

# Amicus Guide

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Summary of Rules of Court and Procedural Considerations  
Relating to *Amicus* Participation



**2017 Edition**  
[www.cacities.org/amicusguide](http://www.cacities.org/amicusguide)



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This summary is for general information only and is not intended as legal advice or to be used in lieu of consultations with an agency's legal counsel. **This summary also is intended to be used in conjunction with, not as a substitute for, consultations with the court rules and other authorities cited.** Moreover, in the interest of clarity and brevity, some issues may receive only a passing reference or may be omitted altogether. Rules or practices of a given court can change. Attorneys are urged to read the authorities cited in this summary to make sure they agree with the interpretations given and to make sure the authorities remain good law. Non-attorneys using this summary are urged to always consult with their agency's attorney when confronting a situation that may have legal ramifications.

This Guide has been updated to reflect California Rules of Court changes effective January 1, 2016.

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## I. Introduction and Overview

### A. What Is An *Amicus* Brief?

An *amicus curiae* ("friend-of-the-court") brief is filed by an entity or individual who is not a party in a given lawsuit, but nonetheless may be affected by the outcome. A party to a lawsuit typically has one goal in mind: to prevail. An *amicus* can take a broader perspective, advising the court of the implications of resolving the issues presented by the case one way or the other.

### B. The Purpose of This Guide

This guide has been developed by the Legal Advocacy Program of the League of California Cities® and the Litigation Coordination Program of the California State Association of Counties operated by the County Counsels' Association of California. It is intended to help these programs and the volunteer *amicus* writers who support the programs. The guide is not a substitute for obtaining and reading the most recent version of court rules for the court in which the brief is being filed.

### C. Terminology

This summary uses the term "*amicus*" participation very broadly, to include any time in which an entity appears before the court as a non-party urging the court to take some action with respect to a case. The term includes not only appearances as "friends-of-the-court" offering full-blown legal argument on issues presented by a case, but also when a non-party entity urges the court to grant a petition for review or decertify a case from publication.

### D. *Amicus* Programs

#### 1. League of California Cities

The League's executive director makes decisions on *amicus* support. The executive director is advised by the Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance in making its recommendations to the executive director. When support by the League is recommended, *amicus* letters and briefs are prepared with the assistance of city attorneys and *pro bono* counsel and filed on behalf of the League.

For details on the League's Advocacy Program, see <http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Legal-Advocacy-Program>.

Each year, the City Attorneys' Department of the League authors a new edition of the California Municipal Law Handbook, which is then published by the University of California's Continuing Education of the Bar (CEB). Attorneys filing *amicus* letters and briefs on behalf of the League are encouraged to cite the Municipal Law Handbook where appropriate. The official Bluebook citation format for the 2016 edition is as follows: City Attorneys' Dep't, League of Cal. Cities, The California Municipal Law Handbook (Cont.Ed.Bar. 2016 ed.) § \_\_\_, p. \_\_\_.

## 2. California State Association of Counties

The California State Association of Counties (CSAC) sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California. The Program is overseen by the County Counsels' Litigation Overview Committee, with representatives from throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide. When a case is determined to affect all counties, the Litigation Overview Committee recommends *amicus* support by CSAC. *Amicus* letters and briefs for selected cases are prepared by the program (with the assistance of both county counsels and *pro bono* counsel) and are filed on CSAC's behalf.

## 3. Other *Amicus* Programs

There are a number of other *amicus* programs of interest to local agencies:

- Association of California Healthcare Districts, 4178 Douglas Blvd., Granite Bay, CA 95746, 916/266-5200. Contact: David McGhee, CEO, email: davidm@alphafund.org.
- Association of California Water Agencies, 910 K Street, Suite 100, Sacramento, California 95814, 916/441-4545. Contact: Whitnie Henderson, Legislative Advocate/Attorney, email: whitnieh@acwanet.com.
- California Association of Sanitation Agencies, 1225 8th. Street, Suite 595, Sacramento, CA 95814, 916/446-0388. Contact: Roberta "Bobbi" Larson, Executive Director, email: blarson@casaweb.org.
- California Department of Justice (Attorney General's Office), P.O. Box 944255, Sacramento, California 94244-2550. The general information number is 916/445-9555. Manuel Medeiros, State Solicitor, (916/323-1996) has oversight of the appellate court briefing and is the contact for *amicus* filings, email: manuel.medeiros@doj.ca.gov.
- California Police Chiefs Association, California State Sheriffs' Association and California Peace Officers' Association, 3777 North Harbor Boulevard, Fullerton, California 92835, 714/446-1400. Contact: Martin J. Mayer, Attorney, Law Offices of Jones & Mayer, email: MJM@Jones-Mayer.com.
- California School Boards Association, 3100 Beacon Boulevard, West Sacramento, California 95691, 916/371-4691. Contacts: Richard Hamilton, Director of Education Legal Alliance, email: rhamilton@csba.org; Keith Bray, General Counsel, email: kbray@csba.org.
- California Special Districts Association, 1112 I Street, Suite 200, Sacramento, California 95814, 916/442-7887. Contacts: Neil McCormick, Executive Director, email: neilm@csda.net; David McMurchie, Legal Counsel, 916/983-8000, email: dcmurchie@mcmurchie.com; Mustafa Hessabi, Legislative Analyst, email: mustafah@csda.net.
- International Municipal Lawyers Association (IMLA), 7910 Woodmont Ave., Suite 1440, Bethesda, Maryland 20814, 202/466-5424. Contacts: Chuck Thompson, Executive Director/General Counsel, email: cthompson@imla.org; Amanda Kellar, Associate General Counsel/Director of Legal Advocacy, email: akellar@imla.org.

- State and Local Legal Center, 444 North Capitol Street N.W., Suite 309, Washington D.C. 20001, 202/434-4850. Contact: Lisa Soronen, Executive Director, email: lsoronen@sso.org.

## II. General Issues for All *Amicus* Submittals

This section addresses issues relating to *amicus* briefs that tend to apply irrespective of the specific court in which litigation is occurring.

### A. The Judicial Branch Is Different

**Quality Not Quantity.** Many organizations and public officials are accustomed to advocacy efforts reflecting such democratic notions as majority rule. A typical example of this strategy is a letter-writing campaign to elected officials designed to express broad-based support for or opposition to a particular proposal. Implicit in such communications is the threat that failing to heed an outpouring of opinion on the wisdom of a particular proposal may have long-term career consequences for the elected official.

**May It Please the Court.** The courts are a completely different kind of institution. Communication with the courts is much more constrained; the courts are not obliged to hear from anyone except the parties to the dispute. Non-parties must specifically seek permission (also known as "leave") to get their perspectives before the court and, in most instances, the decision on whether to grant such permission is entirely discretionary. Furthermore, as this guide illustrates, there are usually rules governing how such support may be communicated. Proof of service requirements is one example of such a rule.

**A Numbers Issue.** *Amicus* brief writers should be aware that the Appellate and the Supreme Courts receive a large number of cases for review that dramatically increase the courts' workloads.

- The California appellate court system is the largest in the United States. In 2012-2013, the 105 Court of Appeal justices, sitting in six districts were faced with 20,391 filings on contested matters and 22,092 dispositions. The Courts of Appeal disposed of 9,429 cases by written opinion. Judicial Council of Cal., Court Statistics Report (2014) pp. xiv-xv.
- In 2012-2013, 7,813 matters were filed and 8,269 matters were disposed with the California Supreme Court. Judicial Council of Cal., Court Statistics Report (2014) p. xvi.
- The 9th U.S. Circuit Court of Appeals is the busiest appellate court in the country with appeals filed in fiscal year 2014 totaling 11,311. U.S. Court of Appeals – Judicial Caseload Profile (2014).

For these reasons, it behooves those wishing to participate in litigation as *amici curiae* to focus on precisely what that term means: friend of the **court**. The purpose of these briefs is to help the **court** reach a wise and just resolution of a controversy. *Amicus* briefs that focus on assisting the court are more likely to be read and considered by the court, which of course, is the whole purpose of preparing such briefs. Additionally, *amici* must follow all procedural and *amicus* brief preparation rules. The 9th Circuit has stated that it will not accept briefs that do not conform to the rules. It is a waste of resources to prepare briefs that never reach their intended audience.

## B. Focus on Being a Friend

**Pursue Truth, Justice and the American Way.** Observers believe there has been a tendency by *amici* to overuse the *amicus* process. The ideal and preferred purpose of an *amicus* brief is therefore not to argue why the party in whose support the brief is filed is right, but why the result being urged is legally correct and just.

**Not Just “Once More with Feeling.”** The *amicus* brief must do this by adding something to the body of argument before the court, not just by reiterating the arguments being made by the parties. United States Supreme Court Rule 37.1 warns that an *amicus* brief that does not bring to the attention of the Court relevant matter not already brought to its attention by the parties is not favored. *Amicus* briefs are very helpful in cases that require the court to articulate the law or establish a test for determining liability. Additionally, briefs from governmental entities are more favored by the courts.

**Fill the Gaps.** The first task of a would-be *amicus* brief writer is to review the briefs of the parties and think carefully about what is missing. It could be "smaller-picture" issues like citations to pertinent authorities. More often the focus of an *amicus* brief is on "big-picture" issues like the effect of resolving the controversy one way or another on the public interest and others similarly situated.

**Presenting the Big Picture.** One way for an *amicus* brief writer to assist a court in seeing the big picture is to collect factual information demonstrating the importance of or implications of the legal issues involved and to which the court or parties may otherwise not have access. Such briefs are sometimes known as "Brandeis briefs," taking their name from Louis D. Brandeis. As a practicing lawyer, the former United States Supreme Court Justice repeatedly included the results of economic and sociological studies with his discussion of legal principles in his briefs.

An *amicus* brief may also take a long-term view on the development of the law, endeavoring to persuade the court to resolve the controversy in a way which either lays the legal foundation for positive outcomes or, in the event of an adverse outcome, minimizes the damage for entities similarly situated to *amici*. An *amicus* brief also generally lets a court know others care about how a case is resolved.

**"Me Too" Briefs.** The apparent proliferation of *amicus* programs seems to be causing the courts to be increasingly selective about which filings they will accept. Many *amicus* briefs are merely extensions of the parties or are third parties who skew the facts or empirical data in their favor. There is a very real risk a court will refuse to grant leave to file an *amicus* brief that does not aid the court and merely reiterates a party's argument, something referred to in this guide as a "me-too" brief.

If, for whatever reason and after careful consideration, an organization does find it necessary to file a "me-too" brief, the best strategy is to represent the brief as what it is: an effort to communicate to the court that others agree with the position being urged by one of the parties or other *amici*. The brief should be short and should not take up the court's time with duplicative argument.

## C. Facts Outside the Record

### 1. Role of the Rules of Evidence

Generally speaking, *amici* must take the case as they find it, accepting the issues being argued to the court by the party most closely aligned to *amici*.

