

Giving Voice to Amici Curiae

By Joanne Geha Swanson

As the highest court in the state, the Michigan Supreme Court has discretionary authority to decide which cases it will review.¹ The cases it accepts are typically those that will impact the development of Michigan jurisprudence beyond the particular interests of the parties before the Court.² In light of this broader impact, the Court recognizes the importance of considering the views of other non-party stakeholders. Amici curiae—Latin for “friends of the court”—fulfill that role and the Court encourages their participation.³

Orders inviting amicus support

The Court’s orders granting leave to appeal or directing a mini-oral argument on the application frequently afford interested parties the opportunity to appear as amici curiae in pending matters. The order may invite briefs from specific organizations known or assumed to have an interest, and/or the order might more generally invite persons or groups to seek permission to participate. These orders are posted on the Court’s website and updated regularly,⁴ enabling practitioners to advise their client and the client’s professional organizations or industry groups of the opportunity to address issues that will affect their interests.⁵ Even absent an invitation, a motion for leave to file an amicus brief in a case that raises an issue of interest may be filed.⁶ Such motions are routinely granted.

Once a case has been identified, additional facts and details can be gleaned from the Court of Appeals decision or the application for leave, response, and reply, which are also posted on the Supreme Court’s website.⁷ Reviewing these documents may help lawyers and their clients determine whether additional information and argument should be brought before the Court. A call to the lawyer for the party whose interests the client shares is frequently helpful. Most often, the parties welcome the inquiry, and might initiate requests for amicus support themselves.

Clients considering amicus involvement might wonder what value they can add and how much it will cost. These are important questions—the answers to which should be balanced against the impact of a decision adverse to the client’s interests. There are certainly no guarantees as to the effect of amicus briefing in any case, but the one-time investment might well be worth the effort of ensuring that the client’s views have been fully presented.

Value added: Others are interested

An amicus curiae brief typically begins with a description of the amicus curiae’s interest. While this description need not satisfy the threshold for standing, it ex-

plains who the amicus is and why the amicus seeks to present its views. Just as importantly, it reminds the Court that this is a significant case with ramifications to citizens, businesses, or organizations that are not before the Court. This explanation gives context to the argument and information the amicus will provide in the succeeding pages.

Value added: Goes beyond the record

Amici curiae are not parties to the case and not precisely bound by the evidentiary record. This allows amici leeway that the parties do not possess. With this in mind, amici add value by providing the Court with background, historical data, or even anecdotal information important to understanding the context in which the issue has arisen. In this respect, an amicus curiae functions as a source of knowledge for the Court. Justices review hundreds of applications for leave to appeal every year. Those applications consist of both civil and criminal cases and, within those categories, every type of case filed in this state. Therefore, justices are expected to be generalists and cannot possibly become experts in every field. On the other hand, clients in the industry can bring an invaluable level of expertise to the case that will not only educate the Court

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and the parties, but can also help justices see the implications of the decision beyond the narrow issues in the case.

Value added: Policy concerns

The amicus might be better positioned to advocate wider policy concerns of which the Court should be aware. The parties can well recite their own circumstances, but the amicus can go further, explaining the potential social, economic, or other effects a decision may have upon the community or segments of the community.⁸

Value added: Sharpen legal issues

Although the amicus may agree with the legal arguments advocated by the party whose position it supports, the amicus's global perspective allows a finer look. The amicus did not shape those arguments and is not wedded to articulating them in any particular way. At this important final stage, the amicus has the ability to look closely at the arguments and refine them. While this typically does not include raising new issues, there may be nuances that have not been addressed or the party may not have clearly articulated the rule the Court should adopt.

Value added: Survey of the law

When a novel issue is presented, it is often helpful for the Court to know how it has been decided in other states. If the parties have not undertaken this research or did not have enough space in their briefs to address it, the amicus can lend valuable assistance by performing this task. If the result in other states is favorable, the amicus can lend helpful persuasive authority to the discussion.

Value added: Responding to opponent

Except as otherwise directed by the Court, amicus briefs are typically not due until 21 days after expiration of the deadline for filing the appellee's brief.⁹ This gives the amicus the opportunity to review both parties' briefs before filing its own with the consequent benefit of being able to fully respond to opposing arguments and caselaw.

Conclusion

Amicus curiae briefs are valuable tools for both the Supreme Court and the industry involved. The participation of amici can bring a sense of importance to the issues. Amici can add helpful insight, knowledge, and information beyond the record in the case, an indispensable level of expertise, and attention to broader policy concerns. Finally, amicus curiae briefs allow non-parties that may be affected by the outcome of the case to present their perspective rather than rely solely on the arguments set forth by the parties. ■



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ENDNOTES

1. MCR 7.303(B). Judicial Tenure Commission orders recommending discipline, removal, retirement, or suspension are the exception under MCR 7.303(A).
2. Generally, to warrant consideration, the application must involve "a substantial question about the validity of a legislative act"; have significant public interest and involve the state, its agencies or subdivisions, or officers of these units; or involve "a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(1)–(3). A decision that is clearly erroneous and will cause material injustice or conflicts with a Supreme Court or Court of Appeals decision is also subject to review. MCR 7.305(B)(5). Other grounds are stated in MCR 7.305(B)(4) and (6).
3. See "MSC IOP Motions in Supreme Court," *Mich Supreme Court Internal Operating Procedures (IOPs) Subchapter 7.300 Court Rules* (2019), p 24, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/MCR%207.300%20IOPs_2019-12-09.pdf> [<https://perma.cc/FM5E-CWFA>] (accessed February 3, 2021).
4. The cases inviting amicus participation are listed on the Michigan Supreme Court's website at <<https://courts.michigan.gov/courts/michigansupremecourt/clerk/pages/amicus-curiae.aspx>> [<https://perma.cc/U5T3-2BTN>] (accessed February 3, 2021).
5. The preparation of amicus briefs in the Supreme Court follows the typical requirements for briefs in calendar cases as outlined in MCR 7.312(H)(3). Further, pursuant to MCR 7.312(H)(4) an amicus brief must now disclose "whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution."
6. MCR 7.312(H)(2).
7. These cases are listed on the Michigan Supreme Court's website at <<https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Pages/Cases-Awaiting-Argument.aspx>> [<https://perma.cc/4SA2-NA7Q>] (accessed February 3, 2021).
8. This is more applicable to common law issues than statutory issues because "courts cannot substitute their opinions for that of the legislative body on questions of policy." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), quoting *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939).
9. MCR 7.312(H)(3).