiae."); *Wilkinson v. Wilkinson*, 585 P.2d 599, 601 n.1 (Colo.App. 1978) ("Although there was no specific motion for continuation or modification of the support order filed by the wife, the trial court, and counsel both at trial and on this appeal, have treated the trial briefs by her counsel and counsel for amicus curiae as in effect the same as such as a motion by her.").

15. F.R.A.P. 29(a)(5); CAR 29(d). *See also* Sup. Ct. R. 33.1(g)(x)–(xii) (amicus briefs are limited to 6,000 words in support of certiorari petitions and 9,000 words in support of merits briefs).

16. *See* F.R.A.P. 29(a)(7) to (8); CAR 29(f) to (g).

17. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

18. *See Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 129–30 (3d Cir. 2002).

19. *See, e.g.*, *Colo. Mining Ass'n v. Bd. of Cty. Comm'rs of Summit County*, 199 P.3d 718, 730-34 (Colo. 2009) (accepting amicus Mined Land Reclamation Board's reasonable interpretation of its own enabling statute and adopting the Board's implied preemption argument).

20. *See* Baron, "The Civil Amicus Brief," 13 *App. Advocate* 4, 8 (2000).

21. *See, e.g.*, *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 154 (1998) (amicus brief filed by 40 states furnished "practical reasons" supporting the Court's decision that the Extradition Clause prevailed over a New Mexico constitutional provision that New Mexico courts had invoked to reject an extradition request from Ohio).

22. *See* Margolis, "Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs," 34 *U.S.F. L.Rev.* 197, 199 and n.12 (discussing origin of the Brandeis brief in a submission by future Justice Louis Brandeis in a 1908 Supreme Court case); Rustad and Koenig, "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs," 72 *N.C. L.Rev.* 91, 93 n.5, 104–07 (1993) (elaborating on the origin of the Brandeis brief).

23. *Adarand*, 965 F.Supp. at 1557–58.

24. *Id.* at 1575–76.

25. *Id.* at 1576.

26. *Id.*

27. *See W. Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1157 (10th Cir. 2009) (appellate review of summary judgment ruling "is limited to the summary judgment record before the district court"); *In re Petition of Edilson*, 637 P.2d 362, 364 (Colo.1981) ("[e]vidence which was not presented to the trial court will not be considered on review").

28. *See, e.g.*, *Kitchen*, 755 F.3d at 1240 (Kelly, J., dissenting) (noting the "reams of sociological evidence urged by the parties" and the "scores of amicus curiae briefs" submitted in an appeal involving the right to same-sex marriage). *See generally* Margolis, *supra* note 22, at 206–210; Rustad and Koenig, *supra* note 22 at 104–17.

29. *See generally* Gomez, "Relying on Internet Sources in the Appeals Courts," 44 *The Colorado Lawyer* 81 (Nov. 2015).

30. Margolis, *supra* note 22 at 213, 221–24, and 229–32.

31. *Id.*

32. *See id*. at 232–35.

33. Rustad and Koenig, *supra* note 22 at 94–95.

34. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993).

35. *See* Rustad and Koenig, *supra* note 22 at 97–99 and nn. 31–32. *See also* Sorenson, "The Ethical Implications of Amicus Briefs: A Proposal for Reformatting Rule 11 of the Texas Rules of Appellate Procedure," 30 *St. Mary's L.J.* 1219, 1254–56 (1999).

36. Rustad and Koenig, *supra* note 22 at 106.

37. *See id.* at 104–14.

38. *Denver U.S. Nat'l Bank v. People*, 480 P.2d 849, 851 (Colo.App. 1970) (citation omitted); *accord Gorman v. Tucker*, 961 P.2d 1126, 1131 (Colo. 1998) ("Because this issue [raised by amicus curiae] was not preserved for our review, we will not address it."); *Beaver Creek Prop. Owners Ass'n., Inc. v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 585 (Colo.App. 2011) (following *Gorman* and declining to consider argument that defendant did not raise on appeal).

39. *See, e.g.*, *PPL Corp. v. Comm'r of Internal Revenue*, 133 S.Ct. 1897, 1907 n.6 (2013) (declining to consider argument that IRS Commissioner admitted it had not preserved for review); *Genova v. Banner Health*, 734 F.3d 1095, 1102–03 (10th Cir. 2013) (rejecting argument by amicus that defendant breached the implied duty of good faith and fair dealing, both because plaintiff had not raised the argument and because it was unavailing in any event); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) (choosing not to address issue raised for the first time on appeal by amicus).

40. *Tyler*, 118 F.3d at 1404.

41. *Id*. (quoting *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993)).

42. *See, e.g.*, *Genova*, 734 F.3d at 1102–03; *Tyler*, 118 F.3d at 1403–04.

43. *See* Shapiro, *supra* note 7 at 757.

44. Margolis, *supra* note 22, at 203.

45. *Id.*

46. Colo. RPC 3.3(a). *See also* Colo. RPC 8.4(c)–(d).

47. Colo. RPC 3.1.

48. Rustad and Koenig, *supra* note 22 at 128.

49. Sup. Ct. R. 37.2(a).

50. *See Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1143 n.7 (10th Cir. 2010). ■