The California Evidence Code applies in every action before all courts in California, except as otherwise provided by statute. *See* Cal. Evid. Code § 300. The Federal Rules of Evidence govern proceedings in the "courts of the United States" to the extent specified in rule 1101. Rule 1101 includes courts of appeals and district courts within the category of "courts of the United States" but, interestingly enough, does not mention the United States Supreme Court. *See* Fed. R. Evid. 1101(a).

## 2. Issues Relating to Judicial Notice

A reviewing court may accept facts outside the record that are presented by *amici* if those facts are subject to judicial notice. *See Pratt v. Coast Trucking, Inc.* (1964) 228 Cal. App. 2d 139, 143-144, (taking judicial notice of proceedings of the Public Utilities Commission, despite party's failure to raise issue below); *see also Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 405, fn. 14 (deciding that an appendix attached to an *amicus* brief that included several declarations and factual statements outside of the record were subject to judicial notice and facilitated informed judicial considerations). Among the types of information that may be subject to judicial notice are facts and propositions that are of such common knowledge within the territorial jurisdiction of the courts that they cannot reasonably be the subjects of dispute. *See, e.g.,* Cal. Evid. Code § 452(g). Also judicially noticeable are facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. *See* Cal. Evid. Code § 452(h).

The state rules of evidence allow a reviewing court to take judicial notice of matters that a trial court may judicially notice. *See* Cal. Evid. Code §§ 459(a) (authorization to appellate courts) and 452 (authorization for trial courts to take judicial notice). Appellate courts must take judicial notice of matters that trial courts are required to judicially notice. *See* Cal. Evid. Code §§ 459(a) (authorization to appellate courts), 451 (matters which trial court must judicially notice), and 453 (matters specified in section 452 must be judicially-noticed; party requesting notice gives adverse party notice and opportunity to respond, and gives court sufficient information to take judicial notice).

## 3. Legislative Versus Adjudicative Facts

A further argument can be made that a court may consider legislative facts presented by *amici*. "Legislative facts" are the kinds of facts invoked when courts are faced with the task of creating law. *See McCormick on Evidence* (5th ed.) § 328 at 369. They are the kind of facts the courts use as a guide to considerations of expediency and public policy. *Id.* § 331 at 444. Legislative facts are distinguished from "adjudicative facts," which are the historical facts relating to the incidents that gave rise to the lawsuit (who did what, when, where and how, and with what motive). *Id.* Indeed, the federal rules relating to judicial notice apply only to "adjudicative" facts. *See* Fed. R. Evid. 201(a).

*McCormick on Evidence* suggests courts will consider legislative facts outside the record, when helpful to reach a wise and just resolution of the legal issues involved in a lawsuit. *See id.* §§ 331-393 (including examples of cases in which courts have used legislative facts). The authors note the courts have not created a rigid procedural etiquette for the proper way to present legislative facts. *Id.* § 333 at 453. The discussion is useful reading (and has citations to authority) if an *amicus* writer either anticipates a challenge or has been challenged on factual statements submitted to the court.

## **D. Submittal by Non-Lawyers**

Usually, an individual may represent him or herself in court (known as appearing "*in propria persona*"). However, this right does not extend to corporations or non-profit associations. See *Merco Construction Engineers, Inc. v. Municipal Court*, 21 Cal. 3d 724 (1978) (overturning a law that allowed officers and employees of a corporation to represent the corporations). See also, *Clean Air Transport Systems v. San Mateo County Transit District*, 198 Cal. App. 3d 576, 578-579 (1st Dist. 1988) (preventing an individual from representing a non-profit association, even when she did not hold herself out to be an attorney and did not charge for the service, and rejecting arguments relating to the first amendment)..

In light of this, the best approach is to have all communications to a court on behalf of an organization or government agency prepared and signed by an attorney. This is also likely to be consistent with an agency's adopted policy (see below).

## **E. Local Agency Policies and Practices**

### **1. Cities**

Some public agencies' participation in *amicus* briefs has been challenged as lacking legal authority to join. Other cities have had their decisions to join be countermanded by city council members who objected to the city's name being added to a specific brief. Under current League policy, *amicus* support is taken in the name of and on behalf of the League rather than individual cities.

### **2. Counties**

Under the guidance of the Litigation Coordination Program, when *amicus* action is recommended by the Litigation Overview Committee of the County Counsels' Association to the California State Association of Counties (CSAC) and CSAC approves such a recommendation, the ensuing *amicus* action is taken in the name of CSAC and on CSAC's behalf. When CSAC participates it is not necessary to seek authority from each individual county. In addition, some county counsels may have authority from their boards of supervisors to add their county as an individually named participant in an *amicus* brief, but most county counsels present each such case to the board for approval of *amicus* support.

### **III. Amicus Participation in the California Supreme Court**

#### **A. Forms or Stages of Participation**

*Amicus* may wish to participate in several stages of litigation before the California Supreme Court: (1) in supporting or opposing a petition for review, (2) in urging the court to certify for or decertify from publication an appellate court decision, (3) in filing a brief on the merits, prior to oral argument, (4) in participating at oral argument, (5) in supporting a request that the court exercise its original mandate jurisdiction, and (6) in support of rehearing a matter already decided by the court.

#### **B. Support for or Opposition to Review**

##### **1. The Decision to Grant Or Deny Review**

###### **a) Grounds for Review**

The California Supreme Court may grant review when:

- (a) Necessary to secure uniformity of decision;
- (b) Necessary to settle an important question of law;
- (c) The Court of Appeal lacked jurisdiction; or
- (d) The Court of Appeal decision lacks concurrence of sufficient qualified judges.
- (e) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

Cal. R. Ct. 8.500(b)(1)-(4). The court may review and decide any or all issues, or specify the issues to be decided. Cal. R. Ct. 8.516.

###### **b) Role of Conference**

Review by the Supreme Court is a matter of discretion. The court decides whether to accept a case at one of its internal weekly conferences. *The Supreme Court of California* (2007 ed.) p. 20. At a typical conference, the justices consider approximately 250 matters. *Id.*

###### **c) Conference Memoranda**

Once the court has granted review, the Chief Justice assigns it to one of the justices who voted in favor of review. *Id.* at p. 21. The selected justice prepares and circulates to the other justices a “conference memorandum,” which details the facts and legal issues of the case, and proposes a resolution of the legal issues. *Id.* at p. 21. After the justices have had sufficient time to consider the matter, the Chief Justice calls a preargument conference. *Id.* at p. 22. If, at the conference, a majority of justices agree the matter is ready to be heard, it is scheduled for oral argument. *Id.*



**d) Decision-Making**

After oral argument, the justices take a tentative vote. *Id.* If a majority agrees with the recommendation of conference memorandum, the justice who drafted the memorandum will prepare a proposed majority opinion. *Id.* at p. 22-23. If the majority view is contrary to the calendar memorandum, one of the majority justices will draft the opinion. *Id.* at p. 23.

The court will file a written opinion within 90 days after oral argument. *Id.*

**2. Timing**

**a) Timing of Party Filings**

A petition for review must be filed within ten days after the Court of Appeal decision in question becomes final. Cal. R. Ct. 8.500(e)(1). For purposes of this rule, the date of finality is not extended if it falls on a day the court is closed. *Id.* With certain exceptions, a court of appeal decision becomes final 30 days after filing. Cal. R. Ct. 8.264(b)(1). So, as a practical matter, a petition for review typically must be filed within 40 days after the Court of Appeal opinion is filed.

Any answer must be served and filed within 20 days after the petition is filed; petitioner may file a reply within ten days after the answer is filed. Cal. R. Ct. 8.500(e)(4) & (5). The California Supreme Court has 60 days from the filing of the last petition for review to act on the petition, unless it chooses to extend this 60-day period by not more than 30 days. Cal. R. Ct. 8.512(b)(1). The total time from the filing of a petition for review and the court's order to review may not exceed 90 days. *Id.* If the court does not rule on the petition within that time, the petition is assumed denied. 8.512(b)(2).

**b) Timing of Non-Party Filings**

**(1) No Specific Deadline**

The court rules do not provide specific deadlines for filing letters in support of or opposition to review.

**(2) Relationship to Court's Timing in Considering Petition**

As a practical matter, one should file letters in support of or opposition to review by the time the reply to the petition for review is due, or within 30 days after the petition for review is filed. Cal. R. Ct. 8.500(e). This increases the likelihood that the letter will become part of the file which is used to prepare the "conference memoranda" on which the decision to grant or deny review is made.

**3. Format and Page Limits**

Individuals or entities supporting or opposing the granting of a petition for review must do so by letter stating the requestor's interests. Cal. R. Ct. 8.500(g)(2). (Note: Current court practice marks such letters "received"; they are neither lodged nor filed.) No authorities or argument may be incorporated by reference from another document, unless the document is a petition, answer or reply in the same case or a connected case that is also before the court. *See* Cal. R. Ct. 8.504(e)(3). There are no specific page limits, although counsel is well-advised to consult the general page limits for party submissions in Rule 8.504. A letter in support of review may not

contain an alternative request for depublication. *See* Cal. R. Ct. 8.1125(a)(2). (See section III.D of this guide.) Finally, a short, informative and well-written letter is more likely to be read and appreciated by the court than a long rehash of arguments already made by counsel for the parties.

As a courtesy to the court, call (415/865-7000) or visit the court's electronic docket at <http://appellatecases.courtinfo.ca.gov/>, double-check that the case hasn't been decided, obtain the Supreme Court docket number for the case, and include the number in a prominent place on the letter.

#### **4. Number of Copies**

Anyone filing "a letter in support of or opposition to" to a petition for review must file an original and eight copies. Cal. R. Ct. 8.44(a)(4). It is not necessary to attach a copy of the lower court's decision.

#### **5. Proof of Service**

The letter in support of or opposition to review must be accompanied by proof of service on each party to the action or proceeding. Cal. R. Ct. 8.25(a)(2). The proof of service must also name all parties represented by each attorney served. *Id.*

#### **6. Effect of Registering Support for or Opposition to Review**

The fact an entity has submitted a letter on the issue of granting review in a case does not constitute leave for that person to file an *amicus* brief on the merits if the petition is granted. Cal. R. Ct. 8.500(g)(3). All persons seeking to file an *amicus* brief on the merits must comply with the court rules for seeking permission to file such a brief. Cal. R. Ct. 8.520. (See section III.F of this guide.) Additionally, the court will not send notice of its decision to those lodging a letter on the issue of granting review.

#### **7. Strategic Considerations**

##### **a) Importance of the Issues Identified in Petition for Review**

The issues identified in the petition for review are critical. The court will grant review as to some or all of them and may well refuse to entertain argument that strays beyond the issues as to which review has been granted. In cases of statewide importance to local agencies, it is helpful if collaboration occurs between the agency seeking review and *amici*, so these issues may be framed in the best way. Also, letters in either support of or opposition to review must discuss the appropriateness of review in light of those issues on which review actually is being sought.

