FIRST DISTRICT APPELLATE PROJECT
Webinar Training

INDISPENSABLE TOOLS TO ADVANCE YOUR CLIENT'S INTERESTS AND SHAPE THE LAW: Deploying Amicus Curiae, Publication/ Depublication Requests and Letters in Support or Opposition of Review

Richard Braucher, FDAP Staff Attorney
Jason Stenson, FDAP Associate Staff Attorney

June 10, 2022

Copyright © 2022 First District Appellate Project.
All rights reserved.

FDAP

Indispensable Tools to Advance Your Client's Interests and Shape the Law: Deploying Amicus Curiae, Publication/Depublication Requests and Letters in Support or Opposition of Review[1]

I. Introduction

With the arrival of justice reform and the dissipation of the War On Crime era, defense attorneys are discovering new tools (and some old ones) to advance their clients' interests and to shape the law for years to come.

No longer isolated and ignored by lawmakers and the culture at large, the reinvigorated defense bar now has justice reform allies from all walks of life and a seat at the table of policy making in Sacramento. We have discovered organizations and individuals with specialized knowledge who have a keen interest in our clients' causes and want to help. We have learned that these entities, as amicus curiae, can make important contributions to our cases and assist the bench in making well-informed decisions.

Amicus curiae, meaning "friend of the court," is not an actual party to an action, but an interested third party who can provide the court with helpful information or arguments which have often not been offered by the parties to the action. This article explores when and how best to engage amicus in your California case, and discusses the nuts and bolts of managing amicus projects.

We will also discuss the use of publication and depublication requests, and letters in support or opposition of review which may, but do not have to involve amicus, as important—but often misunderstood—tools for advancing the interests of our clients and shaping the law. We begin with such requests in the next section.

---

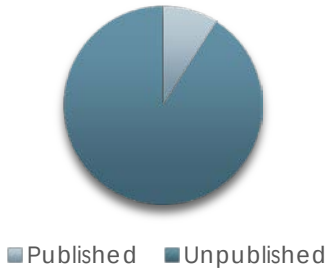
[1] Thank you to J. Bradley O'Connell and Jeremy Price for their valuable contributions to these materials.

II. Publication/Depublication Requests

A. Publication Requests

While all California Supreme Court opinions are published in the Official Reports (Cal. Rules of Ct., rule 8.1105(a)), Court of Appeal opinions are published, initially at least, only if a majority of the rendering court certifies the opinion for publication before the decision is final in that court (Rule 8.1105(b)&(c)).

Of note, only 9 percent of Court of Appeal majority opinions were published during 2019-2020.[2] This means 91 percent of majority opinions were not ordered published.



Every appellate defender should be concerned about this state of affairs. We have seen many appellate decisions worthy of publication that have not been certified for publication, depriving our clients and future litigants of necessary authority and trial courts of opinions upon which they depend for guidance in particular legal and factual settings. This system of selective publication establishing precedent, which has been heavily criticized for many years, may degrade the integrity of the law upon which society depends and impoverish it at the same time.[3]

That is why every practitioner should be well-acquainted with rule 8.1120(a), which permits any party or other interested person to request by letter that the Court of Appeal certify an opinion for publication. The rule is straightforward. The letter must "concisely"

---

[2] Judicial Council of California, *2021 Court Statistics Report*, p. 3 https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf (last viewed 5/26/22).

[3] See, e.g., Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication Depublication, and Vacatur* (1995) 30 Harv. C.R.-C.L. L. Rev. 109.

state the person's interest and provide a reason why the opinion meets a standard for publication. (Rule 8.1120(a)(2).)

The standard for publication is fairly broad. An opinion "*should* be certified for publication" if it meets one or more of the following nine criteria (Rule 8.1105(c)):

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) 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;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) 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 of the law.

(Rule 8.1105(c)(1)-(9).)

The rules expressly declare that factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion. (Rule 8.1105(d).)

The advantage to our clients in obtaining an order publishing an opinion in another case is obvious. A newly published opinion may provide citable authority for an argument, shed light on the meaning of a provision of law, or involve a set of facts material to your case. When aware of the existence of a recent unpublished opinion beneficial to a client's case and meriting publication, counsel should thoughtfully consider a request for publication, if it merits publication.

