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## Introducing Stradley Ronon's New Appellate Publication, The Scope & Standard



### What Are Friends For?

By Mark E. Chopko

Amicus Curiae - a friend of the Court - is an ancient concept that traces its origins to Imperial Rome. It was incorporated into the common law nearly a thousand years ago and found its way into American law. It gives a person or entity a way to appear in a case to which it is not a party and offer the court advice about the proper resolution of an issue - and in the process advances the party's own interests. It is a way to inform a court about legal cases or developments that are beyond the record that might be helpful but are otherwise unknown. For example, in 1686, Sir George Treby, a member of Parliament, filed an amicus brief to the King's Bench to explain the intent of the legislation under scrutiny. That practice was a help, and hence the name amicus curiae. Over time, the practice evolved into advocacy. Courts stopped pretending that its new "friends" were neutrals and required amici to declare their associations with the litigant supported.

Lawyers are familiar with the successful advocacy of Louis Brandeis, whose Supreme Court brief relied on sociological data to advance the cause of workers who were parties to *Muller v. Oregon*. Amicus curiae practice got a significant boost when the Supreme Court relied on the amicus briefing of Thurgood Marshall on behalf of the NAACP to dismantle legal segregation, ultimately leading to the decision in *Brown v. Board of Education*. The continuation and expansion of the involvement of amici curiae in the Supreme Court are in recognition of the Court's significant law-making function in the U.S. governmental system. The Court now publishes a guide for amici parties, which addresses both form and expectations. (See <https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf>.) Today, those seeking to appear in cases as amici curiae need the consent of the parties or, failing that, the permission of the Court. Many state courts still require the permission of the court to file.

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Use of amicus briefs has ballooned over the last few decades. Prominent Supreme Court matters often attract dozens of such briefs on both sides of the merits. The Supreme Court Rule (37.1), however, adds caution for all contemplating that participation: “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.”

Keeping that caveat in mind, this article highlights the reasons why an organization can and should consider filing amicus briefs as part of its overall legal strategy.

1. To urge the right answer - One of the principal benefits of an amicus filing is the opportunity to guide a court through the record and the law to reach what the filing party thinks is the correct answer, especially if the arguments and legal theories are not included in the parties’ briefing. In a Supreme Court that sets a precedent (as opposed to following it), the court is often guided by well-reasoned views of amicus participants offering arguments complementing what the parties advance.
2. To highlight a case’s importance - Thousands of cases are filed every year in the U.S. Supreme Court seeking one of the coveted 70 or 80 slots for cases that will be argued and decided over the Court’s Term. Some arrive with significant media attention and built-in importance. But many do not. An easy way to call attention to the importance of a case that might otherwise be overlooked is to have amicus support when the petition for certiorari is filed. Statistically, the Court grants review more often when there is amicus support. One can debate whether the support itself gives the case greater merit or simply is a way of flagging the petition for a second look. Either way, amicus support is a significant boost to the likelihood of the Court’s review.
3. To advance an issue in the context or background of the case - Often an amicus participant can call a court’s attention to



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issues outside the parties’ arguments that help add color or context to the dispute. For instance, in cases involving the constitutionality of the death penalty for mentally infirm persons and juveniles, the religious community filed united amicus briefs to address the moral application of the Court’s Eighth Amendment standard - whether punishment can be squared with “the evolving standards of decency that mark the progress of a maturing society.” That was not an issue the parties could advance, but one the religious community was uniquely positioned to answer.

4. To advance the amici’s own cause or case - Absent extraordinary circumstances, a Supreme Court often does not take a case involving a legal issue the first time that it arrives for review. Thus, an amicus party can call the court’s attention to other cases that are on their way forward for possible Supreme Court review. And it educates the Court that the amicus participant’s dispute will be worthy of review someday. So why not now?

The strategic use of amicus briefs by organizations can help an appellate court think about a case in a new way, lift an organization’s own cause or dispute, or point the court in a new direction. Briefs that embrace these themes satisfy the substance of the Court’s rule that an amicus participant should advance “relevant matter not already brought to its attention by the parties” rather than simply replicate a party’s argument. When that happens, even the courts will concede it is good to have such a friend.

## Appeals in the time of COVID-19

By Karl S. Myers

The widespread pandemic shutdowns that swept the nation starting in mid-March did not spare appellate courts or practitioners. But like the rest of the legal profession, appellate judges and lawyers have adapted to the circumstances. Appellate business continues, albeit with a few new operating methods.

