

# APPELLATE STRATEGIES

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*INSTITUTE OF CONTINUING LEGAL EDUCATION  
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*Ethical Amici*

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Any attorney who is faced with the decision of whether to solicit or submit an amicus curiae or "friend of the court" brief should first consider certain ethical rules governing a lawyer's conduct and disclosures before an appellate tribunal. First and foremost in this thought process should be an analysis of whether the amicus brief at issue is being submitted to the court for the right reasons.

Traditionally, the purpose of an amicus brief was to offer a court the viewpoint of an impartial observer on the case.<sup>1</sup> The functions of amicus curiae briefs have evolved over time to now provide an appellate court with insight on issues or arguments that the parties omitted either due to poor lawyering, strategic decisions to dedicate more argument to certain issues on appeal, or in order to comply with page limitations.<sup>2</sup> In other instances, amicus briefs can educate a court on the legal effect of the issues on matters of public concern which may have been

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<sup>1</sup> See Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1017 (1967) (portraying the amicus curiae as having originated as a disinterested bystander who volunteered the benefit of his knowledge to the court), (cited in Nancy Bage 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, 1220 (1999)).

<sup>2</sup> See Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 606-07 (1984) (describing page limits and other considerations as the reasons why parties cannot always adequately argue all the desired points and arguments in their briefs and how an amicus can fill this need); see also Kenneth L. Lasson, *Amicus Briefs* (noting that the points contained in a poorly written brief can actually be clarified by a good amicus), in *Appellate Practice for the Maryland Lawyer: State and Federal* (Paul Mark Saneller & Andrew D. Levy eds., 1994) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1220).

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left unrepresented by the parties to the suit.<sup>3</sup> An amicus brief can also be used to explain how the regulation or statute at issue fits within a larger regulatory or statutory framework,<sup>4</sup> or to provide additional information to describe how a particular industry operates.<sup>5</sup> Finally, an amicus brief can apprise the court of the details of another case pending in the system posing related issues.<sup>6</sup>

Many observers note that the role of the amicus brief has drifted, perhaps improvidently, from merely "friend of the court" to that of lobbyist<sup>7</sup> or friend of a party.<sup>8</sup> There is no question that the amicus brief can have a powerful effect, and as a result amicus filings have flooded the appellate courts. In response to the growing number of requests to file amicus briefs, the Supreme Court modified Supreme

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<sup>3</sup> See Ennis, *supra*, 33 CATH. U. L. REV. at 608 (explaining the ability of an amicus to inform the court on issues of public interest); Lasson, *supra* (commenting on the ability of the amicus to point out the "unintended consequences for a group not directly before the court") (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1220).

<sup>4</sup> See E. Susan Garsh & Joanne D'Alcomo, *Role of the Amicus Brief*, Massachusetts Continuing Legal Education, Appellate Practice in Massachusetts §§ 17, 17.3 (1996) (cited in Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1610 (1999)).

<sup>5</sup> *Id.* (cited in Lucas, *supra*, 26 FORDHAM URB. L.J. at 1611).

<sup>6</sup> See Garsh & D'Alcomo, *supra* note 4, at § 17.3 (cited in Lucas, *supra*, 26 FORDHAM URB. L.J. at 1611).

<sup>7</sup> See Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953) (recognizing the lobbying characteristics of the amicus brief); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 594, 703 (1963) (making the connection between identifying amici with their sponsoring groups and the reality of the amicus being an instrument for interest group lobbying); Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 36 (1983) (concluding that by the late 1940s, both the court and interest groups were conscious of the lobbying role of the amicus brief) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1221).

<sup>8</sup> See John Howard, *Retaliation, Reinstatement, and Friends of the Court: Amicus Participation in Brock v. Roadway Express, Inc.*, 31 HOW. L.J. 241, 256 (1988) (admitting that amici curiae become friends of the advocate in many cases) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1221).

