

APPELLATE BRIEFS

By *Debbie Leonard, McDonald Carano*

AMICUS PARTICIPATION IN THE APPELLATE COURTS

Often, when the Nevada Supreme Court encounters an issue of first impression that might have wide-reaching implications for the state, it has only the benefit of the parties' competing arguments to guide its decision making. There may not be any party in the case who will provide the "30,000-foot" perspective of how the Court's decision could affect the state as a whole. For that reason, in recent years, the Nevada Supreme Court has encouraged amicus participation in cases that raise issues of statewide importance. An amicus curiae, or "friend of the court," can frame issues

within competing policy objectives rather than competing litigant needs.

Amici often are public interest organizations, trade associations, governmental entities, private-sector companies, or professional associations. However, NRAP 29, which sets forth the rules for amicus participation, does not limit who may seek to file an amicus brief. Federal and state governments and their officers, agencies and political subdivisions have the right to file an amicus brief without the consent of the parties or leave of court. All others must either file a motion for leave to file an

amicus brief or demonstrate that all parties have consented to such participation. The motion must be accompanied by the proposed brief and state the movant's interest and the reasons why an amicus brief is desirable.

Although amicus briefs are allowed in either of Nevada's appellate courts, the cases assigned to the Court of Appeals under NRAP 17 are less likely to present issues that warrant amicus participation. An appellate court will allow the filing of an amicus brief when the viewpoint of the would-be amicus will assist the court in deciding an issue on appeal. Amicus involvement is also allowed in an original writ proceeding.

The amicus brief itself must comply with NRAP 32 as to its form, and the cover must identify the party or parties that the brief supports and indicate whether the brief supports affirmance or reversal. Although an amicus brief need not comply with NRAP 28 (as to content), it must include a table of contents; a table of authorities; "[a] concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file"; an argument (with an optional summary); and the attorney's certificate required by NRAP 28.2.

Notably, an amicus brief may raise issues not addressed in the parties' briefs. The Court may decline to consider those issues, however, if they are outside of the bounds of the matters on appeal. What parts of an amicus brief to consider, or whether to consider the brief at all, is entirely within the Court's discretion.

Timing is often what makes amicus participation difficult. The amicus brief must be filed no later than 7 days after the brief of the party that it supports. An amicus curiae that does not support either party must file its brief no later

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than 7 days after the appellant's opening brief is filed. Unless a prospective amicus has been following an issue through the court system, it may not be aware that the issue is teed up for consideration by an appellate court. The deadlines therefore limit the number of amicus briefs that are filed.

If a prospective amicus becomes aware of a case after the deadline has already passed, all is not lost. The Court may grant leave for a late filing. Generally, if briefing is already completed, the Court will specify the time within which an opposing party can respond. A request to participate in oral argument will only be granted "for extraordinary reasons" and generally the party whom the amicus supports will have to share its time with the amicus.

The Court may specifically invite amicus participation. In fact, there is now a tab on the Supreme Court's website entitled "Amicus Curiae Briefs," under which it lists orders that have requested the filing of amicus briefs. https://nvcourts.gov/Supreme/Amicus_Curiae_Briefs/. Sometimes, the Court expressly calls on specific groups to participate. For example, recent orders have requested that Nevada Attorneys for Criminal Justice, various sections of the State Bar of Nevada (e.g. ADR, Business, Construction, Family Law and Litigation), the Nevada Justice Association, and the Las Vegas Defense Lawyers be notified and invited to participate in certain cases. The decision to accept the court's request to participate is voluntary. A State Bar section needs approval by the Board of Governors before filing an amicus brief.

Although the Court's specific invitations to participate and its posting of those invitations online has improved the breadth of perspectives in precedent-setting cases, there are still many matters that come before the Court without interested parties timely becoming aware of them. To address this problem, a committee of the State Bar's Appellate Litigation Section has suggested that,

early in a case after the docketing statement is filed, the Court classify the case within an appropriate topic area listed on its website. Interested persons, organizations or Bar sections could then regularly review the subject area(s) in which they have an interest and timely prepare an amicus brief for any case they believe warrants an outside viewpoint.

The limitations of court resources will likely be an obstacle to implementing this suggestion. In the meantime, the Court and appellate practitioners continue to brainstorm ways to make amicus participation more accessible and effective.

Debbie Leonard is a partner at McDonald Carano LLP, where her practice focuses on appeals before Nevada's appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 Chair of the State Bar's Appellate Litigation Section and is Lead Editor of the Nevada Appellate Practice Manual, 2016 edition. She is also a mediator and Nevada Supreme Court settlement judge.



Making a difference

At least one board member from the WCBA has traditionally also served as a member of the board for Washoe Legal Services (WLS). WLS is a non-profit organization founded in 1965 that provides free and low cost legal services to Northern Nevada. In 2016, WLS provided assistance to over 7,000 individuals and directly represented more than 1,600 people, including 282 protected persons in adult guardianship cases, 307 victims of domestic violence, and 982 children in the foster care system. WCBA also contributes approximately \$13,000 annually to WLS. WCBA is proud to further the mission of WLS to provide Northern Nevada's vulnerable populations access to justice, regardless of their ability to pay, to protect their rights, safety, and family stability.

WCBA is looking for volunteers to help plan and teach live CLE seminars of interest to our local attorneys. In addition, we are also looking for members interested in writing CLE articles and quizzes for credit, to be published in the Writ. Please contact us at gina@wcbar.org or 786-4494.



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