To be sure, some things have not changed – or maybe even got better. Much of an appellate judge’s workday involves reading briefs and writing opinions. The same is true of law clerks.

Appellate practitioners similarly spend a good deal of their time in solitude, researching and analyzing the law in online databases, reviewing electronic case records, and writing briefs. Before, these activities happened in a law firm’s offices. Now, they happen in a home office or maybe at the kitchen or dining room table. And wherever it happens, appellate opinion and brief writing always command blocks of uninterrupted time to get “in the zone” – that happy place where the words really flow. For some, working free of office distractions has been a boon for writing focus. And while there remains the need for collaboration, that already happened over the telephone at least some of the time. Now it always does.

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## Appeals in the time of COVID-19

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Appellate courts also have been issuing opinions and accepting briefs mostly without interruption. These courts, by and large, already embraced modern technology before the pandemic. Most issue opinions and accept briefs electronically. So it has been opinion- and brief-writing as usual. Some courts entered general orders extending case and filing deadlines and suspended paper copy requirements. But aside from these modest changes, the written work has continued apace. Appellate courts – particularly mid-level error-correcting courts – always have a heavy burden of work, and they recognize the need to keep cases moving and avoid a backlog of inventory.

Oral advocacy has been a different story. Before the pandemic struck, appellate oral argument was almost universally a traditional, in-person exercise. (Notable exceptions include the late Third Circuit Judge Ruggero Aldisert, who participated by video monitor after he moved to the West Coast for health reasons.) When COVID-19 arrived, appellate courts at first canceled or postponed oral arguments. But the courts knew cancellation and indefinite postponement were not long-term solutions. So they began conducting proceedings by technical means. In the U.S. Supreme Court, that meant telephonic argument. The Pennsylvania Supreme and Commonwealth courts have conducted arguments over WebEx and live-streamed them on YouTube. The Pennsylvania Superior Court at first held argument by telephone, and then moved to video. Many appellate courts are using one or an amalgamation of these methods.

Techno-argument is not as good as the real thing. Judges and practitioners cannot see one another well – or at all. That makes it hard to pick up on non-verbal cues. People inadvertently talk over each other or leave themselves on mute. To assuage these problems, some courts, like the United States and Pennsylvania Supreme Courts, have their Chief Justices play the part of air traffic controller, calling on each justice for an allotted few minutes of one-on-one Q&A with the advocates. But these minor issues aside, electronic oral argument proceedings have gone surprisingly well. The Commonwealth Court has even conducted more than one original jurisdiction injunction proceeding over video. In those cases, the judge, court reporter, witness, and counsel each appeared in a single grid on YouTube.

For their part, practitioners have adapted by learning a series of electronic oral argument best practices and tips and tricks, like these:

- Mimic the in-person argument experience as much as possible. Stand for the argument. Buy a table-top lectern or make one from available furniture, books, or boxes – making sure that what you build is stable.
- Lay a towel on your work surface, and then put everything – telephones, stopwatches, briefs, and papers – on the towel. This limits ambient noise.



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- Get a separate USB camera and microphone, or combo unit. Do not rely on your laptop camera. It is probably of less quality, and it depicts you from below – an unflattering angle. Place your camera in your eyeline, so it appears you are looking at the judges when you speak and not off in another direction.
- Avoid virtual backgrounds. They can distract and create a halo effect or obscure part of your head or face. Better to have a simple-looking wall or bookcase behind you. Also, check the lighting. If there are too many shadows or you appear in silhouette, consider repositioning yourself or the room lights or buying a lightbox.
- Use the quietest room in your home. Station your spouse or teenager (the latter may require a small fee) to serve as the front door “guard” to prevent FedEx or UPS drivers from knocking on the door or ringing the doorbell, sending Spot into a barking frenzy. Also, consider sending Spot and a family member out on a hike.
- Practice with a colleague for comfort and to test electric, battery, and WiFi connections and sound and video quality. Perhaps even connect with opposing counsel for a test. That way, you ensure neither of you will consume argument time or distract the court with technical problems.
- Dress as you would for in-person oral argument. Wear solid and neutral colors and avoid busy patterns. This will prevent excessive contrast, a pixellated look, or the appearance that the fabric of your clothing is moving.