Court Rule 32, effective May, 1, 1997, by requiring a party to disclose who is authoring or paying for the amicus brief.<sup>9</sup>

The rules of the appellate courts frequented by Georgia appellate lawyers, however, are not quite so restrictive. The Federal Rules of Appellate Procedure merely require that the movant seeking leave to file an amicus brief must disclose its interest and the reason why an amicus brief is desirable and relevant to the case.<sup>10</sup> Unlike the federal appellate courts, the Georgia Supreme Court and Court of Appeals do not require leave of court before filing an amicus brief.<sup>11</sup> Although both of the Georgia appellate courts require disclosure of the identity and interest of the person or group on whose behalf the brief is filed, only the Georgia Court of Appeals rule on amicus briefs requires that the brief be limited to issues properly raised by the parties.<sup>12</sup> Federal appellate court decisions, however, reflect that such courts may refuse to consider an amicus brief that raises issues that the parties could have raised on appeal but did not.<sup>13</sup>

Thus, at least in the Eleventh Circuit and Georgia appellate courts where amicus briefs may be filed without disclosure of authorship or payment by a party to the lawsuit, the rules provide appellate lawyers with an opportunity to circumvent page limitations by preparing an amicus brief and having it signed by

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<sup>9</sup>Sup. Ct. R. 37(6) (requiring disclosure of whether the amicus brief was authored in whole or in part by a party as well as identifying those who have made a monetary contribution in preparing or submitting the brief).

<sup>10</sup>Fed. R. App. P. 29.

<sup>11</sup>Georgia Supreme Court Rule 23; Georgia Ct. of App. Rule 25.

<sup>12</sup>Id.

<sup>13</sup>See United Parcel Service v. Mitchell, 451 U.S. 56, 60 n.2 (1979) (refusing to consider arguments not raised by the parties); Preservation Coalition Inc. v. Pierce, 667 F.2d 851 (9<sup>th</sup> Cir. 1982) (refusing

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an outside attorney on behalf of an amicus organization. These rules also do not require disclosure of whether the amicus attorney is simultaneously representing interests in similar cases that will be affected by the decision to be reached by the court receiving the amicus filing. Finally, these rules do not require an amicus attorney to divulge that his or her organization has received, or expects to receive, payment from one of the parties to the underlying appeal.

Ethical considerations arise when a non-party signs a brief authored by counsel for a party to the underlying appeal to the extent that such omission of fact constitutes a potential misrepresentation.<sup>14</sup> It is impossible to predict whether the appellate court would have been less persuaded by the amicus brief if armed with the knowledge that a party's counsel was the author.

This hiding of the ball could raise an ethical problem, particularly in light of Georgia's Disciplinary Rule 3.3, which states that "[a] lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client," and Disciplinary Rule 8.4, which states that it shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to "engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation."

Similarly, ethical considerations might arise when the outside group submitting the amicus brief has some type of interest in the case's outcome that is

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to consider, on appeal, issues raised by parties below, but not amicus) (cited in Lucas, supra, 26 FORDHAM URB. L.J. at 1612).

<sup>14</sup> Cf. G. Richard Orsinger, McDonald Texas Civil Practice § 4:8, at 74 (1992) (asserting that a litigant who prepares an amicus brief and then has the brief signed by a non-party because of their high degree of interest in the case actually misleads the court because someone else appears to be the author of the brief) (cited in Sorenson, supra, 30 ST. MARY'S L.J. at 1251).

not disclosed to the tribunal.<sup>15</sup> Although such an interest might seem to remove the non-party's impartiality, thus making the motivation behind the brief suspect, some jurisdictions actually view such a scenario with optimism because the court will be able to use an amicus brief from such an individual to ascertain the wider impact of its decision.<sup>16</sup>

Finally, an attorney submitting an amicus brief must decide whether disclosure is required where his or her amicus client has received a contribution from a party, or from a member (or even a non-member), and soon thereafter submits the amicus brief in furtherance of that person's cause on appeal.<sup>17</sup> Although United States Supreme Court Rule 37 provides an exception to its monetary disclosure requirement for contributions made by the amicus and members of its group, the rules applicable to amicus briefing before the Eleventh Circuit and the appellate courts of the State of Georgia are silent as to this issue.

Because social or scientific evidence presented for the first time in an amicus brief has not been subjected to the trial court's Daubert analysis, critics have also argued that more detailed disclosures should be required when such scientific

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<sup>15</sup> See Pamela Stanton Baron, *The Civil Amicus Brief* (indicating that attorneys who author amicus briefs on behalf of organizations may need to disclose to the court cases in which they are parties), in State Bar of Tex., *Advanced Civil Appellate Prac. Course J, J-11* (1995) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1252).