IMPORTANT NOTE:

If you are pondering a request for publication of a decision in a case where your client was the prevailing party, consider all possible adverse consequences to your client's case. A request for publication may prompt the opposing party to file a petition for review, risking a full grant of review or grant and transfer of your case back to the court of appeal with directions to vacate the case. Also, in cases where a speedy remand to the trial court is necessary (e.g., resentencing where expiration of a term is looming), a petition for review, even if not granted, may delay issuance of the remittitur impeding relief. Finally, counsel should be sensitive to the client's wishes, keeping in mind that some clients may not want their name appearing in a published opinion discussing details of the case.

Enlisting reputable amicus curiae with relevant expertise or knowledge to write the letter requesting publication may be more effective than writing the publication request yourself. (See Part IV, *post*, "Deploying Amicus Curiae in Your Case.")

In drafting the request, be concise, tacking close to the criteria presumptively warranting publication under rule 8.1105(c). Focus on how the opinion will assist courts, litigants, and the public in the future. While there is no page limitation for a request for publication

(unlike a request for depublication, discussed *post*), *shorter is always better* (we would suggest keeping the request to no more than three or four pages in length).

The letter requesting publication must be delivered to the rendering court within *20 days* after the opinion is filed (Rule 8.1120(a)(3))[4], and a copy must be served on all parties to the proceeding (Rule 8.1120(a)(4)).[5]

The Court of Appeal has jurisdiction to act on the request until the judgment becomes final as to that court, usually 30 days after the date of the filing of the opinion. (See Cal. Rules of Court, rules 8.366(b)(1) [criminal], 8.470, 8.264(b)(1) [juvenile delinquency/dependency].) If the rendering court denies the request or loses jurisdiction to act on it, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The Supreme Court will then order the opinion published or deny the request.[6] (Rule 1120(b)&(c).)

B. Depublication Requests

Depublished opinions are Court of Appeal opinions that the Court of Appeal has certified for publication but that the Supreme Court, acting under its power over opinion publication (Cal. Const., art VI, § 14; Govt. Code, § 68902), orders not published in the Official

---

[4] See Appendix A for Rules "At a Glance" for filing deadlines and basic requirements governing the procedures discussed in this article.

[5] Interestingly, unlike the rules governing depublication requests (rule 8.1125), there is no provision explicitly permitting the filing of a letter opposing a publication request (though presumably an appellate court could allow filing of an opposition letter).

[6] It is extremely rare that the Supreme Court certifies publication after a request to publish in the Court of Appeal is denied.

Reports. In 2020, the Supreme Court ordered 26 opinions depublished.[7]

Any person may request the Supreme Court to order depublication of a published opinion. (Rule 8.1125(a)(1).) The request must not be part of a petition for review; rather it must be made in a separate letter filed in the Supreme Court *within 30 days* after the case becomes final as to the Court of Appeal. (Rule 8.1125(a)(2)&(4.)[8] The request must concisely state the person's interest and the reason why the opinion should not be published, and must not exceed 10 pages. (Rule 8.1125(a)(2) &(3).)

IMPORTANT NOTE:

Appellate defenders should be wary of including any reference to a depublication request in a review petition. Where the Supreme Court has misgivings about an appellate opinion, a depublication suggestion may give the Court an "easy" way to take the opinion off the books without undertaking to resolve the issue itself through a grant of review. To the extent that a depublication request may marginally diminish the prospects for overturning an adverse outcome, its inclusion may be inconsistent with the attorney's duty of zealous pursuit of the individual client's interests.

---

[7] Judicial Council of California, *2021 Court Statistics Report*, p. 23 https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf (last viewed 5/26/22).

[8] Unlike a depublication request made pursuant to rule 8.1125(a), which must be made within thirty days of the opinion's finality in the Court of Appeal, no similar time restriction applies to the California Supreme Court ordering an opinion depublished on its own motion. (Compare rule 8.1125(a)(4) with rule 8.1125(c)(2).)

