



# The Appellate Advocate

*State Bar of Texas Appellate Section Report*

## ARTICLES

Texas Supreme Court Amicus Practice: An Art of Advocacy

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“What is a SLAPP case?” Interlocutory Appeals and the  
Texas Citizens’ Participation Act

*Justice Nora Longoria & Nathaniel Beal*

\* \* \*

Bouncing and E-Bouncing: The End of the  
Citational Footnote?

*Wayne Schiess & Elana Einhorn*

## SPECIAL FEATURES

In Memoriam: David W. Holman (1947-2014)

*R. Alan York & David M. Gunn*

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Interview of Past Appellate Section Chair Roger Townsend

*Kevin Dubose*

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## TEXAS SUPREME COURT AMICUS PRACTICE: AN ART OF ADVOCACY

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Amicus practice has evolved significantly over the last 50 years. Today, amicus briefs are an integral—and at some stages, necessary—part of the appellate process. A well-written amicus brief can influence an appellate court’s decision.

Articles on amicus practice abound. Yet appellate justices still lament the quality of amicus briefs filed in Texas courts.<sup>2</sup> Even the most seasoned appellate lawyer can use a refresher. This paper offers tips and tactics for soliciting and representing amicus in the Texas Supreme Court.

### I. STATISTICS: HAVING FRIENDS HELPS

Statistics show that an amicus brief filed in a case before the Court at any stage before argument increases your odds of moving forward in the process and, ultimately, to getting the relief you want.<sup>3</sup> The Court requests a response to about 40% of petitions for review. These odds increase to 85% if the petition is supported by an amicus.<sup>4</sup> Equally significant, while

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<sup>2</sup> Chief Justice Sherry Radack, Peter Michael Kelly, David A. Furlow, *Questionnaire Regarding Amicus Curiae Briefs*, 22nd Annual Advanced Civil Appellate Practice Course, Chapter 12 (2008) (hereinafter, “Survey”) at 14 (nine justices indicating there is “plenty of room for qualitative improvement” in the amicus curiae briefing filed in Texas appellate courts).

<sup>3</sup> See generally Don Cruse, *Testing the Conventional Wisdom of Appeals*, presented to the Dallas Bar Association, Appellate Law Section (November 21, 2013), at 31–33 (examining petitions for review filed in 2008 through 2013).

<sup>4</sup> *Id.* at 31.

the Court requests full briefing in only 25% of cases, these odds increase to 82% with amici support.<sup>5</sup> Of those fully briefed cases, only 40% will be granted or otherwise summarily disposed. These odds increase to 55% with amici support.<sup>6</sup> These figures confirm conventional wisdom: implementing a strong amicus strategy is undoubtedly a significant step towards success.

## II. FIRST STEPS: HOW TO FIND A FRIEND

In a handful of high-profile cases, prospective amici approach the party. More often, however, a party must seek out amici support. Much thought should be given to the amicus strategy in a case, and clients need to understand that time must and should be invested in the process.

Timing is important. Often organizations are interested in a case, but asking for a brief to be filed within a few weeks' time simply does not provide the organization enough time to get internal approval, hire counsel, and submit an effective brief. Be sure to start the process early, as soon after the court of appeals renders its judgment as possible.

The first task of the strategy is to identify the client. The best cases for amicus support are those involving a highly technical issue or a specialized area of the law. Complex statutory or regulatory cases are also good candidates. A case where the ruling has the potential to affect an entire industry is also ripe for amicus support.

In fact, a seasoned supreme court practitioner already knows those trade organizations that watch the Court and are active in the process. Often, the practitioner has developed relationships with the legal counsel or decision makers within those organizations so that soliciting their support is simple. On occasion, these organizations identify a case on their own—perhaps an important case with weak legal representation—and a prior relationship with the organization

<sup>5</sup> *Id.* at 32.

<sup>6</sup> *Id.* at 33.

will ensure your name is on the list of potential amicus counsel.

Another way to identify amici is to study the dockets of similar cases to determine the organizations and parties that filed amicus briefs in the past. Online dockets and legal research databases make this process easy when you dedicate the time.

