



Amicus briefs

“Friends” with unfriendly facts

BY GARY SIMMS

Imagine that you are in the midst of a jury trial. A spectator stands up and says, “Your Honor, I would like to present some evidence for the defendant, but I don’t want to do so under oath and I don’t want to be cross-examined.” To your amazement, the judge agrees. The spectator takes the stand and tells the jury about research or a study that he has conducted. Or he tells them about someone else’s research. Later, the jury returns a verdict for the defendant. When you question the jurors after they are dismissed, they tell you how impressed they were with the “evidence” presented by the spectator. You are aghast. How could this happen? Well, of course, in a trial court, it would not happen.

Something very much like this, though, frequently occurs in the appellate courts. It is the use – often, the misuse – of alleged facts and evidence in amicus

curiae briefs (“amicus facts”). This occurs in our plaintiffs’ practices primarily in the California Supreme Court and the United States Supreme Court because those are the courts in which amicus curiae briefs are most likely to be filed. Forty-five amicus briefs were filed for *In re Marriage Cases* (2008) 43 Cal.4th 757, 791, fn. 10, and more than 80 amicus briefs were filed for *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. ___, 189 L.Ed.2d 675. And these courts appear to be increasingly relying on amicus briefs. In *Marriage Cases*, for example, the court commended the amicus briefs for being “extensively researched” and of “considerable assistance.” And in the U.S. Supreme Court’s five terms from 2008 to 2013, the court’s opinions cited amicus facts 124 times. (A. O. Larsen, *The Trouble With Amicus Facts* (2014) 100 Va. L. Rev. ___.)

Is this a problem? Yes, because the use of amicus facts most often runs afoul

of almost every other norm or rule regarding the use of evidence at trial or on appeal. More specifically, these amicus facts present three primary problems. *First*, many amicus facts are suspect or untrue. *Second*, the party against whom these facts are asserted generally has no meaningful opportunity to refute them or even to scrutinize their validity. *Third*, appellate judges are generally not competent to evaluate amicus facts, but courts like such “facts,” rely on them, and often cite them – when they are favorable to the court’s view – because of “confirmation bias,” i.e., the universal tendency to view information in a way that confirms one’s beliefs. And such “facts” make the court’s opinion seem more correct, scholarly, and reasonable.

False facts

Many amicus facts are simply junk. It has been that way from the beginning. The widely recognized seminal case in



which extrajudicial data was significant was *Muller v. State of Oregon* (1908) 208 U.S. 412, in which attorney Louis Brandeis (who later became a Supreme Court justice) filed a brief that consisted almost entirely of extrajudicial data such as medical research and social-science studies; indeed, it was 113 pages long and had only two pages of legal argument. Brandeis represented the defendant, State of Oregon, rather than an amicus curiae, but his brief was the progenitor of what are now eponymously known as “Brandeis briefs,” which are the form of many amicus briefs. His brief was also the forefather of junk amicus-facts. It is now widely recognized that much of the data he submitted to the court was junk science even when the brief was written. For example, he claimed that “there is more water” in women’s blood than in men’s blood and that women’s knees are constructed differently than men’s knees. But the court uncritically accepted Brandeis’ claims. (208 U.S. at p. 419, fn. 1 [noting of Brandeis’ experts and studies that “all agree as to the danger” of long working-hours for women].)

The most significant problem for the advocate is that bogus amicus facts can be used against you by a court. Indeed, why else would your opposing amicus submit such assertions to the court? Of course, there is no other reason. Recently, this problem is receiving scholarly attention. In a soon-to-be published law review article, College of William & Mary law professor Allison Orr Larsen examines the problem in detail. (A. O. Larsen, *The Trouble with Amicus Facts*, *supra*, 100 Va. L. Rev. ____.) As Professor Larsen shows, these amicus facts are often either untrue, undocumented, or unverifiable. (See also, Adam Liptak, *Seeking Facts, Justices Settle for What Briefs Tell Them*, N.Y. Times (Sept. 1, 2014).) For example, in *Kirtsaeng v. John Wiley & Sons* (2013) 568 U.S. ____, Justice Kennedy cited an amicus brief’s claim that “library collections contain at least 200 million books published abroad.” But that assertion was based on

an unverified claim in a blog post that was published by a librarian while the litigation was pending but was discontinued after the Supreme Court decision. Another example is in *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, in which the question was whether a state Supreme Court judge with close financial ties to one of the parties (i.e., campaign expenditures for the judge) should have recused himself. Chief Justice John Roberts argued in his dissent that the judge’s participation in the case did not violate Due Process. To support his conclusion, Chief Justice Roberts cited an amicus claim that there were “examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign.” (*Id.*, at p. 901.) What was the Chief Justice’s evidence for this? It was an amicus brief that cited a law review article that, in turn, cited an email from a state judge – an email that was not publicly available.

