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The Impact of Amicus Briefs

by

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The Impact of Amicus Briefs

This article began as an attempt to empirically study the impact of amicus filings, over the last several years, on the decisions of Supreme Court of Texas. It quickly became apparent that it is impossible to definitively quantify the impact that amici have on the decisions of the Court. It is more useful to review individual amicus filings along with the subsequent opinions produced by the Court. This article highlights what these briefs tell us about effective amicus advocacy before the Court.

I. What we know and what we can't know about amicus briefs.

One thing is certain; while individual circumstances and motives vary, every amicus brief is filed with the same intent—to influence and shape the Court's thinking on, or disposition of, a case or legal issue. Sometimes the aim is to get the Court to decide or write on a particular issue in a certain way, and in other instances the goal is merely to get the Court to grant or deny review. The Court knows that each amicus brief is filed with the hope of influencing the Court. In a recent, insightful CLE article, Melissa Davis and Brantley Starr, staff attorneys at the Court, discussed the common aim of amici at the Court:

> Potential amici curiae may have any manner of motivations for wanting to submit a brief in a given case, but one aim is common among these: the desire to influence what happens in the case. Specifically, in the Texas Supreme Court, amici typically want to influence the Court to grant or deny review of a case and to dispose of a case in a particular manner if review is granted.

Melissa Davis & Brantley Starr, *The What, When, Where, How, and Why of Amicus Briefing in the Supreme Court of Texas*, Texas State Bar, 26th Annual Suing & Defending Government Entities Course, at 1 (2014). An amicus curiae should strive to be a true "friend of the court," but no one should lose sight of the fact that the intent of every amicus filing is to influence the Court.

But knowing that amici are trying to influence the Court is not the same knowing the extent to which they are successful. The cases in which amicus briefs are filed have significant statistical deviations in the likelihood of review by the Court. Amicus briefs were filed in only about 2% of the cases in which a petition for review was filed in the Texas Supreme Court, but these briefs appear in 18% of cases that reached the full briefing stage. *Id.* at 2. In Davis and Starr's review, the rate of requested responses from the Court increased from 40% in cases without an amicus, to 85% for cases in which an amicus was filed, and requests for full briefing on the merits rose from 25% to 82%. *Id.* at 1-2. While the Court decides approximately 40% of cases in which it requests full briefing, it decides more than 50% of cases after full briefing when an amicus brief has been filed. *Id.*

As Davis and Starr recognize, these statistics show a strong correlation between cases with amicus support and increased likelihood of review by the Court, but do not tell us anything about whether the amicus support affected the Court's decision-making. *Id.* at 2. Those trying to discern the impact of amicus briefs are faced with a significant chicken-or-egg dilemma: did the Court grant review because of an amicus briefs, or did the case attract amicus filings for the same reasons that made it more likely to obtain review. No doubt, the key to whether the Court grants review in a particular case is whether it believes the case involves legal issues that are important to the jurisprudence of the State. Kurt Kuhn, *End Game: How to Win at the Supreme Court of Texas*, STATE BAR OF TEXAS, 2014 STATE BAR OF TEXAS ANNUAL MEETING (2014). It would come as no surprise that this same trait would attract amicus support.

Not only is it hard to determine the effect of amicus support through statistics, individually reviewing Court opinions also fails to tell a complete story of the impact that amicus support has on the Court, its docket, or individual cases. To begin with, the Court writes opinions to resolve cases, explain the legal reasoning behind the decisions, and to decide and clarify issues of law—not to give credit to each brief or party it found helpful or persuasive. Some of the most effective amicus work in the Texas Supreme Court is done simply in persuading the Court to grant or deny review. And the most compelling amicus brief that ultimately help shape the Court's reasoning and opinion may not be mentioned in the opinion. Even when the Court does cite to a particular amicus, that does not necessarily mean that the amicus brief was influential on the outcome of the case.

A law professor attempting to study the impact that amicus briefs had on Supreme Court Justice Sandra Day O'Connor came to a similar conclusion. She explains:

> The question of influence is not easy to resolve. The mere fact that a Justice cites an amicus brief does not necessarily mean that the brief influenced the Justice. The citation could be a political signal to demonstrate that various views were considered. Further, a brief that is not cited might influence a Justice. Finally, a Justice can cite an amicus brief to deflect its views rather than rely on its views.

Ruth Colker, *Justice Sandra Day O'Connor's Friends*, 68 OHIO ST. L.J. 517, 518 (2007).

With all of these caveats in mind, experienced supreme court counsel can, when the Court's opinion allows, draw reasonable conclusions as to when and how an amicus was effective. These conclusions are obviously more art than science.

II. The "delicate" role of amicus.

Understanding how amicus can be effective requires a basic understanding of the role that amicus plays. In the adversarial system of litigation, courts and counsel normally understand the role that an attorney plays in vigorously representing their clients. But the role of the amicus client, and thus their attorney, is less defined and more in dispute. As one Texas court long ago described amicus, the "role is a delicate one, and should be assumed only to point out some reason apparent of record why the court should, or should not, act in a given matter." *Flinn v. Krotz*, 293 S.W. 625, 626 (Tex. Civ. App.—San Antonio 1927, no writ). Effective amicus counsel knows how to strike the balance that comes with the moniker of "friend of the court."

A. Courts are split on their attitude and treatment of amicus on appeal.

Confusion or disagreement as to the proper use of amicus may be somewhat surprising given the long history of the role. The job of amicus curiae dates back to Roman law, when "the tool allowed an unbiased or neutral outsider to a legal action to provide information to an appellate court in a case in which the amicus was not named as a party." Linda Sandstrom Simard, *An Empirical Study of Amicus Curiae in Federal Court: A fine balance of access, efficiency and adversarialism*, 27 REV. LITIG. 669, 676 (Summer 2006). And amici have obviously played an important and influential role in many of the most significant legal opinions in modern American history. *Id.* at 671. For instance, in *Brown v. Board of Education* the Supreme Court relied on amici to support the fact that segregation generates a feeling of inferiority among persons of color, and in *Rowe v. Wade* the Supreme Court relied on amici to describe the risks associated with abortion and beliefs as to when life begins. *Id.*

The prevalence and role of amicus on appeal has only grown over the years. On the federal side, the Supreme Court saw a huge increase in amicus filings over the second half of the twentieth century. *Id.* "[F]rom 1965 to 1999

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