##### **b) Relationship to Standard for Granting Review**

Being wrongly decided is **not** in itself a ground for Supreme Court review of a Court of Appeal decision. *See People v. Davis*, 147 Cal. 346 (1905). Letters in support of or opposition to review should explain how the case meets the court's standards for review. The purpose of such letters is to communicate that the case is of interest to more than just the parties directly involved and why the case is important. *See, e.g., Marvin v. Marvin*, 18 Cal. 3d 660 (1976). In so doing, however, the writer should explain within the first few paragraphs of the letter why the case meets the standards for review.

Most often, letters in support of review will argue review is necessary to secure uniformity of decision or settle important questions of law.

**c) Uniformity of Decision**

It may be a case is wrongly decided because it deviates from prior appellate decisions. If uniformity of decision is an issue, the letter should explain how the court of appeal decision deviates from (or, if the letter is in opposition to review, is consistent with) prior appellate court decisions.

**d) Important Questions of Law**

The most challenging argument is the case that presents an important question of law. Given the court's workload, it must be extremely selective in the cases it undertakes to resolve. The task is to explain why this particular case merits the court's attention, not just why the court of appeal decision is wrong.

In connection with this effort, counsel should keep in mind the function of the Supreme Court. The Supreme Court's task is to announce durable and generally applicable principles of law. In so doing, the Supreme Court must have a broader and more long-term perspective than the Court of Appeal.

Because the court's focus is on legal principles, it may not be a good use of space in a letter in support of review to engage in an elaborate analysis of the facts of the particular case. However, it may be useful to provide facts that put the controversy in a larger context or show the court the potential impacts of resolving the controversy one way or another. Another useful role is to provide the policy rationale underlying the government agency's action.

Moreover, organizations that regularly monitor appellate court decisions need to be discerning in which cases they support for review. Over the long run, the court could get the impression that an organization takes the position that **any** appellate court decision affecting the organization's membership is "an important question of law." Although this may be true from the organization's perspective, such an approach undermines the organization's credibility with the court. This, in turn, undermines the effectiveness of the organization's advocacy efforts.

**e) Mixed Messages In Opposing Review?**

Letters opposing review are difficult to write when the petitioner is arguing the matter involves an important question of law. The letter risks sending a mixed message: if the case does not present an important question of law, why is an organization bothering to write the court about it? Such letters can undertake to argue the matter was correctly decided by the court of appeal and does not merit the court's further attention. Another strategy might be to argue the case is a poor vehicle by which to address an important question and the court should await another case.

Either of these strategies have risks of their own. In any event, a flurry of letters from various organizations on a given case still can suggest the issues are of great interest, fairly debatable and therefore warrant the court's attention. *See* CEB, *California Civil Appellate Practice*, §§ 14.46, 14.48

**f) Relationship Between Petitions for Review and Requests for Depublication**

An alternative to seeking review of decisions that an organization believes are incorrectly decided is to seek depublication. (See section III.D of this guide.)

A letter in support of review may not contain an alternative request for depublication. *See* Cal. R. Ct. 8.1125(a)(2).

However, an alternative request for depublication can be an efficient device for both the organization making the filing as well as the court, inasmuch as the practice avoids duplicate and repetitive filings.

## **C. Requests for Publication**

### **1. Procedure**

Requests for publication of a noteworthy Court of Appeal decision are made, in the first instance, to the rendering court of appeal within 20 days after the opinion is filed. Cal. R. Ct. 8.1120(a)(3). If the court of appeal loses jurisdiction over the case, it transmits the request to the Supreme Court within 15 days after the decision is final in that court. (For a complete discussion of the rules for requesting publication relating to *amicus* participation before the Court of Appeal, see section IV.F of this guide.)

### **2. Strategic Considerations**

The previous version of Cal. R. Ct. 8.1120 did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or could not have granted. In practice, however, it was uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case, or, if there was no such petition, had lost jurisdiction to grant review on its own motion. Because of the Supreme Court's workload and lesser familiarity with the case, the preferred practice is to make the request to the Court of Appeal within the 30 day period before the Court of Appeal decision becomes final.

## **D. Requests for Depublication**

### **1. Standard for Depublication**

The rule relating to depublication does not contain a specific standard suggesting the grounds on which the court will decertify a case from publication. A requester has two options. One is to argue that the case was wrongly decided and should not remain published because it will provide misguided precedent for future cases.

The other is to argue the decision does not meet the standards for publication established in rule 8.1105(c). Under that rule, an opinion merits publication if it:

- a. Establishes a new rule of law;
- b. Applies an existing rule to a set of facts significantly different from those stated in published opinions;
- c. Modifies, explains, or criticizes with reasons given, an existing rule of law;
- d. Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- e. Addresses or creates an apparent conflict in the law;
- f. Involves a legal issue of continuing public interest;

- g. Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- h. Invokes a previously overlooked rule of law or reaffirms a principle of law not applied in recently reported decisions; or
- i. Is accompanied by a separate opinion concurring or dissenting on a legal issue and publication of the majority and separate opinions would make a significant contribution to the development to law.

Cal. R. Ct. 8.1105.

## **2. Timing**

The request for depublication must be made in a letter not to exceed 10 pages to the Supreme Court within 30 days after the court of appeal decision becomes final. Cal. R. Ct. 8.1125(a)(4). With limited exception, a decision becomes final 30 days after filing. Cal. R. Ct. 8.264(b)(1). So, as a practical matter, the request for publication typically must be filed within 60 days after the Court of Appeal opinion is filed.

Any person may also join in a request for depublication already made. Such joinder must be made within ten days after receipt by the Supreme Court of the request for depublication. Cal. R. Ct. 8.1125(b)(1).

## **3. Format and Page Limits**

Any person may request depublication of an opinion certified for publication. Cal. R. Ct. 8.1125(a)(1). The request must be made by letter and must explain the nature of the person's interest and state concisely why the opinion should not remain published. Cal. R. Ct. 8.1125(a)(3). Requests must not exceed ten pages, but should be kept as brief and to the point as possible. Cal. R. Ct. 8.1125. As a matter of courtesy, a copy of the opinion should be included with the request.

## **4. Number of Copies**

The rule on depublication does not specify how many copies of a request for depublication should be filed. The request appears to fall within the category of "any other document," which requires an original and one copy. Cal. R. Ct. 8.44(a)(6). However, court clerks have suggested that the request should include an original and four copies.

## **5. Proof of Service**

A request for depublication must be accompanied by proof of mailing to the Court of Appeal and each party to the action or proceeding. Cal. R. Ct. 8.25(a)(2). The same requirements apply to letters joining in requests for depublication, except that one must also send a copy to the individual requesting depublication. *Id.*

## **6. Strategic Considerations/Dilemmas**

Counsel is well advised to apply the standards the courts have provided relating to publication to the case at hand. The difficulty with the absence of a specific standard for requesting depublication is that a decision will usually meet one of the tests for publication set forth in rule 8.1125(b) and it is very easy for an opposition to a request for depublication to point out this fact.

For example, if it is argued that the case was wrongly decided (*i.e.*, it deviates from established precedent), it may meet the standard for publication by "establishing a new rule of law" or "creating an apparent conflict in the law." *See* Cal. R. Ct. 8.1105(c)(1) and (5).

Arguments that may be made in support of depublication include:

- a. A better vehicle for articulating the law in this area is working its way up through the courts;
- b. Allowing the Court of Appeal decision to remain published will create confusion (which is sometimes characterized as a "negative contribution to the legal literature" in an effort to tie the argument in with the standards for publication);
- c. The case is an aberrant effort to create what might seem to be a just result and avoid the consequences of established law (this is a risky argument, but may be appropriate in an instance in which "bad facts make bad law");
- d. The Court of Appeal failed to fully analyze the issue, which will create problems in future cases. A variation of this theme is the Court of Appeal did not cite a key case on point.

## **E. Opposing Requests for Depublication**

### **1. Timing**

An opposition to a request for depublication must be filed within ten days after receipt by the Supreme Court of the request for depublication. Cal. R. Ct. 8.1125(b)(1). This short time period underscores the need for close communication between counsel who has obtained a favorable decision and those who may be in a position to oppose a request for depublication.

### **2. Format and Page Limits**

Any person may oppose a request for depublication of an opinion. *See* Cal. R. Ct. 8.1125(b). The opposition must be submitted by letter and must state the nature of the person's interest and explain concisely why the opinion should remain published. *Id.*

The request for depublication may not be included with a petition for review. *See* Cal. R. Ct. 8.1125(a)(2). Letters in opposition to depublication must not exceed ten pages, and should be kept as brief and to the point as possible. *See id.*

### **3. Number of Copies**

The rule on depublication does not specify how many copies of a request for depublication, or an opposition to such a request should be filed. The request appears to fall within the category of "any other document," which requires an original and one copy. Cal. R. Ct. 8.44(a)(6). However, court clerks have suggested that the request should include an original and four copies.

### **4. Proof of Service**

An opposition to request for depublication must be accompanied by proof of mailing to the Court of Appeal, each party to the action or proceeding, and the person requesting depublication. Cal. R. Ct. 8.25(a)(2).

## **F. Briefs on Merits**

### **1. Applying for Leave to File as *Amicus Curiae***

Rule 8.520(f) specifies the procedure for seeking permission to file as *amicus curiae*. Advance permission from the Chief Justice is required; to obtain permission, the applicant must file a signed application that states the applicant's interest and explains how the prepared brief will assist the court in deciding the issue. Political subdivisions are not exempt from the advance permission requirement. The proposed brief must be served and must accompany the application or be combined with it. *Id.*

### **2. Timing**

#### **a) Timing of Application for Leave and Preparation of Brief**

The application and the proposed brief must be filed no later than 30 days after all briefs that the parties may file – other than supplemental briefs – have been filed or were required to be filed. Cal. R. Ct. 8.520(f)(2). The Chief Justice may grant leave to file beyond the deadline if the applicant shows specific and compelling reasons for the delay. *Id.*

The court's strict approach is an effort to avoid filings that merely reiterate arguments already presented by the parties and do not materially assist the court in resolving the issues before it.

The timing for party briefs is as follows:

- Within 30 days after the Supreme Court files the order of review, petitioner must serve and file either an opening brief on the merits or the brief it filed in the Court of Appeal. Cal. R. Ct. 8.520(a)(1).
- Respondent must file either an answer brief on the merits or the brief it filed in the Court of Appeal within 30 days of petitioner's filing. Cal. R. Ct. 8.520(a)(2).
- Petitioner may file a reply brief on the merits or the reply brief it filed in the Court of Appeal within 20 days after the opposing party files its brief. Cal. R. Ct. 8.520(a)(3).

The time periods for party briefing may not be extended by stipulation but only by order of the Chief Justice under rule 8.60. Cal. R. Ct. 8.520(a)(5).