Because of the proliferation of amicus briefs in the United States Supreme Court, examples such as those noted above are relatively easy to find. But the problem also arises in the California Supreme Court. The author of this article faced such a situation. A national group that purportedly represents small businesses filed an amicus brief in the California Supreme Court. The brief claimed that meritless litigation is a major concern of small businesses. That might seem plausible to a conservative judge. As humorist Stephen Colbert might say, it had the ring of “truthiness.” But it was not true. After doing some online research, I located a survey that the group had done of its members. Concern with the costs and frequency of lawsuits was number 65 of 75 concerns – even below the availability of customer parking.

In short, unless a fact alleged in an amicus brief is so clearly correct that it would be properly subject to judicial notice, you should view this “fact” with suspicion, and, if it is harmful to your position, it should be challenged in your response to an amicus brief. Indeed, the

more strongly the amicus fact seems to support your opponent, the more suspect you should probably be.

Little opportunity to respond

The second and related problem is that the party against whom an amicus fact is asserted has no meaningful opportunity to rebut the alleged fact. In the California Supreme Court, a party’s brief in answer to an amicus brief is due 30 days after the amicus brief was filed or the deadline for amicus briefs has expired, whichever is later. (Cal. Rules of Court, rule 8.520(f)(7).) This provides the answering party virtually no time in which to analyze the evidence cited in support of amicus facts, much less any time to obtain rebuttal evidence. For example, assume a defense amicus brief cites a purported academic or scientific study. The plaintiff must obtain an expert to evaluate the study. Then, if the plaintiff’s expert discovers that the amicus study is flawed, the plaintiff must incorporate his expert’s conclusion into the plaintiff’s answering brief. The 30-day period provides little time for this.

The problem is actually worse than a lack of time. Assume your expert explains to you how the defense’s amicus study is flawed in many ways. How do you present your own evidence to the court? You can argue in your brief that you have evidence the amicus study is flawed. But why should the court believe you? You cannot actually cite to any evidence. You will not have had time to obtain your own study, and your expert’s conclusion is not in the record. Also, as discussed below, the general rule, almost without exception, is that a party cannot present new evidence on appeal. So, you are on a one-way street. The amicus is allowed to point to bogus studies or articles, but you have no evidence in the record to rebut the amicus facts.

Judicial competence

Appellate judges are generally not competent to evaluate amicus facts.



Judges may be highly skilled legal analysts and thus able to properly evaluate an amicus' legal arguments, but judges are unlikely to be skilled in medicine, mathematics, the natural sciences or the social sciences. Judges thus must take amicus facts at face value. And of course, the risk is that, if an amicus fact supports a judge's view, he or she will be more willing to accept that amicus fact as being true.

In short, it seems clear as a general matter that amicus facts can be problematic. Moreover, the increasing use of amicus facts by special interest groups and the courts' willingness to rely on such facts often run afoul of well-established evidentiary and procedural rules and policies. An awareness of these principles further highlights the problems with amicus facts. More importantly, when faced with suspect or otherwise troublesome amicus facts, you can argue to the court that these evidentiary and procedural principles should cause the court not to uncritically accept the amicus facts as true.

First and most obviously, neither factual assertions in an amicus brief nor the underlying matters, e.g., academic studies, on which those assertions are based are evidence in the trial-court record on appeal. What the amicus is plainly trying to do is to submit new evidence on appeal. But this is rarely permitted even for a party. The California Supreme Court's own Web site states: "An appeal is NOT a chance to present new evidence or new witnesses." (Capitalization by the court.) Thus, if the court means what it says, it should not consider new evidence presented in the guise of an amicus brief. When you are on the receiving end of negative amicus facts, it might be wise to remind the court of its own admonition.