In contrast, as counsel for an institutional party, the state, the Attorney General's Office does not face such a stark ethical responsibility as to the outcome of an individual case. It may choose to prioritize its more general interest in advancing a legal position (and seeking depublication of adverse opinions) even if doing so may jeopardize the result in the individual case. The same is true of counsel for an amicus organization, including a criminal defense organization. A defense organization may choose to seek publication or depublication of an opinion, based on its more generalized interest in advancing a particular legal interpretation even if the making of such a request may not be entirely consistent with an exclusive focus on the interests of the individual defendant in that case. Thus, an institutional party may choose to request publication of a favorable unpublished opinion, even if doing so could conceivably increase the prospects of a grant of review.

It goes without saying that obtaining an order depublishing an opinion in another case may be very helpful to our clients. With very few exceptions, an unpublished opinion may not be cited or relied upon.[9] (Rule 8.1115(b).) As one court put it, "Without precedential value, a depublished opinion is no longer part of the law and thus ceases to exist." (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109.)

But what kinds of reasons persuade the Supreme Court to order depublication of an opinion? Indeed, what is the rationale for depublication?

At one time it was widely understood that the court ordered opinions depublished when the majority of justices believed the

[9] An unpublished opinion may be relied upon only when it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action. (Rule 8.1115(b).)

opinion to be wrong in some way. (Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions* (2008) 44 Willamette L. Rev. 723, 736.) However, the Supreme Court attempted to extinguish that view in 1991 when the rules were changed, declaring that a Supreme Court order to depublish "is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." (Rule 8.1125(d).) So, if depublication is not to be understood as an opinion on "the correctness of the result of the decision or of any law stated in the opinion," does an argument that the opinion is wrong in some way have merit in a request to depublish? We don't think so.

Yet, over the years, we have observed countless requests (by both defenders and the state) expressly asking for depublication of an opinion on the ground that the Court of Appeal wrongly decided the case. Dubbed "me too" letters by some, they argue at length—sometimes stridently—that the reviewing court "got it wrong." This does not appear to be very persuasive. A case that was wrongly decided, arguably may still meet one or more of the criteria for publication by "establishing a new rule of law" or "creating an apparent conflict in the law." (Rule 8.1105(c)(1)&(4).) Arguing that a case was wrongly decided, without more, may be taken as "sour grapes." Just as we defenders are suspicious of the whole depublication project (especially when it threatens a case we "like"[10]), we can assume that the Supreme Court looks upon outraged requests for depublication with a jaundiced eye.

---

[10] The practice of depublication of opinions in California has been severely criticized for decades. (See Joseph R. Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 515 [recognizing that, to some outside the court, it "smacks of an attempt to rewrite history, to censor the expression of views, and perhaps even to carry out some secret agenda known only to the court"]; Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court* (1993) 26 Loyola L.A. L.Rev. 1033, 1037; *California's Curious Practice of "Pocket Review"* (2001) 3 J. App. Prac. & Process 385; David Greenwald & Frederick

A more effective approach to advocating for depublication is to assert that the opinion *did not merit publication in the first place*. Begin by reviewing the nine criteria warranting publication (Rule 8.1105(c)) and then argue how they are inapplicable to the case. For example, if the case involves a bizarre or seldom encountered factual predicate, one might argue that the case fails to merit publication because, as it involves a "one off" factual event not likely to recur, it neither constitutes a "significant contribution to legal literature" nor "a legal issue of continuing public interest." (Rule 8.1105(c)(6)-(7).)

If you believe the decision is wrong because the analysis is defective, then argue that the opinion does not warrant publication because, far from advancing, explaining or clarifying the law, or making a significant contribution to the law, it is confusing (e.g., does not make sense in the context of other laws or the overall framework of an area of law) or fails to address important aspects of the law, and thus fails to provide guidance to courts and litigants in the future. (Rule 8.1105(c)(2)-(4)&(7).)

It is important to keep the depublication letter brief. Although the rule allows for 10 pages (rule 8.1125(a)(2)), rarely should a depublication letter be that long. We recommend making the most important points early on, in the first paragraph or two, if possible. Maintain a spirit of collegiality (we're all in this together to improve the law) and avoid harsh criticism of the court.