### **3. Format**

#### **a) Form**

Every brief must comply with the relevant provisions of rule 8.204. *Amicus* brief covers are gray (Cal. R. Ct. 8.40(b)) and must contain the information set forth in rule 8.204(b)(10)(D). If the *amicus* brief is in support of the position of one of the parties, that fact must be noted on the cover of the brief. Cal. R. Ct. 8.520(f)(6).

#### **b) Page Limits**

Briefs may not exceed 14,000 words, including footnotes, if produced on a computer, or 50 pages if typewritten unless otherwise ordered. Cal. R. Ct. 8.520(c). However, *amici* should not burden the court with the maximum number of pages if *amici's* point(s) can be

made more succinctly. The brief must include a certificate by counsel stating the number of words in the brief. Cal. R. Ct. 8.520(c)(1).

**c) Number of Copies**

An original and

**(1) 13 copies or**

**(2) 8 paper copies and one electronic copy**

of an *amicus* brief must be filed with the court. Cal. R. Ct. 8.44(a)(1)(A)-(B).

**d) Listing of Joining Parties**

The cover of the *amicus* brief must state the name, address, telephone number, and California State Bar membership number of the attorney filing the brief and of every attorney who joins in the brief. Cal. R. Ct. 8.204(b)(10)(D).

**4. Proof of Service**

The application for leave to file and the brief must be served on all parties before the brief is filed. Cal. R. Ct. 8.520(f)(7). Proof of service must be filed with the application and the proposed brief. *Id.*

Rule 8.212 may impose additional service requirements on *amici*. That rule requires proof of deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at trial. Cal. R. Ct. 8.212(c)(1). If a brief is not filed electronically under rules 8.70-8.79, one electronic copy of each brief must be submitted to the Court of Appeal. Cal. R. Ct. 8.212(c)(2). The rule also requires service on the Attorney General in certain situations in which the state, an officer of the state in his or her official capacity, or a county is a party. Cal. R. Ct. 8.212(c)(3); 8.29(c)(2).

**5. Strategic Considerations**

**a) Role Played by *Amicus* Brief**

There are four kinds of *amicus* briefs. The first is the "me too" brief, which simply says the writer agrees with the perspective presented by one of the parties. These are the least helpful to the court. Moreover, when received in quantity, "me too" briefs impose a burden on the court and imply the court can be swayed by popular opinion.

The second kind of brief comes from an institution or organization whose perspective is different from (perhaps broader than) the parties' perspective and may be affected by the court's decision. These briefs can be helpful in alerting the court to potential consequences (intended and unintended) of deciding the case a given way. *See, e.g., Legislature v. Deukmejian*, 34 Cal. 3d 658, 662, 194 Cal. Rptr. 781, 782 (1983); *County of Marin v. Superior Court*, 53 Cal. 2d 633, 2 Cal. Rptr. 758 (1960); *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 813, 273 P. 2d 619, 623 (1954); *Johansen v. California State Automobile Association*, 15 Cal. 3d 9, 11, 123 Cal. Rptr. 288, 289 (1975), *cited in* CEB, *Civil Appellate Practice*, § 14.6. The briefs do this by explaining the practical realities of how things work.



The third kind of brief comes from those who have a great depth of knowledge in the subject area before the court. These kinds of briefs can also alert the court to the consequences of a given line of analysis and the practical effect of the decision. The briefs may fill gaps in the analysis or research provided by the parties. The court has indicated sometimes it is helpful to have individuals preparing this kind of brief participate in oral argument to answer questions the justices may have.

The fourth kind of brief is what might be called a true "friend" of the court brief. It comes from someone who has information and knowledge to share with the court. The individual does not have a stake in the outcome but has an interest in the development of the law in a given area.

**b) A "Gap" Analysis**

The court's aversion to duplicative filings underscores the need for the application for leave to file as *amicus curiae* to hone in on the gaps the *amicus* brief will fill in the parties' presentation.

Such a focus not only will reduce the chances of being denied leave, but also refines the brief writer's thinking concerning the contents of the brief. As discussed above, the gap can be a failure to fully address important points or it can be a failure to focus on the bigger picture.

**c) Raising Issues Not Raised by Parties**

What if the gap is a complete failure to raise an important legal issue? Generally, *amici curiae* take the case as they find it and may not raise new issues. See *Pan Asia Venture Capital Corp. v. Hearst* (1999) 74 Cal. App. 4th 424, 429 fn. 4; *Calif. Ass'n for Safety Educ. v. Brown* (1994) 30 Cal App.4th 1264, 1274-1275.

This is especially true if *amici* raise an issue that a party has made an express decision **not** to pursue. See *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1515 fn.10. Courts have indicated they will disregard the arguments of *amici* appearing in support of a city when the argument is not espoused by the city and is in fact hurtful to the city's case. See *Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 807.

Under certain circumstances, however, the court has indicated it will allow and address new issues raised by *amicus* briefs. For example, in *White v. Huntington Beach* (1978) 21 Cal.3d 497, 510-511, the court allowed new issues to be raised when the appeal was from a judgment of dismissal following sustaining a general demurrer without leave to amend and a question of jurisdiction appeared to be involved.

In *Sherwin-Williams Company v. City of Los Angeles* (1993) 4 Cal.4th 893, 906 n.8, a new issue was raised in the context of a request for depublication, and the Supreme Court granted review and specifically asked the parties to brief the new issue.

The court's current practice of only granting leave to file an *amicus* brief when the parties have concluded briefing allows the court to pre-screen the content of the *amicus* briefs. This practice suggests the court wishes to avoid repetition of arguments already made by parties.

**G. Oral Argument**

Leave to file an *amicus* brief does not confer a right to participate in oral argument. Cal. R. Ct. 8.524(g). The Supreme Court will only hear arguments from one attorney on each side, unless the court orders

otherwise. Cal. R. Ct. 8.524(f)(1). Each side is given 30 minutes for oral argument. Cal. R. Ct. 8.524(e). If an *amicus curiae* wants oral argument time, it may consult with the counsel for the side *amici* supports and ask permission to use all or a portion of the party's time. Cal. R. Ct. 8.524(g). If permission is given, a request to divide argument time must be filed with the court no later than 10 days after the date of the order setting oral argument. Cal. R. Ct. 8.524(f)(2).

## H. Supporting Requests for Exercise of Original Mandate Jurisdiction

### 1. Standard

In rare instances, the Supreme Court will be persuaded to exercise its original mandate jurisdiction, which is jurisdiction it shares with the courts of appeal and superior courts. *See Palma v. U.S. Industrial Fasteners* (1984) 36 Cal.3d 171. Applications for such writs are governed by California Rule of Court 8.490(a). *See also* Cal. Code Civ. Proc. §§ 1084-1097; Cal. Const. art. VI, § 10. The circumstances must be exceptional. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 269 (effect of denial of writ on statute of limitations).

The case must involve matters of great public importance requiring prompt resolution. *See Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 750-751 (elections controversies); *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565 (right to vote); *San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937 (validity of anti-busing statute; contains helpful listing of cases in which original jurisdiction was appropriate); *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (boundary dispute settlement agreements for public trust lands); *State Board of Equalization v. Watson* (1968) 68 Cal.2d 307 (dispute affecting legislature's ability to enact new law to replace expiring one); *Sacramento County v. Hickman* (1967) 66 Cal.2d 841 (tax matter; delay in resolution would result in confusion, hardship, and public expense); *People v. County of Tulare* (1955) 45 Cal.2d 317 (refusing to exercise jurisdiction when another action in superior court seeking same result is pending); *Lindell Co. v. Board of Permit Appeals of City and County of San Francisco* (1943) 23 Cal.2d 303 (exigent wartime emergency).

The petitioner must also be prepared to show why there is no plain, speedy, and adequate remedy before a lower court. *Brooks v. Small Claims Court* (1973) 8 Cal.3d 661, 663; *Sacramento County v. Hickman* (1967) 66 Cal.2d 841.

### 2. Timing

When a petition is filed, the court has three options:

- a. Summarily deny the writ;
- b. Issue an alternative writ that calls for the usual appellate briefing schedule;
- c. Issue a "*Palma*" letter giving the real party in interest 15 days to submit authorities as to why a peremptory writ should not issue. *See Palma v. U.S. Industrial Fasteners* (1984) 36 Cal.3d 171 (1984) (concluding "due notice" requirement of Code of Civil Procedure Code section 1088 requires peremptory writ not issue in first instance unless parties adversely affected have received notice and opportunity to respond).

A court will usually issue a *Palma* letter when it is inclined to grant the writ and wants to get the other side's views before doing so.

Although no statement in opposition to a petition is required unless requested by the court, respondent or real party in interest must serve and file points and authorities in preliminary opposition to the petition within 10 days after the petition is filed. Cal. R. Ct. 8.487(a). To

minimize the likelihood of summary denial, it may be useful for any submission in support of the grant of a writ to be filed as soon as possible after the petition for the writ is filed.

**3. Format**

Rule 8.485 governs applications for matters within the court's original jurisdiction. There is no specific provision for *amicus* support in such proceedings except for an *amicus curiae* brief by the Attorney General. Keep in mind the court's overwhelming workload. In 2012-2013, the court received 2,911 original filings. Judicial Council of Cal., Court Statistics Report (2014) p. 5.

**4. Number of Copies**

The brief in support of the writ is an "any other document," which means an original and one copy must be filed in the Supreme Court. *See* Cal. R. Ct. 8.44(a)(6).

**5. Proof of Service**

General service requirements in writ proceedings are described in rule 8.486(f), which does not specifically address the service obligations of *amici*. *Amici* may wish to consult the general service requirements for *amicus* briefs. *See* Cal. R. Ct. 8.25(a). Rule 8.212 may impose additional service requirements on *amici*. That rule requires proof of deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at trial. Cal. R. Ct. 8.212(c)(1). It also requires service on the Attorney General in certain situations in which the state, an officer of the state in his or her official capacity, or a county is a party. Cal. R. Ct. 8.212(c)(3) and 8.29(c).

**6. Strategic Considerations**

Submittals from *amici* would seem to be especially helpful when a party is attempting to persuade the court the case involves matters of great public importance requiring prompt resolution. Arguments concerning public importance should focus on **why** the case is of public importance, as opposed to simply asserting it is so. A comparison of the issues in a particular case with those in which original jurisdiction was exercised may be persuasive.

**I. Support for Rehearing**

**1. In General**

Petitions for rehearing are governed by California Rules of Court, rule 268. *See also In re Jessup* (1889) 81 Cal. 408, 466 (finding the powers to revise, modify, and correct judgments is one of the inherent powers of every court, as long as the judgment remains in the court's jurisdiction); *Kenney v. Kenney* (1954) 128 Cal.App.2d 128 (remedy for imperfect directions by a reviewing court is a petition for rehearing). The Rules of Court contain no specific authorization for *amicus* participation in the court's process of deciding to rehear a case.

