

AMICUS CURIAE BRIEFS

Angela Ables, Esq.
(405) 272-9221

Amicus Curiae briefs are becoming utilized in the insurance industry litigation field more often than ever before due to the impact of such litigation not only on the industry but consumers as well. In the past several years, whenever an important point of law is to be decided, associations, trade groups and interested citizens utilize the Amicus Curiae brief to be heard on the issues that may affect not only the litigants but others as well.

Black's Law Dictionary sets forth the Latin definition of an Amicus Curiae as "a friend of the Court." Black's also states that an Amicus Curiae is a "person who has no right to appear in a suit, but is allowed to introduce argument, authority, or evidence to protect his interests." An Amicus is a legal argument filed in a lawsuit by a person or organization not a party to the case, but who has an interest in the outcome. (For example, in the Supreme Court abortion case, *Webster v. Reproductive Services*, amicus curiae briefs were filed by hundreds of pro-choice and anti-abortion organizations). The court may give the arguments in the amicus curiae brief as much or as little weight as it chooses. An Amicus Curiae Brief is a tool used by many organization or association clients who, although not a party to a lawsuit, have vital information and a point of view not being proffered by the defendant or plaintiff. Attorneys representing large associations or entities who will be affected by a court ruling, should always consider the efficacy of filing an Amicus Curiae brief with the Court reviewing an issue of import to not only the parties to the litigation, but to others.

Oklahoma Supreme Court Rule Regarding Amicus Curiae Briefs

While there are no specific rules in the Oklahoma District Courts for Amicus Briefs by non-parties, there are specific Oklahoma Supreme Court Rules which should be followed when a case has made its way to that appellate court. Rule 1.12 of the Oklahoma Supreme Court Rules sets forth the requirements for filing Amicus Curiae briefs in a case pending before this state's highest court. The main and overriding requirement for an amicus is that a brief filed in this manner may not raise any new issues which have not been raised by the parties to the litigation.

Consent of The Parties or by Order of the Court

For cases which have arrived at the Oklahoma Supreme Court by the appellate route, Rule 1.12 (a) (1) states the Court will allow an Amicus Curiae Brief which does not exceed twenty-five (25) pages in length filed during the briefing cycle of an appeal if it is accompanied by written consent of all the parties. The Rule goes on to state that if consent is denied by either or both of the parties, Rule 1.12(b) must be followed.

Rule 1.12(b) sets forth the requirements for an amicus to follow if one or both of the parties refuse to consent to the "friend of the court" brief. Provided the Amicus acts within the briefing cycle of the appeal, the Amicus Curiae may file a statement with the Court. This "statement" should be set forth in a Motion for Leave to File an Amicus Curiae Brief and may not exceed five (5) pages in length. The "statement" contained in the Motion must concisely disclose "the nature and extent of the applicant's interest". The statement, in addition, to setting forth the interests of the Amicus Curiae, must state any facts or questions of law which may not be presented adequately by the litigants, as well as the relevancy of such facts or questions of law to the disposition of the case at hand. After mailing said Motion for Leave to File containing the statement filed with the Court to the parties, consent by the parties will be "deemed" to have been granted if an objection is not filed within ten (10) days of the mailing to the parties. If one of the parties does file an objection with the Court, the Oklahoma Supreme Court will review the statement, objection(s) and then determine whether to allow the filing of an Amicus Brief. The Court will issue an Order to the parties and the amicus either allowing or denying the filing of such an Amicus Brief and

generally will also set forth the time frames for the Amicus, since most Amicus Brief statements are filed while the briefing schedule is ongoing for the parties.

The Amicus should be vigilant to not only adhere to the issues already raised by the parties while avoiding raising any new issues or facts not already before the court, but also must be diligent in the preparation of its brief in a timely manner so as not to delay the case by its inclusion.

Original Jurisdiction Proceedings

If a case is pending before the Supreme Court in an original jurisdiction proceeding, the rules for Amicus Briefs are different. Rule 1.12 (a) (2) delineates the rule that an Amicus may *not* appear in such a proceeding unless specifically authorized by Order of the Chief Justice. (See also Oklahoma Supreme Court Rules 1.191(h) relating to Original Proceedings before the Court.) Pursuant to Rule 1.12(b) (2), an Amicus may file the same type of statement required when a party fails to consent in writing to the inclusion of an Amicus Curiae Brief. As stated previously, the statement may not exceed five (5) pages and must set forth:

- A. The nature and extent of the applicant's interest
- B. Setting forth the questions of law which may not be presented adequately by the party litigants
- C. Explaining the relevancy of these questions of law to the disposition of the case at hand.

The "statement" must be filed with the Supreme Court and mailed to the parties wherein the parties will have ten (10) days to object, "unless the Court orders otherwise." The Court will then review the Statement and the Objections, if any, to determine whether to allow an Amicus Curiae Brief in an Original Jurisdiction proceeding, which will be followed by an Order stating the decision of the Court. Generally, the Court also sets forth the schedule for an Amicus Brief with the Order allowing or rejecting the inclusion of an Amicus in the litigation.