Issues of procedure have not historically found friendly support. Yet studies indicate 30-50% of the Court's docket touch on procedural issues, either trial or appellate.<sup>7</sup> Procedure is important because these issues can arise in virtually any case. On occasion, these questions warrant the attention of defense and trial lawyer affiliations. But many times they do not. Appellate practitioners should keep in the mind that the Appellate Section of the State Bar has an amicus committee. The Appellate Section will consider filing an amicus brief in matters of importance to the State and to the civil appellate bar "if the Section's special knowledge, training, or experience would provide a significant contribution to the court's consideration of the legal issues."<sup>8</sup>

Of course, the more organized your amicus strategy is, the more likely to get a quick response from whomever you solicit. Be prepared. Send a summary along with the briefing. Identify potential issues to be addressed based on the organization's unique perspective. Solid advanced preparation will significantly increase the likelihood that an organization will agree to file an amicus brief on your behalf.

<sup>7</sup> Kurt H. Kuhn, *What Issues are Important to the Jurisprudence of the State?*, University of Texas Seminar on State and Federal Appeals (2006) (analyzing decisions issued in calendar years 2004 and 2005 and concluding 27% involved procedure); Elizabeth V. Rodd, *What's Important to the Jurisprudence of the State?*, State Bar of Texas, Practice Before the Supreme Court of Texas (2002) (analyzing FY1999-2000 docket and indicating 47 of the 96 opinions issued involved procedure).

<sup>8</sup> See Appellate Section, State Bar of Texas, Guidelines for Seeking Support (adopted August 2013) (available <http://tex-app.org/Amicus-Guidelines.pdf>).

### III. STRATEGY: HOW TO BE A FRIEND

#### A. The Goal of Effective Amici

The two overarching goals of an effective amicus brief are brevity and helpfulness. Long-winded briefs that add nothing to the Court's decision-making process will be quickly discarded. As Judge Posner wrote:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.<sup>9</sup>

To keep your brief short, keep it simple. Focus on one aspect of the case. Doing too much will lose your primary audience.

The Cardinal Rule of amicus briefs is to be original. Do not duplicate the party's brief. The United State Supreme Court's rule states:

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.<sup>10</sup>

Texas does not have a similar rule, but the Texas Supreme Court justices surely adopt its sentiment.

The inverse is equally true. Do not advance legal arguments not made by parties. If the justices are not able to decide the case on a theory advanced in an amicus brief

<sup>9</sup> *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)

<sup>10</sup> U.S. Supreme Court Rule 37.

because the parties simply did not raise the issue, the amicus brief is not helpful. It may feed the ego, but it will have no impact on the Court's decision making process.

Finally, objectivity is important. Remember the amicus curiae is intended to be a friend of the Court, not a friend of the parties. While that concept may be eroding in the modern explosion of amicus practice, an effective amicus counsel will still maintain objectivity as a primary goal. A significant number of the Texas appellate justices cite more objectivity as the single most effective way litigants can improve amicus briefs.<sup>11</sup>

No doubt, an objective brief is a powerful brief. There are a number of methods at your disposal. You can survey the law in other jurisdictions. You can track the legislative history of a statute. You can trace the historical progression of a judicial doctrine.

Other effective strategies include highlighting the legal, social, or economic implications of the decision. This can be done objectively, yet persuasively, when the policy supports your position.<sup>12</sup>

Effective amicus briefs also can provide the Court historical or background information beyond the trial court's record. This may include social science data. It may also be as simple as an explanation of a process or practice that is unfamiliar to the justices. Real world experience enlightens and aids the Court in its decision making process.

Beyond the general amicus briefs, there are several common, more particular types of briefs. "An increasingly popular category of amicus brief is the academic brief— 'Brief on behalf of Legal Historians,' or 'Brief on Behalf of Professors of Securities Law.' These are usually drafted by a few professors and then circulated from law faculty to law

<sup>11</sup> Survey at 13.

