

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

August 27, 2021

## Five Reasons Every Young Appellate Lawyer Should Write Pro Bono Amicus Briefs

There are few more rewarding or meaningful ways to volunteer than writing a pro bono amicus brief.

By Andrew Tutt

Amicus briefs are a mainstay of federal appellate practice. Every year seems to bring more amicus briefs at the U.S. Supreme Court. According to R. Reeves Anderson and Anthony Franze, we are witnessing a [“decade-long surge in amicus briefs.”](#) *Brown v. Board of Education* had six amicus briefs. *Bostock v. Clayton County* had [94](#). Since 2010, amici at the Supreme Court alone have [“filed more than 8,000 briefs, participated in 96 percent of all argued cases, and were cited by the justices in more than half of their rulings.”](#) An explosion in amicus briefs has also taken place in the courts of appeals. Major appeals involving nationally important issues routinely garner numerous supporting amicus briefs on both sides from professors, organizations, and even state attorney generals. This is the [“amicus machine”](#) at work, and it shows no signs of slowing down.

The predictable consequence of this state of affairs is that young appellate lawyers are being asked more often if they might spare some time to write a pro bono amicus brief on behalf of a legal scholar or a national organization. But given the hectic pace and responsibilities of private practice, the question arises: Is it worth it? Should a young appellate lawyer go to the trouble to find a sponsoring partner, clear conflicts, open a matter, and even recruit a team of associates, all so she can spend several Saturdays alternating between Westlaw and an unforgiving Microsoft Word document?

The answer is an emphatic yes. There are at least five reasons young appellate lawyers should jump at the chance to write pro bono amicus briefs. First, and most importantly, they help the courts to decide difficult high-stakes cases. Second, they offer invaluable experience in all of the core areas that appellate lawyers need: strategy, research, and writing; occasionally they even offer one-of-a-kind opportunities that are typically unavailable to young attorneys. Third, they offer the opportunity to establish important

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

relationships and connections with scholars and national organizations that can prove invaluable over the course of an appellate lawyer's career. Fourth, they can enhance your reputation with judges and other practitioners. Fifth, writing a high-quality pro bono amicus brief can be a deeply fulfilling experience that is also incredibly interesting and even fun. It certainly beats doc review!

## No. 1: Amicus Briefs Help Courts Decide Difficult Cases

The most important reason young appellate practitioners should write amicus briefs is that courts really do appreciate them. Perhaps no one said it better than then-Third Circuit Judge Samuel Alito in a leading case on the subject generally:

If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, *if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.*

[Neonatology Assocs. P.A. v. Comm'r](#), 293 F.3d 128, 133 (3d Cir. 2002) (emphasis added). And courts find amicus briefs extremely helpful and influential much more often than practitioners may realize. Amicus briefs help judges to understand the consequences or implications of their decisions, to see additional arguments the parties haven't made, or to situate a case within a broader historical or sociological phenomenon or narrative.

Examples of important amicus briefs abound. Most lawyers are aware of the famous "Brandeis brief" from *Muller v. Oregon*. 208 U.S. 412 (1908). At the time a lawyer in private practice, future justice Louis Brandeis's brief assembled 100 pages of economics and social science to demonstrate that long workdays negatively affected women's health. The court cited the brief approvingly, *id.* at 419, and ruled in favor of limiting workdays for women. And so the legend of the Brandeis brief was born.

Some may also know the brief filed by Virginia Seitz and Carter Phillips in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which Jeffrey Toobin dubbed perhaps "[the most influential amicus brief in the history of the Supreme Court.](#)" That brief, on behalf of high-ranking retired officers and civilian leaders of the U.S. military, argued that affirmative action programs like those of the University of Michigan were "essential to the military's ability to fulfill its principle mission to provide national security." The Court found the brief persuasive, quoting from it extensively in explaining that the "benefits" of affirmative action "[are not theoretical but real.](#)" *Grutter*, 539 U.S. at 330. "[Similarly and more recently,](#)

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

[five justices repeatedly asked the advocates in \*Hollingsworth v. Perry\*, one of the court's same-sex marriage cases, about standing arguments pressed by 'the Dellinger brief'—referring to Walter Dellinger, another prominent Supreme Court expert.”](#)

But even beyond these more famous examples, amicus briefs make a difference in many of the cases in which they are filed—and can even change the national conversation on an important legal issue. The Supreme Court once spent a considerable portion of an oral argument [discussing an amicus brief by Professor Richard Re](#). And in a case where the author of this article served as amicus counsel, a Seventh Circuit panel [spent three pages discussing the arguments raised by the amici](#). That amicus brief played an important part in [a national conversation](#) about the historical basis for nationwide injunctions.

Amicus briefs can also make a difference behind the scenes even when they aren't cited in the eventual opinion or discussed at oral argument. An amicus brief can narrow (or broaden) the issues the court reaches or change the way they are discussed in a case without ever being explicitly mentioned. They can help judges to garner an understanding of the “big picture” in a case and how a particular ruling will fit within that larger framework. The mere *filing* of an amicus brief can be extremely important to ensuring that a case is taken seriously by making it clear the case is important to someone besides the parties. The significance of amicus briefs to the work of the courts is an important reason that appellate practitioners should make a point of writing them.

## No. 2: Amicus Briefs Help to Build Important Skills and Provide Unique Opportunities

Pro bono amicus briefs provide young practitioners with something else beyond the opportunity to help the courts make well-informed decisions: they offer invaluable opportunities to hone legal research and writing skills. Young appellate lawyers, especially in elite practice groups, research and write extensively. But when they are starting out, they do that work against the backdrop of, and with the aid of, other extremely talented lawyers who will revise and rewrite their work and even do a considerable amount of their own additional research. All too often, the end result is that young lawyers have little opportunity to take full responsibility for the overall quality of a final written brief or to develop a unique voice. Taking on a pro bono appellate brief can offer the opportunity to take responsibility for researching and writing a high-quality appellate legal argument without all the additional layers of revision and review.