**2. Timing**

Because the decision on rehearing must occur before the court loses jurisdiction, the time schedule for rehearing applications is fast. *See* Cal. R. Ct. 8.264(b) (decision becomes final 30 days after filing). Requests for rehearing must occur within 15 days after the filing of the decision. Cal. R. Ct. 8.268(b)(1)(A). A party must not file an answer unless requested to do so by the court. Cal. R. Ct. 8.268 (b)(2). Any answer must be served and filed within 8 days. *Id.*

**3. Format**

Time constraints and the lack of express authorization for *amicus* submittals suggest that *amicus* support for rehearing should take the form of a concise letter brief.

**4. Number of Copies**

Such a letter would be an "any other document," which means an original and one copy must be filed in the Supreme Court. Cal. R. Ct. 8.44(a)(6).

**5. Proof of Service**

*Amici* may wish to consult the general service requirements for *amicus* briefs. See Cal. R. Ct. 8.520(f). Rule 8.212 may impose additional service requirements on *amici*. That rule requires proof of deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at trial. See Advisory Committee comment to Cal. R. Ct. 8.500(f). Service is also required on the Attorney General if the brief or petition questions the constitutionality of a state statute, or if the brief or petition is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in a criminal case, a case in which the state or state officer in his or her official capacity is a party, or in a case in which the county is a party. Cal. R. Ct. 8.29.

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## **IV. *Amicus Participation Before the California Courts of Appeal***

### **A. Forms or Stages of Participation**

*Amicus* participation before the courts of appeal may take one of several forms. *Amicus curiae* may participate (1) at the brief on the merits stage, prior to oral argument, (2) at oral argument, (3) in urging the court to certify for publication a given appellate court decision, or (4) in support of rehearing. *Amici* may also file papers in support of the court's granting extraordinary writs.

### **B. Briefs on Merits**

#### **1. Timing on Filing Application for Leave to File**

Any person or entity may serve and file an application for permission to file an *amicus curiae* brief. The proposed brief must be served and must accompany the application. Cal. R. Ct. 8.200(c)(1). Applications to file *amicus* briefs in the Court of Appeal must be filed within 14 days after the last appellant's reply is filed or could have been filed, whichever is earlier. *Id.*

The timing for party briefs in civil cases is as follows:

- Appellant's opening brief must be served and filed within 40 days after the filing of the record (or the reporter's transcript after a rule 8.124 election), or within 70 days after filing a notice of election under rule 8.124, if the appellant did not serve and file a notice to prepare a reporter's transcript. Cal. R. Ct. 8.212(a)(1).
- Respondent's brief must be served and filed within 30 days after appellant's opening brief is filed. Cal. R. Ct. 8.212(a)(2).
- Appellant may file a reply brief within 20 days after respondent's brief is filed. Cal. R. Ct. 8.212(a)(3).

The time periods for party briefing may be extended by stipulation for not more than 60 days and, after that, only for good cause by the presiding justice. Cal. R. Ct. 8.212(b)(3). The stipulation must be filed prior to the expiration of the time period sought to be extended. *Id.*

#### **2. Format**

##### **a) Form**

*Amicus* briefs in the courts of appeal must comply with rule 8.204. The cover of an *amicus* brief must be gray. Cal. R. Ct. 8.40(b)(1). *Amicus* must indicate on the cover of the brief which party, if any, the brief supports. Cal. R. Ct. 8.200(c)(4). Some courts of appeal have required *amici* to separately bind the application for leave to file an *amicus* brief and the proposed brief (when the two are submitted simultaneously).

Additional form requirements may apply in courts that permit or require electronic filings. Local rules should always be consulted. (See Appendix 1 of this guide.)

##### **b) Page Limits**

Briefs may not exceed 14,000 words, including footnotes, if produced on a computer, or 50 pages if typewritten, unless otherwise ordered. Cal. R. Ct. 8.204(c)(1) and (2). The court is more likely to read, consider and appreciate shorter briefs, however.

**c) Number of Copies**

An original and four copies must be filed with the Court of Appeal with proof of delivery of four copies to the Supreme Court. Cal. R. Ct. 8.212(c)(2). In civil appeals, one electronic copy or, in the case of undue hardship, proof of delivery of 4 paper copies to the Supreme Court as provided in rule 8.212 is also required. Cal. R. Ct. 8.44(b)(2).

Again, one should always consult the local rules. Courts that have adopted mandatory electronic filing may accept electronic filings in lieu of any paper copies. (See Appendix 1 of this guide.)

**d) Listing of Joining Parties**

The cover of the *amicus* brief must state the name, address, telephone number, and California State Bar membership number of the attorney filing the brief and of every attorney who joins in the brief. Cal. R. Ct. 8.40(c). Sometimes *amicus* brief writers list only the names of the public agencies joining the *amicus* brief; however, if an *amicus* writer includes the names of the public agencies' attorneys, the agency attorneys' California State Bar membership numbers must be included. Failure to comply with this rule could result in rejection of the *amicus* brief. 8.204(e). Listing the agencies' attorneys is the preferred method given *Knight v. City of Eureka* (1898) 123 Cal.192 (finding that power to appoint city attorney is the exclusive prerogative of city council). (See discussion on local agency policies and practices in section II. E of this guide).

**e) Other Content**

An application for leave to file an *amicus* brief must be filed along with a copy of the proposed brief. Cal. R. Ct. 8.200(c). The application must state the applicant's interest and explain how the proposed *amicus* brief will assist the court in deciding the matter. Cal. R. Ct. 8.200(c)(2).

**3. Proof of Service**

The proposed brief must be served and must accompany the application. Cal. R. Ct. 8.200(c)(3). When serving documents in a court that has adopted local rules requiring filings to be made through the court's electronic filing system via TrueFiling, note that an attorney's registration with Truefiling constitutes consent to service or delivery of all documents by any other party in the case through the system. (See Appendix 1 of this Guide.)

Rule 8.212 may impose additional service requirements on *amici*. That rule requires proof of deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at trial. *See* Cal. R. Ct. 8.212(c)(1). It also requires service on the Attorney General in certain situations in which the state, an officer of the state in his or her official capacity, or a county is a party. Cal. R. Ct. 8.212(c)(3) and 8.29(c).

**4. Recourse if Application is Rejected**

In at least one instance where an *amicus* brief was rejected, the court later accepted the brief following a request for reconsideration made by letter.

## 5. Strategic Considerations

In a case that may have less-than-ideal facts, one factor to consider is whether the filing of an *amicus* brief may make a court more likely to publish an adverse decision. See CEB, *California Civil Appellate Practice*, § 14.29. In 2004-2005, courts of appeal published only eight percent of their decisions. Judicial Council of Cal., Court Statistics Report (2006) p. 29.

## 6. Additional Considerations

Rule 8.1115 prohibits in almost all circumstances citing or relying on unpublished cases. Cal. R. Ct. 8.1115(a). A violation of this rule at best gets a portion of the brief disregarded by the court and hurts the brief writer's credibility. At worst, it can prompt a motion to strike the brief and the court can disregard the brief in its entirety. See *Legarra v. Federated Mutual Insurance* (1995) 35 Cal.App.4th 1472, fn.4.

## B. Oral Argument

Leave to file an *amicus* brief does not confer a right to participate in oral argument. CEB, *California Civil Appellate Practice*, § 14.60. However the party in whose support the brief was filed may share its oral argument time with *amicus*. *Id.* Upon written request to the court, *amicus* may divide oral argument time with the side *amici* supports. Cal. R. Ct. 8.256 (c)(2). Each side is given 30 minutes for oral argument. *Id.*

## C. Supporting Requests for Extraordinary Writs

### 1. Standards

#### a) Exercise of Original Mandate Jurisdiction

In rare instances, a court will be persuaded to exercise its original mandate jurisdiction. Cal. R. Ct. 8.485(a). See also Cal. Const. art. VI, § 10. The case must involve matters of great public importance requiring prompt resolution. See *Johnson v. Bradley* (1991) 279 Cal.Rptr. 81 (exercise of original jurisdiction over legislators' attack on local campaign finance measure), *aff'd* (1992) 4 Cal.4th 389 (1992) (finding local measure is not preempted). See also *American Federation of State, County and Municipal Employees v. County of San Diego* (1992) 11 Cal. App. 4th 506 (exercise of original jurisdiction in local employee labor relations suit against county). The petitioner must also be prepared to show why there is no plain, speedy and adequate remedy before a lower court.

#### b) Petition for Extraordinary Relief

From time to time, counsel will believe it desirable to obtain appellate court review of a trial court decision in advance of the usual time period for taking an appeal. The general criteria for determining the propriety of an extraordinary writ are:

- (1) The issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional interest;
- (2) A trial court order deprived petitioner of an opportunity to present a substantial portion of his cause of action;
- (3) Conflicting trial court interpretations of the law require a resolution of the conflict;

- (4) A trial court order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case;
- (5) The party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and/or
- (6) The petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal.

*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274 . The extent to which these criteria apply depends on the facts and circumstances of the case. *Id.* See also *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740 (granting a writ on the grounds that significant legal issue was present, there was strong public interest, and question presented was issue of law).

Another consideration is whether a decision has the potential for "throwing open the courtroom doors" to unnecessary and expensive litigation. See *Babb v. Superior Court* (1971) 3 Cal.3d 841 (granting extraordinary writ when trial court erroneously refused to uphold demurrer to cross-complaint for malicious prosecution in malpractice action).

Only one in ten petitions for extraordinary relief are granted. *Omaha Indemnity*, 209 Cal. App. 3d at 1273.

Although no statement in opposition to a petition is required under rule 8.490, respondent or real party in interest has ten days from service and filing to file points and authorities in opposition to the petition. Cal. R. Ct. 8.487(a).

## 2. **Timing**

When a petition is filed, the court has three options:

- a. Summarily deny the writ;
- b. Issue an alternative writ that calls for the usual appellate briefing schedule;
- c. Issue a "*Palma*" letter giving the real party in interest 15 days to submit authorities as to why a peremptory writ should not issue. See *Palma v. U.S. Industrial Fasteners* (1984) 36 Cal.3d 171.

## 3. ***Amicus* Participation**

Because writs may be processed on a weekly basis in some courts of appeal, it is critical for any submission in support of the grant of a writ to be filed as soon as possible after the petition for the writ is filed. Some courts of appeal may also have a policy of not accepting *amicus* briefs unless an alternative writ or a *Palma* letter has been issued and then only if the application and brief is submitted within the parties' briefing schedule.

## 4. **Format**

Rule 8.485 governs applications for matters within the court's original jurisdiction. There is no specific provision for *amicus* support in such proceedings (except for the Attorney General). Some courts have insisted on full-blown applications for leave and brief. See Cal. R. Ct. 8.200(c). Others have accepted letter briefs. The brief must state the nature of the requestor's interest. See



Cal. R. Ct. 8.200(c)(2). As a practical matter, the best practice is to submit an application for leave and brief.