Second, California Rules of Court, rule 8.252(c) provides a specific procedure a party must follow when requesting the court to allow new evidence on appeal. The rule makes no mention of amici curiae. Arguably, this reflects a determination that amici curiae should not be allowed to present new evidence on

appeal. But even if an amicus curiae might be allowed to present new evidence under Rule 8.252(c), the amicus should be held to the rule's requirements, including a formal motion to admit the evidence. To the extent an amicus is relying on what might properly be characterized as an expert's testimony, e.g., the expert's conclusions, the court should be urged to comply with Rule 8.252 by issuing an order states that: (1) the issues on which the evidence will be taken, (2) who will hear the evidence, and (3) the time and place for taking the evidence. Alternatively, even if the amicus facts are based on what is properly deemed to be documentary evidence, e.g., an academic study, the rule seems to require at a minimum that the evidence must actually be submitted to the court: "For documentary evidence, a party may offer the original, a certified copy, or a photocopy." (Rule 8.252(c)(3).) That makes sense. If a party wants a court to consider evidence, the party should submit the evidence to the court. But that is rarely done by amici curiae. They freely cite the evidence they claim supports their amicus facts, but they almost never submit the actual evidence.

Third, the proponent of an amicus fact should be required to meet the rigorous standard for taking judicial notice. California Evidence Code section 452, which governs permissive judicial notice, states that a court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Many, perhaps most, amicus facts will fail to meet this exacting standard; indeed, they will not come even close to doing so. Thus, it is fair to ask why facts that do not meet this standard should be allowed to be shoved under the court's door in the form of an amicus brief. Moreover, a party seeking judicial notice must furnish the court "with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453, subd. (b).)

Thus, as with California Rules of Court, rule 8.252(c)(3), the amicus should be required to submit the evidence cited in the amicus brief, e.g., reports, studies, and surveys.

Fourth, the increasing uncritical reliance on amicus facts is inconsistent with the court's own view of its role regarding evidence. Faced with claims that trials have become tainted with "junk science," appellate courts have emphasized the need for trial courts to keep out such evidence. As the California Supreme Court has put it, "[a] trial court has the duty to act as a 'gatekeeper' to exclude speculative expert testimony." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753.) Indeed, *Sargon* imposed on trial courts a "substantial gatekeeper responsibility." (*Id.*, at p. 769.) But many amicus facts are a backdoor attempt to avoid the gate. If trial courts must be vigilant to scrutinize expert evidence, appellate courts should be equally vigilant when faced with such evidence in amicus briefs.

Fifth, and perhaps most importantly, point out to the court the central significance of the right to cross-examination in our adversarial system of justice. Evidence Code section 711 states, "At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine." The importance of cross-examination is also reflected by Evidence Code section 1292, which sets forth the requirements for allowing testimony in a prior action to be considered as evidence in a subsequent civil action. One requirement is that the party against whom the testimony was offered in the former action must have had "the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." (Evid. Code, § 1292, subd. (a)(3); see, *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342 [holding that defendant's motion for summary judgment was



properly denied because it was based on inadmissible former testimony[.]) And in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 579, the California Supreme Court went so far as to strongly suggest that the denial of cross-examination is a structural error that might warrant reversal even without a showing of prejudice. Likewise, in *McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal.App.2d 500, the court reversed a judgment for the defendant in a wrongful-death action because the plaintiff had been denied the right to cross-examine a witness. As the court explained, “An improper denial of the right of cross-examination constitutes a denial of due process [citations]. Apart from historical considerations, the reason cross-examination is one of the ingredients of a fair hearing is practical. In a trial or preliminary hearing there is usually a disputed

factual issue. Where this occurs, *cross-examination provides a major method for establishing the accuracy and reliability of direct testimony.*” (*Id.*, at p. 506, italics added.)

In summary, the increasing acceptance of and reliance on amicus facts is troublesome in many respects. But courts do not yet seem to appreciate the problems caused by amicus facts. So, faced with suspect or untrue amicus facts, there may be little you can do. But it may well be worth your effort to educate the court regarding the problems generally caused by amicus facts and to show why the amicus facts in your case should be rejected or viewed with skepticism.



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