After the depublication letter request is filed, the Court of Appeal or any person may, within 10 days, submit a response supporting or opposing the depublication. (Rule 8.1125(b)(1).) Such a letter submitted by anyone other than the court must state the person's interest, and must not exceed 10 pages. (Rule 8.1125(b)(1)& (2).)

A. O. Schwarz, Jr., *The Censorial Judiciary* (2002) 35 U.C. Davis L. Rev. 1133; Moghadam, Rafi, *Judge Nullification: A Perception of Unpublished Opinions* (2011) 62 Hastings L.J. 1397.)

III. Letters in Support or Opposition of Petition for Review

Any person or entity may submit an amicus letter to the Supreme Court supporting or opposing a petition for review or an original writ. (Rule 8.500(g)(1).) The letter must describe the interest of the amicus curiae.[11] (Rule 8.500(g)(2).) There is no deadline for filing the letter; however, we recommend filing soon after the petition for review is filed.[12] Such letters are vitally important to shaping the law in a favorable way for our clients and should be a part of every defender's toolkit.

The letter supporting or opposing a petition for review should adhere to the criteria governing grounds for review enumerated in rule 8.500(b):

> (1) When necessary to secure uniformity of decision or to settle an important question of law;
> (2) When the Court of Appeal lacked jurisdiction;
> (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
> (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

By far the most frequent ground for review is contained in paragraph (1), above, specifically that the decision is necessary "to settle an important question of law." Among many things, an important question of law may involve a novel issue or statute, explore an emerging body of law, or arise from a set of heretofore unexamined facts or circumstances. Amicus writing a letter in support of review has considerable latitude in persuading the court

---

[11] The rule indicates that receipt of the letter does not constitute leave to file an amicus curiae brief on the merits. (Rule 8.500(g)(3).)

[12] Be aware that letters in support or opposing petitions for review do not appear on the Supreme Court's public case docket because they are marked "received," but not lodged or filed.

that an issue is an important question of law. There is much room here for creativity. Counsel may refer to unpublished decisions to shore up an argument that an issue constitutes an important question of law or that review is necessary to secure uniformity of decision. Amicus may have special information on the subject or cite statistics showing, for example, that an issue has statewide importance.

Here, as in the context of publication/depublication requests, whether the court "got it wrong" is not a justification for granting a petition for review.[13] While it is technically true that the California Supreme Court is not a court of error correction, amicus may still argue that a case should be granted review for the purpose of transferring the matter back to the Court of Appeal to correct an error which is contrary to prevailing law. (Rule 8.500(b)(4).) Obviously, having authority at hand is helpful to make this argument.

---

[13] In an interview recently, Justice Groban exhorted lawyers not to argue as a ground in support for a petition for review that the Court of Appeal was wrong: "The primary guidance I can give is that there is a tendency, particularly for lawyers who have been working on the case for a while and particularly for lawyers who were involved in the case at the trial level, to scream in their petition that the lower court got it wrong, the lower court got it wrong, they got it wrong. And if you look at our rules, error correction is not one of the bases for granting a petition for review; we are not a court of error correction. We get thousands of petitions every year and grant a very small fraction of them. So, the question that we debate when deciding whether to grant a petition that are reflected in our rules is, essentially, why are you so special; not to correct an error." (Cheryl Lee Johnson, Courtney A. Palko, *A Conversation with California Supreme Court Justice Joshua P. Groban* (2021) 31 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 28, 34.)

IV. Deploying Amicus in Your Case

A. What Amici Can Do

As our Supreme Court has put it, "[a]micus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.) Thus, amicus briefs can provide a court with a statewide or national perspective to show the legal or social consequences of question. They can furnish a unique perspective at the core of a legal issue, how it affects a community at large, shedding light on matters that are not immediately apparent. Amicus can provide expertise to explain how a statute in question fits within a larger statutory framework and how resolution of the issue may affect it. Often, amicus may have more familiarity with an issue on appeal than the parties themselves. As evidenced by the increasing number of references to amicus curiae in recent decisions in the California Supreme Court and the Court of Appeal, reviewing courts look to amicus for assistance and direction.