**5. Number of Copies**

The brief is an "any other document," which means an original and one copy must be filed in the Court of Appeal. *See* Cal. R. Ct. 8.44(b)(6).

**6. Proof of Service**

General service requirements in writ proceedings are described in rule 8.486(f), which does not specifically address the service obligations of *amici*. *Amici* may wish to consult the general service requirements for *amicus* briefs. *See* Cal. R. Ct. 8.200(c). Rule 8.212 may impose additional service requirements on *amici*. That rule requires proof of deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at trial. Cal. R. Ct. 8.212(c)(1).

**7. Recourse If Petition Denied**

Generally, the rules do not provide for reconsideration of summary denial of a writ. The remedy is to petition for California Supreme Court review. (See section III. B of this guide.)

**8. Strategic Considerations**

Extraordinary writs are disfavored by Courts of Appeal. If granted, petitions for extraordinary relief stop the ordinary progress of an action toward a judgment until a reviewing tribunal passes upon an intermediate question. *Omaha Indemnity, supra*, 209 Cal.App. d at 1272. Moreover, both petitions for extraordinary relief and requests for exercise of original mandate jurisdiction can be viewed by the courts as an effort to "cut in line" ahead of those litigants awaiting determination of post judgment appeals and cause the ordinary appeals to be shunted to the sidelines. *See id.* at 1273. Writs are being used too frequently and routinely. The courts warn that writs should be used rarely and circumspectly and only when the case is clear cut. Because of the antipathy towards such writs, would-be *amici* are well-advised to file only when they are able to state specifically how the criteria for determining the propriety of an extraordinary writ (listed in section c.1.b above) have been met.

**9. Oral Argument**

The Supreme Court has held that statutes and rules of court do not require courts of appeal to hold oral argument before summarily ruling on a writ. *See Lewis v. Superior Court* (1999) 19 Cal.4th 1232. Chief Justice George has noted that the Constitution does not provide for oral argument in writ proceedings and that use of oral argument needlessly adds to the workload of already overburdened appellate courts.

**D. Support for Rehearing**

Requests for rehearing are governed by California Rule of Court, rule 8.268. *See also In re Jessup*, 81 Cal. 408, 466 (1889) (finding the powers to revise, modify, and correct judgments is one of the inherent powers of every court, as long as the judgment remains in the court's jurisdiction); *Kenney v. Kenney*, 128 Cal. App. 2d 128 (1954) (remedy for imperfect directions by a reviewing court is a petition for rehearing).

Courts of appeal have accepted *amicus* briefs or letters in support of rehearing. *See New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602 (1923) (denying petition of non-party, *amicus curiae* for rehearing). *Amicus* arguments may be particularly helpful to explain the impact of the original decision.

If a full brief is to be filed, time constraints suggest attaching the proposed brief to the application for leave to file as *amicus* in support of rehearing. Interested cities also filed a letter brief in support of rehearing in *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (4th Dist. 1992).

## **E. Request for Depublication**

A request for depublication of a Court of Appeal decision must be addressed to the Supreme Court within 30 days of the decision becoming final. Cal. R. Ct. 8.1125(a)(4). The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages. Cal. R. Ct. 8.1125(a)(2). The request must state the interest of the party requesting depublication and concisely state the reasons why the opinion should not be published. A request for depublication must be accompanied by proof of service on the Court of Appeal and each party to the action. Cal. R. Ct. 8.1125(a)(5). (See section III. D of this guide.)

## **F. Requests for Publication**

### **1. Standard for Publication**

The standards for publication are established in rule 8.1105. Under that rule, an opinion merits publication if it:

- a. Establishes a new rule of law;
- b. Applies an existing rule to a set of facts significantly different from those stated in published opinions;
- c. Modifies, explains, or criticizes with reasons given, an existing rule;
- d. Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- e. Addresses or creates an apparent conflict in the law;
- f. Involves a legal issue of continuing public interest; or
- g. Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- h. Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
- i. Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant development of the law.

Cal. R. Ct. 8.1105(c)(1)-(9). In 2004-2005, courts of appeal published only eight percent of their decisions. Judicial Council of Cal., Court Statistics Report (2006) p. 29.

### **2. Timing**

#### **a) In General**

The rule requires the request to be made within 20 days after the opinion is filed. Cal. R. Ct. 8.1120(a)(3). With certain exceptions, a court of appeal decision becomes final 30 days after filing. Cal. R. Ct. 8.264(b)(1). As a practical matter, the request for publication should be made within 20 days of the date of decision to provide the court with an opportunity to review the request and act on it before it loses jurisdiction.

**b) Special Timing Issue with Respect to Multiple Requests**

If an organization knows the court will be receiving multiple requests for publication, it should endeavor to have these requests filed with the court at the same time if at all possible. This enables the court to consider all the requests at once. Conversely, having the requests "trickle in" over the 20-day period runs the risk the court will deny the initial request without knowing the extent of interest in having the case published.

**3. Format and Page Limits**

Requests for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. Cal. R. Ct. 8.1120(a)(2). The request must be made within 20 days after the opinion is filed by a letter stating concisely the nature of the requestor's interest and why the opinion meets one or more of the publication standards. Cal. R. Ct. 8.1120(a)(2) and (3). The rules state the page limit for such requests should not exceed 10 pages., *See* Cal. R. Ct. 8.1125(b)(2). As with any filing, the more concise, the better. Note the court has the authority to certify an opinion for partial publication. Cal. R. Ct. 8.1110(a).

**4. Number of Copies**

The rule on requesting publication does not specify how many copies of such a request should be filed. The request would seem to fall within the category of "any other document" under rule 8.44(b)(6), which requires an original and one copy. However, court clerks have suggested that the request should include an original and four copies. For the convenience of the court, the request should also include a copy of the opinion.

**5. Proof of Service**

A request for publication must be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. Cal. R. Ct. 8.1120(a)(4).

**6. Procedure If Court Loses Jurisdiction or Denies Request**

If the Court of Appeal does not, or by reason of the decision's finality as to that court cannot, grant the request for publication, the court rules require the court to transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. Cal. R. Ct. 8.1120(b)(1). The transmitting court must also send a copy of its recommendation and reasons to each party and to any person who has requested publication. Cal. R. Ct. 8.1120(b)(2). It may be useful to include an explanation of this procedure for transmitting the request to the Supreme Court in its request for publication to the Court of Appeal.

**7. Strategic Considerations**

**a) Timing**

As indicated above, requests for publication are most effective and most likely to be granted if made well before the Court of Appeal loses jurisdiction. The Court of Appeal

that decided the case is familiar with the issues and will know if indeed publication will fill some gap in reported decisions.

The difficulty for organizations interested in seeking publication of helpful unpublished decisions is finding out about such decisions, since by definition they do not appear in the published reports of decisions. Because it appears the Supreme Court rarely will order a decision published, it is prudent to make such requests after the court of appeal loses jurisdiction only in the most important cases. This avoids imposing on the Supreme Court's time and conserves resources for cases of only extraordinary consequence.

**b) Potential Drawback of Seeking Publication**

A potential drawback of seeking publication of a favorable unpublished decision is the possibility the arguments concerning the case's importance will be used against the public entity in support of a petition for review.

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## V. *Amicus* Participation in Appellate Departments of Superior Courts

### A. Applying for Leave to File as *Amicus Curiae*

Rule 8.882(d) permits filing of *amicus* briefs with the permission of the presiding judge and subject to such conditions as the presiding judge prescribes.

### B. Timing

The brief must be filed within 14 days after the appellant's reply brief is filed or could have been filed, whichever is earlier. Cal. R. Ct. 8.882(d)(1). For good cause, the presiding judge may allow later filing. *Id*

The timing for party briefs in civil cases is as follows:

- Appellant's opening brief must be served and filed within 30 days after the record is filed in the appellate division. Cal. R. Ct. 8.822(a)(1).
- Respondent may file and serve a respondent's brief within 30 days after appellant's opening brief is filed. Cal. R. Ct. 8.822(a)(2).
- Appellant may file a reply brief within 20 days after Respondent's brief is filed. Cal. R. Ct. 8.822(a)(3).

The time periods for party briefing may be extended by stipulation for not more than 60 days and, after that, only for good cause by the presiding justice. Cal. R. Ct. 8.212(b)(3). The stipulation must be filed prior to the expiration of the time period sought to be extended. *Id*.

### C. Format

*Amicus* briefs in the appellate department of a superior court must comply with rule 8.883.

### D. Number of Copies

The original brief with the proof of service must be filed with the clerk. Cal. R. Ct. 8.817; 8.882(e)(2).

### E. Proof of Service

Every brief of *amicus curiae* must, before filing, be served on all parties to the appeal. Cal. R. Ct. 8.882(e)(1); 8.817(a)(1). The brief must also be provided to the clerk of the trial court for delivery to the judge who presided at trial. Cal. R. Ct. 8.882(e)(2). The rule also requires service on a public officer or agency when required by rule 8.29. Cal. R. Ct. 8.882(e)(4).

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## **VI. *Amicus* Participation in State Trial Courts**

### **A. Permissibility**

Generally, an *amicus* brief may be filed in a trial court at the court's discretion. See CEB, *California Civil Appellate Practice*, § 14.66 (citing *In re Veteran's Industries, Inc.*, 8 Cal. App. 3d 902, 924, 88 Cal. Rptr. 303, 316 (1970); *People v. City of Long Beach*, 183 Cal. App. 2d 271, 276, 6 Cal. Rptr. 658, 661 (1960)). However, counsel should always consult local court rules; at least one superior court reportedly refuses to entertain *amicus* briefs.

### **B. Applying for Leave to File as *Amicus Curiae***

One practice guide suggests counsel for *amici* notice a motion in the law and motion department before the case has been set for trial or apply to the presiding judge (or to the assigned trial judge) before the trial begins. See CEB, *California Civil Appellate Practice*, § 14.67. The proposed brief is usually attached to the application. *Id.* Counsel should check with local rules and the court clerk for further direction. *Id.*

### **C. Strategic Considerations**

Typically, statewide *amicus* programs do not get involved in litigation at the trial court level on the theory that the purpose of the organization's *amicus* program is to shape precedent that may have a statewide effect. Since a trial court decision typically will not have such a precedent-setting effect, organizations usually reserve resources for appellate litigation. But statewide programs may wish to become involved at the trial court level where a matter of statewide interest is involved, and the matter has been identified as one where a favorable trial court decision would be particularly helpful in light of a substantial likelihood that the matter will be appealed to the court of appeal.

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## VII. *Amicus* Participation Before the United States Supreme Court

### A. Stages of Participation

#### 1. In General

*Amicus* participation may occur at two stages. *Amici curiae* may participate (a) prior to the granting of a petition for *certiorari* or prior to the Court's consideration of the parties' jurisdictional statements (the "petition stage"), Sup. Ct. R. 37.2, or (b) prior to oral argument in a case ("brief on the merits stage"). Sup. Ct. R. 37.3. In order to file papers with the United States Supreme Court, an attorney must be admitted to practice before the court. See Sup. Ct. R. 5, 9.1.