Indeed, more than giving a young lawyer the opportunity to take responsibility for the research and argument, taking on such a brief can offer a first opportunity to take overall

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

responsibility for a whole matter, including client interaction and matter management, strategy, and team building. These skills—crucial for any lawyer—can be hard to come by outside the pro bono amicus context. Because of the sheer demand for pro bono amicus briefs, and because unhelpful ones can be “disregard[ed]” (as Justice Alito once pointed out), pro bono amicus briefs are a unique opportunity for a young appellate associate to lead an important appellate project for the first time.

In addition to traditional skill building, pro bono amicus briefs can offer interesting and unexpected opportunities. If a party opposes the filing of the amicus brief, that may mean an opportunity to engage in motions practice in the court of appeals, an important experience that every appellate practitioner should have. And a truly outstanding amicus brief can even result in the court [permitting counsel to participate at oral argument in the case](#). The opportunity to appear as an arguing amicus can mean invaluable on-your-feet oral argument experience for a young appellate advocate.

## No. 3: Writing Amicus Briefs Helps Young Lawyers Establish Important Connections

One of the other important virtues of writing amicus briefs is that they allow young appellate lawyers to build key relationships. It is no secret that to take a case through the courts of appeals and to the Supreme Court, an appellate advocate needs amicus support. [“As experienced Supreme Court practitioner Pam Karlan helpfully puts it, a good Supreme Court advocate needs both an ‘amicus wrangler’ \(someone to recruit the right amici\) and an ‘amicus whisperer’ \(someone to coordinate the message\).”](#) There are [several organizations](#) and legal scholars widely known for providing helpful, cogent, resonant arguments as friends of the court. But if you’ve never written an amicus brief for any of these organizations or scholars, how can you possibly reach out to them to see if they might be interested in filing an amicus brief? Writing amicus briefs helps young lawyers get to know the people and organizations who regularly file amicus briefs in the courts of appeals and the Supreme Court. Knowing these people and groups helps to build rapport and credibility with them when it comes time to ask if they might file an amicus brief in a case. Once these folks have seen the quality of your work on a case that they care about, they are more likely to trust your judgment in a future case where you ask for their support.

Additionally, the connections that young practitioners make writing pro bono amicus briefs extend beyond amicus briefs. The people who participate frequently as amici in the federal courts (or direct the organizations that do) often go on to positions where their recommendation could provide an important future professional opportunity for a young appellate lawyer. It never hurts to get to know more people, and volunteering to write a

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

pro bono amicus brief for an organization or person you have never worked with before offers just that chance.

## No. 4: Writing Amicus Briefs Can Get You Noticed

Writing amicus briefs in the Supreme Court and the courts of appeals can provide a valuable addition to your resume and law firm profile page. Clients of all kinds certainly like to see that the lawyers working on their own appeal are also filing influential briefs in important cases in appellate courts across the country. But aside from the fact that representing organizations in important cases is a notable achievement all its own, writing high-quality briefs will get you noticed. Judges and lawyers take note of powerful, persuasive, and important legal arguments whether they are made by the parties or the amici. People do read signature blocks. [There is a reason the Supreme Court justices referred to the brief by Virginia Seitz and Carter Phillips in \*Grutter\* as the “Carter Phillips brief” and the brief by Lisa Blatt in \*Trump v. Hawaii\*, 138 S. Ct. 2392 \(2018\), as “the Lisa Blatt brief.”](#) Writing powerful pro bono amicus briefs is a surefire way to build your reputation, which is a key step in going from a young appellate practitioner to an elite one.

## No. 5: Writing Amicus Briefs Is Fun, Fulfilling, and Part of Our Professional Obligation

Finally, there are three good extra-credit reasons to write pro bono amicus briefs.

The first is that they are fun to write. If you are a practicing appellate lawyer—unless you made a big mistake somewhere along the way—it is because you are a big nerd who loves to think about hard legal questions (and also, perhaps, to argue). Pro bono appellate briefs provide an opportunity to dive deeper into a legal question than you would in a party brief. Or, if the brief is about practical consequences, it can serve as an opportunity to investigate the true human impact of a legal case. These briefs may offer an opportunity to write more freely than you could as a party—to tell the court, as it were, what your amicus client *really* thinks.

In addition to being fun to write, amicus briefs can be fulfilling. If you agree with the position of the amicus you represent, it is an opportunity to advance a cause you care about. If you decide to take on a brief advocating a position you disagree with, it is an opportunity to understand an issue from the other side and argue for it, which is consistent with the highest aspirations of our profession.

# Appellate Practice

American Bar Association Litigation Section

Fall 2021, Vol. 41 No. 1

---

Last, but not least, under ABA Model Rule 6.1, [the provision of pro bono services is a professional responsibility and individual ethical commitment of each lawyer](#). Authoring pro bono amicus briefs in the federal courts of appeals is a terrific way to honor that commitment while making a significant impact on the lives of thousands of people.

## Conclusion

Ultimately, authoring pro bono amicus briefs can be a great way for young appellate lawyers to help the courts, hone their skills, make connections, build their reputations, and have fun. They can be a lot of work, but there are few more rewarding or meaningful ways to volunteer. So the next time your friend at another firm asks, “Hey, do you think you might be able to take on a pro bono amicus brief?,” just say, “Yes!” You’ll be glad you did.

*[Andrew Tutt](#) is a senior associate at Arnold & Porter Kaye Scholer LLP in Washington, D.C.*