Think of amicus as an effective multi-use tool. As already noted, amicus can file letters in support or opposition to petitions for review, submit requests to publish or depublish appellate court decisions. Amicus can file briefs in the Court of Appeal or the Supreme Court, and participate at oral argument. Amicus can also be a sounding board, providing valuable feedback and advice to counsel at all stages of the case.

B. Choose Amici Carefully and Know the Rules Governing Amicus Briefs

The best amici have special expertise or can provide an important perspective on the subject matter of the case, making themselves useful to the court. Be creative in your search for amicus bearing in mind the important aspect of your case which could strongly benefit from assistance. A good place to start are published

opinions which reference particular amicus curiae in discussing the subject matter of your case. Law review articles concerning your issue may also be a good source. Interacting with a network of professionals with specific expertise can be fruitful. Other lawyers, colleagues, and associates can be helpful in brainstorming amicus assistance. The appellate projects may have amicus suggestions and contacts, too.

As important as topical expertise is, choosing amici who are going to have positive impact on the court is paramount. Persuasive amici do not just argue why the party they support is right; they advocate for why a particular position is legally correct and just. Effective amici do not merely repeat arguments already conveyed by a party in the pleadings. They may, however, expand on particular aspects of arguments, sharpening them in a way that is helpful to a fair and just resolution of the case. Amici may also helpfully explain the context and "big picture" implications of a decision—its future impact. Amici may provide valuable information, insight or background.

There are a numerous criminal defense organizations and offices that often file amicus briefs.[14] In addition to those, however, we encourage you to consider: (1) organizations with a particular focus on the types of legal or social issues of the case (e.g., racial justice, juvenile justice, free speech & civil liberties); (2) professional organizations, other than lawyers (e.g., medical or psychological organizations, forensic specialist organizations); and (3) counter-intuitive supportive organizations, such as groups perceived as conservative or otherwise rarely aligned with the criminal defense bar but which support the defense position in the particular case (e.g., law enforcement officers or parole/probation officers'

[14] See Appendix B for "Organizations Who Recently Filed Amicus Briefs for the Defense in Criminal, Delinquency, Dependency and Civil Commitment Appeals Before the California Supreme Court."

organizations; former prosecutors; government accountability organizations concerned about correctional spending or practices).[15]

Amici must also understand the permissible scope of argument and the limits of evidentiary rules. "The general rule is that an amicus curiae accepts the case as he finds it and may not launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1049, fn 12.) Under this rule, courts will not consider arguments not presented in the trial court and are not urged by the parties on appeal. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275.)

There are some exceptions where courts will exercise discretion and address new issues raised in amicus briefs. (See *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 502 [new issue may be raised in amicus brief if issue is one of law based on undisputed facts and involves important questions of public policy].) In very rare instances, courts have granted relief in criminal appeals based on arguments initially raised in an amicus brief. (E.g., *People v. Easley* (1983) 34 Cal.3d 858, 863, 874;[16] *People v. Bui* (2011) 192 Cal.App.4th 1002, 1011 fn. 13.)

---

[15] Although it didn't involve a criminal case, a good example is *Grutter v. Bolinger* (2003) 539 U.S. 306, 331. In upholding a law school affirmative action program, the Supreme Court quoted the amicus brief of a group of "high-ranking retired officers and civilian [military] leaders" who discussed the value of "'limited race-conscious admission and recruiting policies'" at the military service academies: "'[b]ased on [their] decades of experience,'" a "'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.'"