<sup>12</sup> *Id.* (indicating that the most effective amicus briefs are the ones that examine the policy implications of a ruling).

faculty, seeking professorial signups.”<sup>13</sup> These briefs are frequently criticized. “Some judges . . . may give these filings undue weight.”<sup>14</sup>

Another type of brief is the “Litigant Brief,” filed by parties to a different case that have same or similar circumstances but are behind in the litigation process. These briefs may be effective in convincing the Court to deny a petition that does not ideally present an issue or to otherwise delay a decision. At minimum, a Litigant Brief may prompt consideration of the issue outside of the vacuum of a particular record or set of facts.

Similarly, an amicus brief can be effective in limiting a predictable, but unfavorable decision for an industry or interest group. Often parties view an issue as black-and-white, with no shades of gray. A brief that emphasizes nuances or alternative rulings may help shape Texas law in a way that minimizes harm to your client.

Unfortunately, countless amicus briefs are filed that are simply not helpful to the Court. The “Chicken Little Brief” is particularly unhelpful. The sky is falling in every case the Court decides. Briefs adopting this approach will be dismissed as ineffective rhetoric. Instead, use strong, factual information to support your concerns.

The “Me too Brief” that simply summarizes the legal analysis of a party is not helpful. Nor are “Lobby Documents” that are obviously compelled by self-interest. Rare is the altruistic amici. But the art is in drafting a brief from the amicus’ special perspective that still assists the court.

## **B. Collaboration**

A common practice at the United States Supreme Court that appears less common at the Texas Supreme Court is the collaboration among interested parties to file a single brief. It is unfortunate that this strategy is not used more, as it can be

<sup>13</sup> See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008), at 104–05.

<sup>14</sup> *Id.*

very effective. Collaboration could enable amici to retain a top advocate that would be more persuasive to the Court. And the justices want collaboration.<sup>15</sup> Collaboration reduces repetition. It also sends a substantive message of broad consensus. It can be persuasive that many organizations hold the same view, particularly if the organizations are ideologically opposed.

Likewise, an unexpected amici can be powerful. For example, in *Strickland v. Medlen*, a case deciding whether Texas would allow recovery of noneconomic damages for loss of companionship of a pet, a group of pet welfare groups collaborated on an amicus brief. Their message: “To be clear, creating emotion-based liability in pet litigation is not the proper decision.”<sup>16</sup> The message resonated because it was unexpected. The result was that the majority cited the amicus and also commended its analysis.<sup>17</sup>

### C. The Forgotten Art

Top appellate practitioners who practice before the Texas Supreme Court understand the art in drafting a petition for review. There is also an art to drafting an amicus brief. A petition for review will tell the Court why it should grant a case at every opportunity. Likewise, an effective amicus brief should indicate—at every opportunity—what your interest is and, importantly, why your brief is different from the parties’ briefs. Often this point is made in the statement of interest. But it should be included in any place in the brief that a justice

<sup>15</sup> Survey at 13 (three justices cited consolidation as the primary way for appellate lawyers to improve their amicus practice).

<sup>16</sup> No. 12-0047, *Strickland v. Medlen*, Amicus Brief of American Kennel Club, *et al.*, available at: <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=8c881838-7ca7-4ad7-ae82-cc21b43662f7&coa=cossup&DT=BRIEFS&MediaID=8f80a524-1518-4596-a081-8c439cc41535>.

<sup>17</sup> 397 S.W.3d 184, 195 (Tex. 2013) (“The pet-welfare amici make a forceful case.”), 190 (“We agree with the amicus brief submitted by the American Kennel Club (joined by several other pet-welfare groups). . .”).



might start her review. The table of contents should intrigue the justices as to the uniqueness and helpfulness of your brief as much as the summary of the argument. Give the Court reason to turn the page.

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Advocating for a client as *amici curiae*, as with all legal advocacy, requires the development of your own personal style. Integrating these suggestions, basic as they may be, will enhance the effectiveness of your chosen style. Mastery of them will ensure your amicus brief is viewed as a true friend, and not a foe, to the judicial process.