Only time will tell if practitioners will need these best practices when things go back to normal (whatever “normal” might be). But given circumstances forced the appellate courts to adapt by using technology-assisted oral argument, many judges are now used to it. Some appellate judges are interested in keeping video arguments in the “toolbox” going forward. It is foreseeable that a court might use it in unusual circumstances – such as in an expedited case, where geography separates the participants, or if there is severe weather. It thus may be that these technological methods end up as permanent features of the appellate courts – not just temporary ones.

## Settlement is still an option – a primer on appellate mediation

By Patrick R. Kingsley

Trial judges love when cases settle. So they do what they can to make it happen. But we do not normally think the same is true of appellate judges. Once the trial court enters judgment and the case goes up on appeal, many assume the appellate court will not do much to try to get the parties to settle. But that is not necessarily the case. In a quiet nook of many appellate courthouses, you will find a mediation program. These small programs – which trace their roots to a pioneering mid-1970s program created by the U.S. Court of Appeals for the Second Circuit – give parties a chance to settle while their case is on appeal. As an added bonus, most of these programs are cost-free to the participants.

Appellate mediation programs come in different shapes and sizes, but most are like the one employed by the U.S. Court of Appeals for the Third Circuit. It employs a staff of a few full-time mediators. The mediation staff uses appellate case intake forms to decide whether a case is suitable for the program. Parties also can ask the staff to mediate their case. If selected, the Court automatically defers briefing. The parties submit a short position paper and then participate in one or more in-person mediation sessions with a mediator. Lead counsel and a person with authority to settle attend for each party. The in-person mediation typically starts with a general session of all parties, followed by separate “caucuses” between the mediator and each party. The process mostly mimics the familiar mediation process at the trial court level.

Other courts have similar programs. The Pennsylvania Commonwealth Court’s mediation program is like the Third Circuit’s, except a senior judge of the Court acts as the mediator and mediation does not automatically defer appellate briefing. The District of Columbia Circuit uses accomplished and trained local lawyers as mediators, and is highly selective about the cases it selects for the program.

Not every appellate court has a mediation program. For example, neither the Pennsylvania Supreme nor Superior court has one. The former never did, and the latter ended its program years ago. And even for those courts that do have a program, its scope is typically limited to civil cases with a damages dispute where each party has an attorney.

Where they exist, are appellate mediation programs successful? The answer is a matter of perspective. While statistics are hard to come by, the programs do not appear to settle most cases. Part of that has to do with mediator quality. Just as with trial-level mediators, some appellate mediators are better than others. And some mediators are able and willing to invest significant time and energy trying to get a case settled, while others are only able or willing to make a more modest attempt.



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To be fair, appellate mediators face an uphill battle. By the time a case is on appeal, the parties’ positions have hardened. One side has won, the other has lost. The winner is confident of victory on appeal, as appellate courts affirm most of the time. The winner may also have in hand a well-reasoned and -written trial court decision. And, of course, by the appeal, both sides have sunk plenty of money into attorney’s fees – which they could have used to fund a settlement. These factors do not make for great settlement dynamics. For these reasons, it does not seem to make much sense to force parties into an appellate mediation – as some courts do. There is nothing wrong with reaching out to encourage the participation of parties who could benefit from mediation. But forcing them into it often results in a waste of everyone’s time.

Even with these hurdles, appellate mediation programs can post surprisingly good results. New Jersey’s Civil Appeals Settlement Program recently reported a success rate of over 40%. Statistics from other courts show some appellate mediation programs have settled about half of the referred cases. These figures, while impressive standing alone, are all the more so given settlement attempts were surely made in these cases at the trial court level – and they all failed. So it would seem it is worth continuing the modest investment needed to sustain appellate mediation programs.

The settlement statistics also reveal that parties to an appeal understand that litigation risks and realities still exist on appeal. Affirmance is not guaranteed; there is always the risk that the court might reverse the ruling below. It could also vacate and send the matter back for a new trial, putting the parties back at square one. The trial court may have written a poor-quality decision, or its conclusion may be on shaky legal ground. And, of course, appeals are not free, so there is still the fact of attorney’s fees to consider. Settling during an appeal replaces these risks and costs with certainty and finality.

So the next time you have a case on appeal, do not write off the possibility of a court-aided settlement. Appellate mediation programs – admittedly of uneven quality, and not always successful – can help parties who are interested in avoiding the risks and costs associated with a final decision on appeal.