[16] In *Easley,* the Supreme Court based on new arguments raised by the State Public Defender in an amicus brief before the Court's opinion became final. The Court ultimately reversed the death judgment based on those arguments. (*Easley* at 863, 874; cf. *People v.*

Amicus briefs must also comply with the rules of evidence. (See Evid. Code, § 300 [the California Evidence Code applies "in every action before all courts in California."]) Accordingly, it is the general rule that a reviewing court may accept facts presented by amici that are outside the record provided 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 discuss them below]). We think courts tend to give wide latitude to presentation of outside facts, including even by way of declarations, when the information provided is helpful and is not obviously biased. (See *Bily v. Arthur Young & Co., supra,* 3 Cal.4th at 405 [declarations "consist[ing] of surveys and opinions directly generated by interested parties engaged in lobbying activities" did not qualify for judicial notice]; cf. *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 537 (conc. & dis. opn. of Slough, J.) ["We received an amicus curiae brief and declaration that is helpful on this point"].)

As a practical matter, amicus curiae frequently have greater latitude than the parties themselves to present such matters outside the record. That is especially so if the amicus is an organization that can present the Court with an informed picture of circumstances or practices "on the ground" in a particular area or of the practical import that a particular ruling may have.

C. Prepare and Consult with Amicus

It is critical that counsel provide guidance and direction to amicus. Amicus must know the requirements of the amicus task and understand deadlines and procedures associated with it. Some large organizations have in-house amicus counsel, who are well-versed with the rules of your jurisdiction. Others may need more guidance.

Filing letters in support or opposition to a petition for review and requests to publish or depublish decisions is fairly simple. As discussed above, permission to file is not required, and extensive

---

Murtishaw (1981) 48 Cal.3d 1001, 1029 ("retreating" from some "implications" of *Easley* capital holding).)

consultation is not necessary. However, drafting and filing an amicus brief on the merits, in either the Court of Appeal or the Supreme Court, requires leave from the court, much planning and coordination of efforts.

IMPORTANT NOTE:

While it is essential that a party's counsel consult closely with amicus counsel and it is entirely appropriate to make comments and suggestions regarding the amicus arguments, the party's counsel's role should not amount to drafting the amicus brief's arguments. As noted below, the relevant rule requires disclosure of anyone who "[a]uthored the proposed amicus brief in whole or in part." (Rule 8.200(c)(3).) The evident purpose of that rule is to deter a party's counsel from authoring an argument nominally being presented by an independent amicus.

Counsel should contact and engage amici early in the case. Often it will be necessary to convene conference calls with amici for the purpose of strategizing, planning, preparing, reviewing, and filing of briefs. Where more than one amicus is engaged, briefing tasks must be carefully coordinated to ensure all briefing is complementary, avoids repetition, and is, above all, helpful to the court.

Counsel should be intimately familiar with all requirements and deadlines governing amicus briefs and amicus participation in the reviewing courts.

D. Briefs

In the Court of Appeal, the amicus brief must be filed within 14 days after the last appellant's reply brief is filed (or could have been filed) with an application for permission of the presiding

justice.[17] (Rule 8.200(c)(1).) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter. (Rule 8.200(c)(2).) Rule 8.200(c)(3) requires that the application identify: "(A) Any party or any counsel for a party in the pending appeal who: (i) Authored the proposed amicus brief in whole or in part; or (ii) Made a monetary contribution intended to fund the preparation or submission of the brief; and (B) Every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal." The proposed brief must be served and must accompany the application, and may be combined with it. (Rule 8.200(c)(4).)

Except for deadlines, filing in the Supreme Court has similar rules. The application to the Chief Justice and the proposed brief must be filed no later than 30 days after all briefs—other than supplemental briefs—have been or were required to be filed.[18] (Rule 8.520(f)(2).) Rules requiring disclosure of interest, explanation as to how the proposed brief will assist the court, and identification of any party or counsel who authored the brief or any person who made a monetary contribution are the same as those in the Court of Appeal. (Rule 8.520(f)(3)&(4).) Also, as in the Court of Appeal, the proposed brief must be served and must accompany the application, and may be combined with it. (Rule 8.520(f)(5).)

The rules provide for the filing of a response by any party to the amicus brief. (Rules 8.520(f)(7) [Supreme Court], 8.200(c)(6) [Court of Appeal].) Rules do not provide for an amicus reply to a party's response. However, reviewing courts will sometimes invite amicus to file letter briefs, along with parties to the action, to answer

---

[17] For good cause, amicus may request permission from the presiding justice to file later. (Rule 8.200(c)(1).)