#### 2. Reply Briefs and Petitions for Rehearing

*Amici curiae* are not permitted to file reply briefs or briefs in support of a petition for rehearing. See Sup. Ct. R. 37.3.

#### 3. Form Requirements

Supreme Court Rule 37.5 requires every *amicus* brief or motion filed under rule 37 comply with the applicable provisions of Supreme Court Rule 21 (motions to the court), 24 (briefs on the merits), 33.1 (printing requirements), and 29 (filing and service of documents). Briefs filed under rule 37.3 are also subject to an electronic transmission requirement. (See Appendix 1 of this guide.) **The court does not accept letter briefs.**

### B. Application for Leave to File/Consent of Parties

In general, *amicus* participation requires written consent of the parties or the granting by the Court of a motion for leave to file a proposed brief. Sup. Ct. R. 37.2(b) (governing motions for leave to file when consent of the parties has been refused). See also Sup. Ct. R. 21.2(b) (governing motions to file *amicus curiae* brief). Such motions, however, are not favored by the court. However, neither written consent nor a motion for leave to file is required when an *amicus* brief is submitted by a state or a political subdivision of a state. Sup. Ct. R. 37.4.

As a practical matter, this exemption from the consent requirement for local entities is most helpful at the petition stage. Observers say the Court is not particularly generous in granting motions for leave to file *amici* briefs at this stage. See Sup. Ct. R. 37.2(b).

At the brief-on-the-merits stage, however, the Court reportedly is fairly generous in granting motions for leave to file an *amicus* brief when the parties have refused to consent. Such applications are usually granted if made in a timely manner and the would-be *amicus* wishes to make helpful and credible arguments. Of course, the application and brief must also be submitted in proper form. Counsel for *amicus* may call the clerk's office for advice about proper form. Typically, such motions for leave may be bound with the proposed brief on the merits. The motion itself should be short and to the point.

### C. Standard for Granting *Certiorari*

United States Supreme Court review on a writ of *certiorari* is not a matter of right, but of judicial discretion.<sup>1</sup> Sup. Ct. R.10. The Court will grant a petition for *certiorari* only when there are compelling reasons for doing so. *Id.* Some of the reasons include:

1. Conflicting decisions among the circuits, between state courts of last resort and circuit courts of appeals, or among state courts of last resort;
2. When a court of appeals has departed from the accepted and usual course of judicial proceedings (or sanctioned such a departure by a lower court);
3. When state courts or federal courts of appeal have resolved important questions of federal law which have not been, but should be, settled by the United States Supreme Court (or has decided them contrary to United States Supreme Court decisions).

Sup. Ct. R. 10.

### D. Timing

#### 1. Petition Stage

An *amicus* brief must be submitted within the time period allowed for filing a brief in opposition to a petition for *certiorari* or allowed for filing a motion to dismiss or affirm. Sup. Ct. R. 37.2(a). Briefs in opposition are due within 30 days after the case is placed on the docket, unless the time is extended by the Court. Sup. Ct. R. 15.3. The clerk may also extend the time for filing. Sup. Ct. R. 30.4.

#### 2. Brief on the Merits Stage

##### a) Brief Supporting One of the Parties

An *amicus* brief must be submitted within the time period allowed for filing of the brief by the party whose position the *amicus* brief supports. Sup. Ct. R. 37.3(a). The brief shall be submitted 7 days after the brief for the party supported is filed. *Id.* The *amicus* brief should indicate which party it supports or whether it supports affirmance or reversal of the decision on appeal. Sup. Ct. R. 37.3(a). It is a good idea to be as concise as possible.

The timing for party briefs is as follows:

- The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of *certiorari*. Sup. Ct. R. 25.1

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<sup>1</sup> Although originally all of the United States Supreme Court's jurisdiction was mandatory, Congress has progressively reduced the Court's mandatory jurisdiction so that now most of the Court's exercise of jurisdiction is discretionary. This whittling away of the Court's mandatory jurisdiction culminated in 1988 with the passage of the Supreme Court Case Selections Act (Public Law No. 100-352). The statutes explaining the Court's jurisdiction are found at title 28 of the United States Code, sections 1251 to 1259. One of the few remaining areas of mandatory jurisdiction involves certain appeals from three-judge court decisions. *See* 28 U.S.C. § 1253.

- Respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed. Sup. Ct. R. 25.2.
- The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Sup. Ct. R. 25.3

**b) Brief Supporting Neither Party**

If the brief does not support either party, then the appropriate time period for filing an *amicus* brief is that time period allowed for filing the appellant's or petitioner's brief. Sup. Ct. R. 37.3(a).

**c) Reply Briefs and Petitions for Rehearing**

*Amici curiae* are not permitted to file a reply brief or a brief in support of a petition for rehearing. Sup. Ct. R. 37.3(a).

**E. Format, Page Limits and Color of Covers**

**1. In General**

Supreme Court Rule 33 specifies the page limits and color of the covers of *amicus* briefs. In addition to specifying page limits and cover colors, rule 33 contains very specific requirements applying to type size, margins, paper size, contents of brief covers, etc. The rules require the cover of the *amicus* brief to identify the party supported by the brief. Sup. Ct. R. 37.3(a).

**2. Petition Stage**

An *amicus* brief at the petition stage is limited to 20 pages of typeset Roman 11-point standard font or larger with two-point or more between lines. The cover of the brief must be cream-colored. Sup. Ct. R. 33.1(b), 33.1(g)(x).

**3. Merits Stage**

An *amicus* brief on the merits is limited to 30 pages of typeset Roman 11-point standard font or larger with two-point or more between lines. Sup. Ct. R. 33.1(b), 33.1(g)(xi), 33.1(g)(xii). If the brief is in support of the plaintiff, petitioner or appellant, or in support of neither, the color of the cover must be light green. Sup. Ct. R. 33.1(g)(xi). The cover of a brief in support of the defendant, respondent or appellee must be dark green. Sup. Ct. R. 33.1(g)(xii).

**F. Number of Copies**

Forty copies of each brief must be filed with the Court. Sup. Ct. R. 33.1(f). *See also* Sup. Ct. R. 21.2(b) (governing motions to file *amicus curiae* brief and requiring 40 copies to be filed). In addition, an electronic copy must be submitted to the Clerk and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. Sup. Ct. R. 37.3.

For guidelines, see [http://www.supremecourt.gov/oral\\_arguments/2013ElectronicMeritsBriefsSubmissionGuidelines.pdf](http://www.supremecourt.gov/oral_arguments/2013ElectronicMeritsBriefsSubmissionGuidelines.pdf).

**G. Proof of Service**

*Amicus* briefs must comply with proof of service requirements of Supreme Court Rule 29. Sup. Ct. R. 37.5.

**H. Oral Argument**

Oral argument by a party or by counsel for *amicus curiae* must comply with Supreme Court Rule 28. A party may consent to counsel for *amicus curiae* arguing on its behalf, but leave of Court is also required. Sup. Ct. R. 28.7. In addition, when a party does not consent to counsel for *amicus curiae* arguing on its behalf, counsel for *amicus curiae* may seek leave of the Court by "setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available." *See id.* However, such a motion will be granted "only in the most extraordinary circumstances." *Id.* It is very rare for an *amicus* to get argument time.

**I. Strategic Considerations**

The Court's rules say an *amicus curiae* brief which brings a relevant matter to the attention of the Court which has not already been brought to its attention by the parties is of considerable help to the Court. Sup. Ct. R. 37.1. A brief that does not serve this purpose simply burdens the staff and the facilities of the Court; such briefs are not favored. *Id.*

Filing an *amicus* brief in which counsel stress the importance of the case to others besides the immediate parties may be more useful to the Court at the petition stage. Once the case has been accepted for review, its importance almost goes without saying.

In addition, an entity contemplating filing an *amicus* brief in opposition to *certiorari* may wish to consider whether it is advantageous to draw attention to the importance of the case at this stage. One regular Court observer calls *amicus* briefs in opposition to *certiorari* "highly unorthodox." An entity opposing *certiorari* may be better served by waiting to see if *certiorari* is granted, and then filing an *amicus* brief on the merits. *See* R.L. Stern, *Appellate Practice in the United States* at 309 (2d ed. BNA 1989). *See also* R.L. Stern, E. Gressman, S.M. Shapiro, K.S. Geller, *Supreme Court Practice* (7th ed. BNA 1993).

There is one situation in which an *amicus* brief in support of respondent may be appropriate. In some instances, respondent may not oppose the granting of *certiorari* (for example, when the courts of appeal have reached conflicting decisions and those involved in the controversy would like a definitive resolution of the issue). In this situation, *amici* may find it productive to also weigh in on the utility and importance of having a final resolution of the issue.

## VIII. *Amicus* Participation in the United States Court of Appeals for the Ninth Circuit

### A. In General

The Federal Rules of Appellate Procedure apply in all circuits. However, the Ninth Circuit has many additional/different requirements. A party or an *amicus* should consult and comply with the rules specific to the Ninth Circuit. The Ninth Circuit has stated that it will no longer ignore an attorney's failure to follow the rules. The court will strike briefs and dismiss cases for failure to comply with the court rules.

### B. Application for Leave/Consent of Parties

In general, an *amicus curiae* may submit a brief only if accompanied by written consent of all parties to a case or if the court grants a motion for leave to file an *amicus* brief. Fed. R. App. P. 29(a). Neither consent nor leave is required if the brief is presented by a state. *Id.* No exemption applies to political subdivisions. *Id.*

Consequently, unless all parties consent in writing to the participation of an *amicus curiae*, an entity wishing to participate as an *amicus* must submit a motion for leave to file a brief along with the proposed brief. Fed. R. App. P. 29(a)-(b). The motion for leave should state the applicant's interest in the case and reasons the brief is desirable and why the matters asserted in it are relevant to the disposition of the case. Fed. R. App. P. 29(b).

The proposed *amicus* brief must comply with Federal Rule of Appellate Procedure 32. While an *amicus* brief need not comply with Rule 28, it must include a table of contents, a table of authorities, a concise statement of the identity of the *amicus* and its interest and source of authority to file, an argument, and a statement of compliance, if required by Rule 32(a)(7)(C).

All briefs must be prepared and filed in compliance with the Federal Rules of Appellate Procedure, unless the circuit rules provide otherwise. *See generally* Circuit Rule 28-1. *See also* Fed. R. App. P. 25 (filing and service), Fed. R. App. P. 28 (briefs), Fed. R. App. P. 29 (*amicus curiae* briefs), Fed. R. App. P. 30 (appendix to the briefs), Fed. R. App. P. 31 (filing and service of briefs), and Fed. R. App. P. 32 (form of briefs, the appendix and other papers). Briefs not complying with FRAP and these rules may be stricken by the court.