Ethical Considerations

If an Amicus simply re-states and reiterates the position of one or another of the parties, it has not complied with the Court rules as the Supreme Court mandates that the Amicus Brief Counsel attempt to ascertain the various arguments to be made by the party whose positions the Amicus seeks to support. Obviously, the purpose of this discovery of the arguments is to avoid repetition of the same arguments which would waste the Court's time and serve no useful purpose as a "friend of the court". Counsel for Amicus should be ever mindful that the positions of their clients should assist the Court in its determination without duplicating arguments or raising new issues on appeal; to do otherwise not only is a disservice to the Amicus client, but a further disservice to the judicial system that every lawyer seeks to honor. Adhering to this rule strictly is an ethical consideration which should be followed by all lawyers who have been granted an opportunity to place their client's points of law and arguments on the issues before the Court. If new issues are raised or arguments repeated, the Amicus Brief could be disregarded and rejected by the Court.

No Delay Allowed By Filing

The filing of a Motion for Leave to File an Amicus Curiae Brief will not delay a pending action before the Supreme Court, nor will the brief, if allowed by consent of the parties or leave of the Court, stay the proceedings. Regardless of whether the brief is filed pursuant to consent of the parties or leave of the court, it must be made during the briefing cycle which has been established for the party the Amicus seeks to support in its brief and in conformity with the applicable provisions of Rules 1.10 ("Briefs") and 1.11("Form and Content of Briefs"). Only "extraordinary cause" being shown to the court will allow an Amicus Curiae Brief to be filed at any time other than during the normal briefing cycle.

In Original Jurisdiction proceedings, a Motion for Leave to File an Amicus Curiae Brief, will not delay a pending action, but the Court will set the time to file a brief and no reply brief is allowed.

Responses To Amicus Briefs

Rule 1.12(e) allows leave to be sought by any party in the case for the purpose of filing a Response to an Amicus Curiae Brief. Additionally, sub-paragraph (f) allows the Court to grant oral argument by an Amicus upon a motion setting forth “extraordinary cause”.

Amicus Curiae On Certiorari & Rehearing

Sub-section (g) of Rule 1.12 sets forth the requirements concerning matters which are before the Supreme Court on certiorari to the Court of Civil Appeals. In such cases, Amicus Curiae are allowed to file a statement in support or opposing certiorari *only* by order of the Supreme Court granting leave to file the statement. A statement may only be filed by an Amicus Curiae in support of certiorari when a party has petitioned the court for certiorari and concomitantly, an Amicus Curiae may only file a statement opposing certiorari when a party has responded by opposing certiorari. The Amicus can only provide questions of law on the issues pending in support of one of the parties, but cannot place itself in the position of a litigant party.

For re-hearings before the Supreme Court (see Rule 1.13) or the Court of Civil Appeals, an Amicus may only file a brief by order of the Court granting leave to file the brief and the brief in support of rehearing may only be filed when a party has first petitioned the court for rehearing. The Amicus cannot set the perimeters of the litigation; it can only assist the court by providing questions of law not presented by the party litigants and its Amicus Brief is filed to support one of the parties, not represent a party.

As stated previously, there are no concomitant rules relating to Amicus Briefs in the District Courts, but utilizing the Supreme Court Rules relating to Amicus Curiae Briefs has been used in District Court, following the same guidelines relating to consent or leave of court. Although there are no specific rules for an Amicus in a court of original jurisdiction in the state district courts, several judges have allowed the procedure to be used and if there are issues of import to associations or other clients, this procedure can be utilized.

Federal Courts Of Appeal

Federal Rule of Civil Procedure 29 sets forth the requirements concerning an Amicus Curiae Brief for the federal appellate courts. The United States government, a State, Territory, Commonwealth or the District of Columbia are allowed to file an Amicus Curiae Brief without the consent of the parties or leave of the court, but all other entities, persons or organizations are allowed to file an Amicus only by leave of the court or if the brief states that all parties have agreed to its filing. (See FRAP 29 (a)).

A Motion for Leave to File an Amicus Curiae Brief must be accompanied by the proposed brief and also must state:

- (1) the movant’s interest; and
- (2) the reason why an Amicus Brief is desirable, and
- (3) why the matters asserted are relevant to the disposition of the case.

All Amicus Briefs must comply with Rule 32 requirements, but in addition, the “cover” of the brief must identify the party or parties supported and further indicate whether the brief supports affirmance or reversal of the lower court. If the Amicus is a corporation, FRAP 29 (c) states that the brief must include a disclosure statement like that required of parties by Rule 26.1. (Rule 26.1 requires a corporate disclosure statement to be filed with the principal brief or upon filing a motion, response, petition or answer in the court of appeals, for nongovernmental corporations identifying its parent corporations and listing any publicly held company that owns 10% or more of the party’s stock.)