[18] The Chief Justice may allow later filing for good cause. (Rule 8.520(f)(2).)

questions, which may involve matters in a party's response to an amicus brief.

In both the Court of Appeal and Supreme Court, amicus curiae may, but is not entitled to, participate in oral argument. (Rules 8.524(g) [Supreme Court], 8.256 (c)(2) [Court of Appeal].) Rules governing when and how participation may occur in the respective courts differ. In the Supreme Court, amicus may seek permission from the party to use a portion or all of the party's time (30 minutes), subject to the 10-minute minimum prescribed in the rules.[19] (Rules 8.524(e), (f), & (g).) In the Court of Appeal, upon written request, amicus may be granted permission to argue and the court may apportion the 30 minutes allotted to each party or expand the time. (Rule 8.256 (c)(2).)

E. Oral Argument

The decision whether to invite amicus participation at oral argument will require a thorough reassessment of the overall needs of the case in light of all the briefing submitted. If counsel decides amicus participation is important, then careful preparation for oral argument should ensue. We recommend convening some version of a moot court, or at least a conference, to coordinate topical tasks, practice answering questions, and manage time. In the event it is decided that argument by amicus is not required, we have found that amicus can be very helpful in preparing counsel for oral argument, and is often eager to do so.

V. Conclusion

So, remember: you and your client may have a friend you have not met yet, a friend—amicus curiae—who could have an important impact on the outcome of your case. Consider deploying amicus in selected cases. While you are at it, unpack and consider

---

[19] If the party gives amicus permission to participate in oral argument, counsel must file a request to the court for permission to divide argument within 10 days of the order setting the case for oral argument. (Rule 8.524(f(2)(g).)

the tools we have discussed—publication and depublication requests, and letters in support or opposition of review—to advance our clients' interests and shape the law.

Appendix A

Rules "At a Glance"

(filing deadlines and basic requirements governing procedures discussed in this article)

A. Publication Request

Format: letter. (Rule 8.1120(a)(2).)

Time for filing: must be filed in the Court of Appeal within 20 days after the opinion is filed. (Rule 8.1120(a)(3).)

Requirements:

(1) Who may request? Any person. (Rule 8.1120(a)(1).)
(2) Must concisely state the person's interest and provide a reason why the opinion meets a standard for publication. (Rule 8.1120(a)(2).)
(3) One or more criteria of rule 8.1105(c)) presumptively warranting publication present?
(4) Length: no page limitation, but presumably short (no more than 3-4 pages).
(5) Must be served on all parties. (Rule 8.1120(a)(5).)

Action by the Court of Appeal: If the court does not or cannot grant the request before the decision is final, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. It must forward these materials to the Supreme Court within 15 days after the decision is final.

Action by the Supreme Court: The Supreme Court may order the opinion published or deny the request. It must send notice of its action to the Court of Appeal, all parties, and any person who requested publication.

B. Depublication Request

Format: separate letter, not part of petition for review. (Rule 8.1125(a)(2.)

Time for filing: letter must be filed in the Supreme Court within 30 days after the case becomes final as to the Court of Appeal. (Rule 8.1125(a)(4.)

Requirements:

(1) Who may request? Any person. (Rule 8.1125(a)(1).)
(2) Must concisely state the person's interest and the reason why the opinion should not be published. (Rule 8.1125(a)(3).)
(3) Criteria warranting publication (Rule 8.1105(c)) inapplicable to the case?
(4) Length: must not exceed 10 pages. (Rule 8.1125(a)(2).)
(5) Must be served on all parties and the rendering Court of Appeal. (Rule 8.1125(a)(5).)

Action by the Supreme Court: The Supreme Court may order the opinion depublished or deny the request. It must send notice of its action to the Court of Appeal, all parties, and any person who requested depublication. (Rule 8.1125(c)(1).)

C. Response to Depublication Request (Supporting or Opposing)

Time for filing: within 10 days after the Supreme Court receives a request. (Rule 8.1125(b)(1.)

