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Three Keys to Amicus Brief Success

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Amicus brief writing is all the rage. The U.S. Supreme Court alone now receives between 600 and 1,000 amicus briefs every year—an average of 7 to 12 for each argued case, nearly double the number filed in 1995, and eight times the volume in the 1950s. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1902 (2016). Federal circuit courts and state appellate courts—and even trial courts—are also seeing more and more amicus briefs. How can counsel filing amicus briefs stand out from the crowd and make an impact? Based on experience, I've identified three keys to preparing impactful amicus briefs: pairing with the right client, making the right kinds of arguments, and mustering the right types of materials.

The Right Client

Pairing with the right client is essential for making an impact with your amicus brief. Most importantly, amicus parties need to match well with the case: What special expertise or experience does this particular client bring to this particular case? There should be some unique perspective or knowledge that your client can add. For example, when we represented the National Association of Criminal Defense Lawyers (NACDL) in *Vartelas v. Holder*, which challenged the retroactive application of a statute restricting immigrants' right to travel abroad for short periods, we leveraged on our client's expertise to make argument about the practical functioning and impact on the plea bargain process. The "interest of amici" section of the brief should then be tailored to highlight your client's specific expertise and experience directly relevant to the case.

Briefs from parties who are known and respected by the court are most likely to be read closely and taken seriously. In addition to the United States, these prominent players include organizations like the ABA, ACLU, AFL-CIO, Cato Institute, Institute for Justice, NACDL, and the U.S. Chamber of Commerce. Adam Feldman, *Amicus Policy Success in Impactful Supreme Court Decisions*, Empirical SCOTUS (Feb. 19, 2018). In addition, well-respected authorities taking a counterintuitive position—such as former law-enforcement officers writing in support of a criminal defendant—will often grab the court's attention.

If you are looking to pair with a client and the case seems like a fit for one of these groups (or others with similar credibility), consider reaching out to see if they are interested. And if you are already representing a client who doesn't have such name recognition, you should also consider reaching out to see if a leading organization is interested in joining your client's brief. If the content of the brief is compelling and matches well with one of these groups' policy positions and expertise, they may agree to sign on. If so, it's a win-win for you, your client, the larger organization, and the court.

The Right Arguments

The amicus context raises special considerations when trying to craft the best possible arguments. It is important to think (and argue) like an amicus, not a party.

It is crucial to avoid arguments that are redundant with those made by the parties themselves or other amici. Supreme Court Rule 37, for example, instructs that an amicus brief that does not raise matters beyond what the parties have addressed "burdens the Court" and is "not favored." Raising arguments made by other amici will also add little value for the court. Given these considerations, amicus counsel should coordinate with counsel for the party they support and counsel for allied amici. Communication between counsel enables the creation of a coordinated briefing strategy and the avoidance of redundancy.

What types of arguments should amici make in their briefs? Broadly, value-additive amicus arguments that successfully leverage your client's expertise and credibility usually fall into three major categories: (1) original legal, constitutional, or historical arguments supporting a position or proposition advanced by a party, (2) amplification of an argument raised by a party with discussion of additional implications, and (3) alternative legal routes to reaching the desired case outcome.

With regards to the first category, there are often additional arguments or materials that support a claim made by one of the parties. Perhaps the main party has argued for a particular interpretation of a constitutional provision but has not raised the argument that their interpretation is supported by an intratextual reading alongside another provision. Or maybe a party's statutory interpretation claim is further supported by an overlooked canon of interpretation. Additional historical, empirical or legal materials too, such as an overlooked piece of legislative history, might bolster a party's position, as discussed in more detail below.

Second, an amicus brief can amplify a party's argument by pointing out additional legal or practical implications. A ruling for one side may raise practical challenges in application or enforcement. There might also be additional policy implications—negative externalities or economic impacts—in a different area of law or on different parties. For instance, in *Zivotofsky v. Kerry*, involving whether the federal Executive or Legislative Branch controls the recognition power, we represented a bipartisan coalition of Members of U.S. House of Representatives arguing that a broad ruling for the President would hamper the ability of Congress to legislate in critical areas touching on foreign affairs. The decision came down in the Executive's favor on the narrow recognition power issue, but the majority opinion expressly affirmed the robust role of Congress in foreign affairs more broadly, consistent with our arguments.

Third, there may be alternative grounds for deciding the case that the parties gave short shrift or did not raise. While difficult to pull off, providing the court with a different way to reach the result your client wants can be case-determinative. In the key Affordable Care Act case, *NFIB v. Sebelius*, an amicus brief on behalf of constitutional law scholars focused solely on the argument that the individual mandate should be construed as an exercise of Congress's taxing power—the precise grounds on which the court eventually upheld the mandate.

Finally, be sure to frame the brief around your unique arguments. Unlike the main party's brief, which will lay out the procedural history and methodically work through the legal issues in the case, the starting point for your brief should be its novel, value-adding perspective. It should jump right into these points and stay disciplined and focused on them throughout. Think about it as entering the case midstream—you don't need to get the court from the dock to where your

argument begins a hundred miles downriver because the main brief already did that. You should pick up the argument only where your piece of it begins.

The Right Materials

Lastly, amicus counsel should pay particular attention to the authorities they cite. Highlighting materials the main parties in the case have not brought to the court's attention is essential in adding value and getting noticed. Three types of authorities are worth special mention.

First, empirical or other economic/sociological evidence, particularly if drawn from non-legal fields or from sources other than court decisions—such as demographic research, economic studies, or government-issued crime statistics—can be useful in providing the court with the facts they need to reach the decision you want. These materials can support novel arguments about the practical impacts of potential decisions, and are often cited in court opinions. For example, in *Padilla v. Kentucky*, which concerned the obligation of criminal defense attorneys to advise their clients about deportation risks, we represented legal ethics and criminal law professors and submitted voluminous evidence not cited by the parties regarding the current practices of lawyers in warning clients about deportation consequences; this portion of our brief was quoted by the Supreme Court in the majority opinion.

Second, additional historical material can be very important to the court, especially in cases involving constitutional issues. For instance, in the earlier *Zivotofsky* case, *Zivotofsky v. Clinton*, we represented a bipartisan coalition of Senators and Members of the House of Representatives and presented significant historical evidence not cited by the parties in tracing the development and congressional centralization of passport powers from the Founding through the 20th century. The majority opinion resolved the political question issue favorably for us and specifically noted the involvement of Members of Congress as amici.

Finally, legal materials overlooked by the parties—like relevant statutes and cases, especially Supreme Court cases with relevant dicta—can be compelling. In *Vartelas v. Holder*, for example, we cited cases discussing the fundamental right to travel—an issue not extensively briefed by the parties themselves—and these cases were later cited in the Supreme Court's opinion.

By connecting with a client whose expertise fits the case, choosing appropriate arguments that leverage the client's experience and knowledge base, and drawing from original source materials not mustered by the parties, amicus counsel can ensure their briefs are not lost in the crowd, but actually impact the court's decision—allowing you be a true *friend of the Court*.