<sup>16</sup> See La. St. Sup. Ct. R. VII § 12(1) (including as criteria, of which one must be satisfied, that an amicus have an interest in another case involving a similar issue); Miss. R. App. P. 29(a) (requiring that, in a motion for leave to participate, an amicus must meet one of four requirements, one of which is that they have an interest in another case containing similar question) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1253).

<sup>17</sup> See Baron, *supra* note 15, at J-11 (questioning the necessity for a group or association to reveal when a contribution has been accepted close in time to the submission of an amicus brief that is in support of the contributor) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1253).

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evidence is submitted in an amicus brief.<sup>18</sup> These critics suggest that the amicus party should disclose whether a study producing such scientific evidence was "produced for the purpose of litigation rather than for publication in a peer-reviewed professional social science journal."<sup>19</sup> To remedy ethical concerns, critics have proposed that the amicus should submit an appendix revealing the methodology and data used in published and unpublished reports relied upon by the amicus in their brief.<sup>20</sup> In addition, critics call for the disclosure of the qualifications of the principal investigators, the source of funding for the studies, and whether any conflicts of interest exist.<sup>21</sup>

On the other side of the ethical coin, an attorney's duty to zealously represent his client's interest may require solicitation of amicus briefing or submittal of an amicus brief on behalf of his or her non-party client. The disciplinary rules adopted by Georgia effective January 1, 2001, require a lawyer to act with reasonable diligence and promptness in representing a client.<sup>22</sup> The comments to Rule 1.3 further state that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take

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<sup>18</sup> See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94 (1993) (advocating the requirement of more detailed disclosures in these types of amicus briefs due to the special problems involving social science evidence) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1255).

<sup>19</sup> Id. at 158 (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1255).

<sup>20</sup> See id. at 157-58 (suggesting that courts should require amici to release published and unpublished reports by appendix, which would define the methodology and underlying data used) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1255-56).

<sup>21</sup> See id. at 157 (expanding on suggested requirements of amicus briefs that bear social science evidence, such as mandating the disclosure of the credentials of principal investigators, the monetary course of the studies, and potential motivational conflicts) (cited in Sorenson, *supra*, 30 ST. MARY'S L.J. at 1256).

<sup>22</sup> Georgia Rules of Professional Conduct Rule 1.3 (2001).

whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."<sup>23</sup> An amicus brief clearly falls within the ambit of "lawful and ethical measures" in furtherance of the client's case.

The commentary to Georgia's ethical rules also note that a lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>24</sup> An attorney's ethical obligation to assist the judge or jury in arriving at its distillation of the "truth" is best fulfilled through the zealous advocacy of the client's position under the existing paradigm of civil litigation, which includes the option of amicus briefing.<sup>25</sup>

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<sup>23</sup> Id. Rule 1.3 cmt. 1.

<sup>24</sup> Id.

<sup>25</sup> Jamil N. Alibhai et al., *Zealous Advocacy and the Search for Truth*, 61 TEX. B.J. 1009, 1014 (1998) (cited in Lucas, *supra*, 26 FORDHAM URB. L.J. at 1630).

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APPENDIX

A. Excerpts From Supreme Court of the United States Rule 37

1. An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.
2. (a) An amicus curiae brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. . . .  
(b) When a party to the case has withheld consent, a motion for leave to file an amicus curiae brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an amicus curiae brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interests. Such a motion is not favored.
3. (a) An amicus curiae brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the court grants leave to file under subparagraph 3(b) of this Rule. . . . The amicus curiae brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. . . .  
(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an amicus curiae brief may be presented to the Court. the motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an amicus curiae brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.
4. No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

6. Except for briefs presented on behalf of amicus curiae listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, whom made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

**B. Excerpts From Federal Rule of Appellate Procedure 29**

- (a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.
- (b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:
- (1) the movant's interest; and
  - (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

**C. Georgia Supreme Court Rule 23**

Amicus curiae briefs may be filed without prior permission and shall disclose the identity and interest of the persons on whose behalf the briefs are filed.

**D. Georgia Ct. App. Rule 25**

Amicus curiae briefs may be filed without leave of Court, disclosing the identity and interest of the person or group on whose behalf the brief is filed and limited to issues properly raised by the parties. Only members of the Bar of this Court or attorneys appearing by courtesy may file Amicus Curiae briefs.