New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 264—NO. 122

THURSDAY, DECEMBER 24, 2020

Outside Counsel

Tips for District Court Amicus Brief Success

BY AKIVA SHAPIRO, LEE R. CRAIN AND AMANDA L. LESAVAGE

Photo: Shutterstock.com

District court amicus—"friend of the court"—briefs provide a distinct and underutilized opportunity for potential amici to make an impact on the outcome of cases of significance and on the development of the law. The arrival of an amicus brief in a district court case, as in an appeal, signals the potential impact of the case beyond the parties directly before the court and can have a profound impact on a case's outcome.

In one case, for instance, our team filed a district court amicus brief on behalf of several professional medical organizations offering essential medical expertise to a district court facing a constitutional question about a medical practice; we were permitted to participate at oral argument on a motion for a preliminary injunction and our brief's medical conclusions were cited by the district court in denying the motion. Our team has also filed amicus briefs in numerous cases about federal census policies explaining the real-world impact of flawed census data on businesses, with one district court ultimately citing our brief in a case striking down key census policy.

Despite the opportunity district court amicus briefs afford, amicus participation is far less common at the federal district level than at the U.S. Supreme Court and the federal appellate court levels. In fact, in a survey of nationwide federal court filings conducted by our firm for this article, we found that district courts received amicus briefs in 0.1% of civil cases, amounting to roughly 300 cases per year in all district courts combined. By comparison, circuit courts received amicus briefs in 1-2% of cases, or roughly 500-1,000 cases every year (from a much smaller pool of cases), and the Supreme Court received amicus briefs in 90% of merits cases.

Guidance on how to file a district court amicus brief is, like the filing themselves, scarce. No Federal Rule of Civil Procedure (FRCP) exists to govern district court amicus briefs. And while some district courts have announced local rules, see D.D.C. Local Civil Rule 7(o), most have not. Instead, parties are generally left to consider a hodgepodge of local practices and guidance that vary by the district and even the individual district judge, arising out of district courts' inherent authority to permit amicus participation in the exercise of their discretion. Compare, e.g., *Cobell v. Norton*, 246 F. Supp. 2d 59, 62-63 (D.D.C. 2003) ("An amicus brief should [only] be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has

AKIVA SHAPIRO *is a litigation partner in Gibson, Dunn & Crutcher's New York office.* LEE R. CRAIN *and* AMANDA L. LESAVAGE *are litigation associates at the firm.*

unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.") with, e.g., *C & A Carbone v. Cty. of Rockland*, 2014 WL 1202699, at *3 (S.D.N.Y. March 24, 2014) ("Although plaintiffs are represented by competent counsel and some of the arguments proffered in the proposed amicus brief are duplicative of those raised by plaintiffs, the court nevertheless finds the amici's perspective to be helpful."); see also, e.g., *Lehman XS Trust, Series 2006–GP2 v. Greenpoint Mortg. Funding*, 2014 WL 265784, at *1 (S.D.N.Y. Jan. 23, 2014) ("Resolution of a motion for leave to file an amicus brief thus lies in the 'firm discretion' of the district court."); *Jin v. Ministry of State Sec*., 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("District courts have inherent authority to appoint or deny amici… .").

The time has come to standardize amicus practice in the district courts just as it is standardized in the appellate courts in the Federal Rules of Appellate Procedure and the Rules of the Supreme Court. To that end, we intend to submit to the U.S. Judicial Conference's Committee on Rules of Practice and Procedure a proposed rule to bring clarity, uniformity, and recognition to this important practice area. But the rulemaking process is potentially lengthy and the outcome is uncertain. Unless and until the Committee adopts such a rule, district court amicus counsel will have to muddle through. Based on our experience, we have identified several procedural and substantive tips for preparing highly effective district court amicus briefs.

Find the Right Time To Weigh In. Timing is everything—especially in the district court. Appellate amicus practice requires few strategic decisions as to when an amicus brief should be filed: the rules set forth clear deadlines. But, in the district court, where there are more opportunities for amici to weigh in at different points in a case, picking the right moment is critical. If possible, amicus requests should be made in the context of the case's most important moments, like motions for preliminary injunctions, to dismiss, and for summary judgment. Weighing in at a less important moment may make an amicus brief's perspective less useful. It is also crucial that an amicus brief is filed in time to give all parties the opportunity to respond to the brief, ensuring the amicus brief is filed in a procedurally fair way. This means that an amicus brief should typically be filed after the party the amicus is supporting files its principal brief, but sufficiently in advance of the opposing party's responsive brief.

Based on our experience, we have identified several procedural and substantive tips for preparing highly effective district court amicus briefs.

When in Doubt, Ask for Leave To File. Absent a clear local rule, individual judge's practice, or court order allowing amicus briefs as of right, amicus counsel should file her brief in the form of a motion for leave to file attaching the proposed amicus brief. In our experience, an amicus party's position is strengthened if they first obtain consent from the parties.

Keep It Short and Sweet. An amicus brief should be materially shorter than the parties' briefs, consistent with the U.S. Supreme Court Rules and Federal Rules of Appellate Procedure for amicus briefs. While these rules are not binding at the district court level, they arise out of the common sense notion that as a friend of the court and not a party, you should be saying less than the parties themselves. In our experience, moreover, the shorter the submission the more likely it will have an impact before a busy district judge already awash with paper. We have also found that filing an informal, 8-10 page letter that both requests permission to file an amicus submission and provides the substance of the amicus submission—instead of formally moving for leave and filing a separate, formal brief—can be effective, especially where time is of the essence. The presiding judge can grant the letter request and file the letter in one docket entry, which increases the likelihood that the request will be acted upon quickly.

Add Value. In the district court, amicus counsel should consider many of the same factors that go into filing appellate amicus briefs, such a selecting the right case, adding value with the right argument, and partnering with the right client. (See "Three Keys to Amicus Brief Success" for a broader explication of amicus best practices). At a high level, amicus parties should bring a unique perspective that leverages the expertise of the party submitting the brief and adds value by drawing on materials or focusing on issues not addressed in detail in the parties' submissions, instead of repeating arguments that the parties or other amici curiae have already raised. District courts are also more likely to be moved by the views of well-known and respected organizations. Accordingly, choosing the right amicus-appropriate arguments and partnering with the right client will undoubtedly increase the impact of any amicus filing.

Reprinted with permission from the December 24, 2020 edition of the NEW YORK LAW JOURNAL © 2020 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # NYLJ-12232020-471218