An Amicus Brief, while not required to comply with Rule 28, must include the following information:

- (1) a table of contents, with page references;

- (2) a table of authorities – cases (alphabetically arranged), statutes and other authorities – with references to the pages of the brief where they are cited;
- (3) a concise statement of the identity of the Amicus Curiae, its interest in the case, and the source of its authority to file;
- (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
- (5) a certificate of compliance, if required by Rule 32 (a) (7). (Rule 32 (a) (7) states that a brief submitted under Rule 32 (a) (7) (B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation set forth in the Rule. The certificate must state either (i) the number of words in the brief; or (ii) the number of lines of monospaced type in the brief.)

Length: The length of the Amicus Brief may be no more than one-half the maximum length authorized by the rules for a party's principal brief, unless the court grants permission to file a longer brief for the Amicus. If the court grants a party permission to file a longer brief than the Rules allow, this extension does not affect the length of the Amicus, so specific authority to file a longer brief must be applied by for the Amicus.

Time for Filing: An Amicus Curiae must file its brief, accompanied by a motion for filing, when necessary, no later than seven (7) days after the principal brief of the party being supported is filed. If the Amicus does not support either party, it must file its brief no later than seven (7) days after the appellant's or petitioner's principal brief is filed. Obviously, the Court may grant leave for a later filing, specifying the time within which an opposing party may answer.

Reply Brief: An Amicus Curiae may not file a Reply Brief except with the Court's specific permission to do so.

Oral Argument: An Amicus may participate in oral argument only with the Court's specific permission.

United States Supreme Court

Rule 37 of the U. S. Supreme Court Rules sets forth the requirements for Amicus Curiae Briefs in the highest court in the land. The Court states in its Rule that an Amicus who brings to 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."

An Amicus Curiae brief may be submitted to the U. S. Supreme Court before the Court considers a Petition for a Writ of Certiorari, a Motion for Leave to File a Bill of Complaint, a jurisdictional statement, or petition for extraordinary writ, *provided*, all parties consent to the filing of the Amicus in writing, or the Court grants leave to file.

Time: The Amicus Curiae Brief must be filed within the time allowed for filing a brief in opposition or for filing a Motion to Dismiss. Like the requirement in the federal appellate rules, the brief must set forth whether consent by the parties was granted and the cover of the brief must identify the party the Amicus seeks to support with its filing.

If a party refuses to consent to a third party filing an Amicus in the case, a Motion for Leave to File an Amicus Curiae Brief may be filed by the entity seeking to file such brief, prior to 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. The Motion must be filed pursuant to Rule 33.1 (Booklet Format) and the brief must accompany the Motion, filed as one document. The filing must also state the party or parties who have withheld consent and the

nature of the movant's interest must be set forth. The Supreme Court rule states that such a Motion "is not favored".

Oral Argument: In a pending case before the Supreme Court for oral argument, an Amicus Curiae Brief may be filed if all parties consent in writing or if the court grants leave for such filing. If a party refuses to consent, a motion for leave to file an amicus may be filed as one document with the brief and must indicate the party or parties who have refused to consent to the filing thereof as well as the movant's interest in the case. If the Amicus Brief does not support either of the parties, it must be filed within the time frame allowed for the petitioner's or appellants brief. If the brief supports one of the party litigants to the case, the Amicus Brief must be filed within the time allowed for filing the brief for the party supported. The brief must set forth whether consent was granted by the parties and the "cover" of the brief must identify the party litigant being supported by the Amicus or it must indicate whether the Amicus is supporting affirmance or reversal of the lower court's decision. No Amicus Curiae Brief may be filed as a reply brief or in support of, or in opposition to, a petition for rehearing in the Supreme Court.

The one exception to filing a motion for leave to file an Amicus Curiae belongs to governmental entities, such as United States through the Solicitor General, an agency of the United States government, a State, Commonwealth, Territory, or Possession when submitted by its Attorney General, or a city, county, town or similar entity when submitted by its authorized "law officer".

A brief or Motion filed with the Supreme Court by an Amicus Curiae must be accompanied by proof of service pursuant to the requirements of Rule 29 of the U. S. Supreme Court. While Rules 21 (Motions to the Court), 24 (Briefs on the Merits) and 33.1 (Booklet Format) have applicable provisions to which Amicus Curiae Briefs are subject, Rule 37.5 states that it is sufficient to set out in the brief

- (1) the interest of the Amicus Curiae
- (2) the summary of the argument
- (3) the argument
- (4) the conclusion

A Motion for Leave to File may not exceed five pages in length. Rule 33.2 sets forth the requirements for any party objecting to the Motion for Leave to File.

Disclosure: Except for the entities noted hereinabove as exceptions such as the U. S. government, states, commonwealths or cities and towns, every Amicus Curiae must set forth whether counsel for a party authored the brief in whole or in part and shall further identify every person or entity, other than the Amicus itself, its members, or its counsel, who made any monetary contribution to the preparation or submission of the brief. This disclosure to the court must be made in the first footnote on the first page of the text of the brief. (See Rule 37.6)

With class actions being utilized to re-write insurance law in the United States, the utilization of Amicus Curiae will continue to provide a mechanism for non-litigants to "weigh in" on the issues at hand, the outcome of which will, and usually does, affect millions of individuals throughout this country.