### C. Timing

A brief by an *amicus curiae* must be filed within seven days after the filing of the principal brief by the party whose position the *amicus* brief supports. Fed. R. App. P. 29(e).

The court may grant leave for a later filing. Fed. R. App. P. 29(e). An *amicus* brief that supports neither party must be filed within seven days after the appellant's or petitioner's principal brief is filed. *Id.*

### D. Format, Page Limits and Color of Covers

*Amicus* briefs may be no more than one-half the maximum length authorized for a party's principal brief. Fed. R. App. P. 29(d). A principal brief may not exceed 30 pages, or a reply brief 15 pages. Fed. R. App. P. 32(a)(7)(A). The type-volume limitation for a principal brief is 14,000 words or 1,300 lines of text for monospaced face briefs. Fed. R. App. P. 32(a)(7)(B)(i). A reply brief may contain no more than half of the type volume specified for a principal brief. Fed. R. App. P. 32(a)(7)(B)(ii). A certificate of compliance with the page and word limitations must accompany the brief. *Id.* *Amici* may only exceed the limit requirements upon permission by the court. Circuit

Rule 32-2. The court looks with disfavor on motions to exceed the applicable page or type-volume limitations. *Id.*

Except by the court's permission, *amici* are not allowed to file reply briefs. Fed. R. App. P. 29(f). The cover of the *amicus* brief must be green. Fed. R. App. P. 32 (a)(2).

Federal Rules of Appellate Procedure 32 outlines the specific requirements of print type and size as well as the information that must be included on the cover of each brief. *Amicus* brief writers should also review Circuit Rule 28-2, which among other things, requires "briefs" to include a statement of jurisdiction and identify the standard of review (which should of course be supported by a citation to relevant authorities) for each issue.

#### **E. Number of Copies**

In lieu of the 25 copies required by Rule 31(b), an original and 7 copies of each brief must be filed with the court. Circuit Rule 31-1. In addition, two copies must be served on counsel for each party. Fed. R. App. P. 31(b). In the event a hearing or rehearing *en banc* is granted, each party must file 20 additional copies of the brief. Circuit Rule 31-1.

Unless the Court grants a party's request to be exempted from the requirement, all attorneys are required to submit all filings electronically. Circuit Rule 25-5. (See Appendix 1 of this guide.) Parties submitting a brief electronically shall defer submission of paper copies of the brief pending a directive from the Clerk to do so, but must serve any unregistered party or exempt counsel with one paper copy of the brief on the day that the brief is submitted electronically. *Id.*

#### **F. Proof of Service**

Papers filed with the clerk must contain an acknowledgment of service by the person served or a proof of service consisting of the date, manner of service and names and addresses of the persons served, and certified by the person who made the service. *See* Fed. R. App. P 25(d). Federal Rules of Appellate Procedure 25 also governs filing of papers and manner of service allowed. *See* Fed. R. App. P. 25(a) and (c).

In addition, Circuit Rule 25-2 specifies that any communication to the court must comply with Federal Rule of Appellate Procedure 32 (form of briefs, the appendix and other papers) and must be addressed to the Clerk of the United States Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939. The rule also requires a party to provide the clerk with additional copies sufficient for each judge when a communication is intended to go to the personal attention of a judge or judges

The address for same day or overnight mail delivery is Clerk, United States Court of Appeals, 95 Seventh Street, San Francisco, CA 94103-1526. Circuit Advisory Committee Note to Rule 25-2.

#### **G. Oral Argument**

Counsel for *amicus curiae* may participate in oral argument only with the court's permission. Fed. R. App. P. 29(g). The court may be more likely to entertain oral argument from an *amicus* if a party agrees to cede time to the *amicus*. Given that arguments are frequently limited to 15 minutes for the entire case, parties may be less than enthusiastic about sharing time. Also, a willingness to cede time may suggest to the court the matter does not warrant oral argument in the first place.

## H. Request for Rehearing/Suggestion for Rehearing *En Banc*

### 1. Purpose

Rehearing is commonly granted to correct minor factual errors or other mistakes in a published opinion. One city attorney who clerked with the court suggests rehearing is rarely worth seeking unless some obvious error has occurred or rehearing *en banc* is one's primary objective.

That same observer notes rehearing *en banc* is infrequently granted in the Ninth Circuit and may only be worth seeking if the case presents an opportunity to eliminate inconsistencies within the ninth circuit or among circuits. He suggests the strongest argument for *en banc* review is the case creates a square conflict within the circuit. Another strong argument is the case gives the circuit an opportunity to bring its precedents in line with the prevailing view of other circuits. He notes the purpose of *en banc* review is **not** to correct errors or even, necessarily, to decide important questions of law.

### 2. Procedure

Requests for rehearing are governed by Federal Rules of Appellate Procedure 40 and Circuit Rule 40-1. No mention is made of *amicus* support for such requests. It would appear that any *amicus* submittals requested by the court should comply with Federal Rule of Appellate Procedure 32(c)(2).

### 3. Role of *Amicus*

*Amicus* participation may be helpful in obtaining *en banc* review. A well-timed and cogent *amicus* brief from an affected group may draw one of the judges' attention to the case.

*Amicus* participation may also be helpful after the court has agreed to hear a case *en banc*. Cases accepted for *en banc* review are typically weighty or difficult, which means the thoughtful contributions of *amici* are likely to be helpful to the court. Moreover, because the *en banc* panel convenes specially for one or two cases, oral argument may be an hour or more and the court may be more amenable to a request by *amici* to participate in oral argument.

## I. Strategic Considerations

### 1. The Importance of Clarity

The judges in the Ninth Circuit reportedly rely heavily on their law clerks. Accordingly, the initial audience for one's brief should not be expected to know about the substantive area of the law involved. If the clerk does not understand the local agency's argument, the bench memorandum distributed prior to argument will not favorably reflect it.

### 2. The Role of Circuit Precedent

*Amicus* brief writers in the Ninth Circuit should keep in mind three-judge panels in the Ninth Circuit are bound by circuit precedent. Only the *en banc* court can change circuit precedent and, therefore, it is useless to argue these precedents are unpersuasive and should be disregarded. The best one can do is to argue those precedents have been vitiated by more recent United States Supreme Court decisions or that *en banc* review is necessary to re-examine those precedents.

### 3. **Argument Headings As An Argument Summary**

Ninth Circuit cases are typically heard on a three-day calendar of 15 to 20 cases. Judges' and clerks' workloads are heavy, so it pays to make briefs as clear and concise as possible. Argument headings should be designed as a sort of "executive summary" of *amici's* positions, which allows the clerk or judge to use the brief quickly, easily and effectively. Long-winded headings are a missed opportunity.

### 4. **The (Non-) Utility of Multiple *Amici* Briefs**

The official circuit position is the filing of multiple *amici curiae* briefs raising the same points in support of one party are disfavored. *See* Circuit Committee Advisory Note to Rule 29-1. The circuit encourages *amici* to file a joint brief or, alternatively, *amici* to join in the arguments or factual statements of a party or *amici* by short letter brief. *Id.* Such letter briefs must be filed and served on all parties. *Id.* An original and three copies must be filed. *Id.*

### 5. **Repetitions of Party Arguments**

*Amici* should not repeat the arguments or factual statements submitted by the parties. *See* Circuit Advisory Committee Note to Rule 29-1 ("Movants are reminded that the court will review the amicus curiae brief in conjunction with the briefs submitted by the parties . . ."). *Amici's* role is therefore to cure any omissions in the legal argument and to provide the court with a broader view on how the preferred rule of law would work in practice and why real world considerations dictate the adoption of that rule.

## J. **Requests for Publication**

### 1. **Standard for Publication**

The standards for publication are established in Circuit Rule 36-2. Under that rule, a disposition merits publication only if it:

- a) Establishes, alters, modifies or clarifies a rule of law, or
- b) Calls attention to a rule of law that appears to have been generally overlooked, or
- c) Criticizes existing law, or
- d) Involves a legal or factual issue of unique interest or substantial public importance, or
- e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
- f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.



## **2. Timing**

### **a) In General**

The request for publication must be made within 60 days of the issuance of the court's decision. *See* Circuit Rule 36-4.

### **b) Special Timing Issue with Respect to Multiple Requests**

If an organization knows the court will be receiving multiple requests for publication, it should endeavor to have these requests filed with the court at the same time if at all possible. This enables the court to consider all the requests at once. Conversely, having the requests "trickle in" over the 60-day period runs the risk that the court will deny the initial request without knowing the extent of interest in having the case published.

## **3. Format and Page Limits**

A request for publication may be made by letter addressed to the clerk of the court, stating concisely the reasons for publication. Circuit Rule 36-4. The letter must have at least one inch margins and all sides, with double spaced text in a 14 point font or larger for proportionately spaced typefaces. Fed. R. App. P. 32 (a) (4)-(5) and Fed. R. App. P. 32 (c). The rules do not contain a specific page limit for such requests, although a good practice would be to keep the letter as brief as possible.

## **4. Number of Copies**

An original and three copies must be filed with the clerk of the court. One copy must be served on each party to the action or proceeding in the court of appeals. *See* Fed. R. App. P. 27 (d) (3) and Circuit Rule 27-1.

## **5. Proof of Service**

A request for publication must be accompanied by proof of its service on each party to the action or proceeding in the court of appeal. Fed. R. App. P. 31 and Circuit Rule 36-4.

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## **IX. *Amicus* Participation in United States District Court**

### **A. Brief on the Merits**

Acceptance of *amicus* briefs in federal trial courts is subject to the court's discretion. *See* 25 Fed. Proc. L. Ed. § 59:382 (discussing court's discretion to allow interested parties to participate as *amicus curiae* in lieu of granting permissive intervention under Federal Rule of Civil Procedure 24(b) and noting court has complete discretion to determine fact, extent and manner of *amicus* participation).

### **B. Requests for Publication**

Most district court decisions are not published. Reasons for publishing a district court decision might include: 1) the decision is contrary to another, published district court decision, 2) the situation resolved by the decision is a recurring one on which there is no ninth circuit guidance. Counsel should check the local district rules for guidance on procedures for requesting publication; in the absence of a local rule on the subject, a letter explaining the benefits of publishing the case in question will usually suffice.

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*\*Please note, many of the above cites have been updated for this 2017 guide. Not all, however, were. Please confirm the citations before citing to them.*

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### **Additional Information**

For an electronic copy of this document, please visit [www.cacities.org/amicusguide](http://www.cacities.org/amicusguide).

For a list of the League of California Cities' recent court filings, please visit [www.cacities.org/recentfilings](http://www.cacities.org/recentfilings).

To submit a request for amicus assistance to the League, please visit [www.cacities.org/requestamicus](http://www.cacities.org/requestamicus).

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#### COMMENTS

Have you found a typographical error or bad cite?  
Do you disagree with an interpretation of a rule in this guide?  
Is there something you would like to add to this guide?

Please send comments to [jleonard@cacities.org](mailto:jleonard@cacities.org) or dial 916-658-8276.

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