Requirements:

(1) Who may submit a response? The rendering court or any person. (Rule 8.1125(b)(1).)
(2) If not the rendering court, must state the person's interest. (Rule 8.1125(a)(3).)
(3) Length: must not exceed 10 pages. (Rule 8.1125(b)(2).)
(4) Must be served on all parties, the rendering court, and any person who requested depublication. (Rule 8.1125(b)(2).)

D. Letters in Support or Opposition of Petition for Review

Format: Amicus curiae letter (not a brief) (Rule 8.500(g)(1).)

Time for filing: No deadline; soon after the petition for review is filed.

Requirements:

(1) Who may submit? Any person or entity. (Rule 8.500(g)(1).)
(2) Must describe the interest of the amicus curiae. (Rule 8.500(g)(2).)
(3) Any matter attached to the letter or incorporated by reference must comply with rule 8.504(e) (rule governing attachments and incorporation by reference for a petition for review). (Rule 8.500(g)(2).)
(4) Length: no page limits (presumably within the limits for a petition for review, answer, and reply (rule 8.504(d))).
(5) The letter should adhere to the criteria governing grounds for review enumerated in Rule 8.500(b).
(6) Must serve on all parties. (Rule 8.500(g)(1).)

E. Amicus Briefs in the Court of Appeal

Time for filing: within 14 days after the last appellant's reply brief is filed or could have been filed under ruled 8.212 (whichever is earlier), the amicus brief must be filed along with an application for permission of the presiding justice. (Rule 8.200(c)(1).) NOTE: the presiding justice may allow a later filing if good cause is shown. (*Ibid*.)

Requirements of application for permission to file an amicus curiae brief:

(1) Who may submit? Any person or entity. (Rule 8.200(c)(1).)

(2) Must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter. (Rule 8.200(c)(2).)

(3) Must identify:

- Any party or any counsel for a party in the pending appeal who: (i) Authored the proposed amicus brief in whole or in part; or (ii) Made a monetary contribution intended to fund the preparation or submission of the brief; and
- Every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal. (Rule 8.200(c)(3).)

Requirements of the proposed amicus curiae brief:

(1) Must be served and accompany the application, and may be combined with it. (Rule 8.200(c)(4).)

(2) The covers of the application and proposed brief must identify the party the applicant supports, if any. (Rule 8.200(c)(5).)

F. Amicus Briefs in the Supreme Court

Time for filing: an application for permission to file the amicus brief, along with the proposed brief, must be filed no later than 30 days after all briefs—other than supplemental briefs—have been or were required to be filed. (Rule 8.520(f)(2).) NOTE: the Chief Justice may allow a later filing for good cause. (*Ibid*.)

Requirements of application for permission to file an amicus curiae brief:

(1) Who may submit? Any person or entity. (Rule 8.520(f)(1).)

(2) Must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter. (Rule 8.520(f)(3).)

(3) Must identify:

- Any party or any counsel for a party in the pending appeal who: (i) authored the proposed amicus brief in whole or in part; or (ii) made a monetary contribution intended to fund the preparation or submission of the brief; and
- Every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal. (Rule 8.520(f)(4).)

Requirements of the proposed amicus curiae brief:

(1) Must be served and accompany the application, and may be combined with it. (Rule 8.520(f)(5).)

(2) The covers of the application and proposed brief must identify the party the applicant supports, if any. (Rule 8.520(f)(6).)

G. Amicus Participation at Oral Argument in the Court of Appeal

Upon written request, amicus may be granted permission to argue and the court may apportion the 30 minutes allotted to each party or expand the time. (Rule 8.256 (c)(2).)

H. Amicus Participation at Oral Argument in the Supreme Court

Amicus may seek permission from the party to use a portion or all of the party's time (30 minutes), subject to the 10-minute minimum prescribed in the rules. (Rules 8.524(e), (f)&(g).) If the party gives amicus permission to participate in oral argument, counsel must file a request to the court for permission to divide argument within 10 days of the order setting the case for oral argument. (Rule 8.524(f(2)(g).)

Appendix B

Organizations Who Recently Filed Amicus Briefs for the Defense in Criminal, Delinquency, Dependency and Civil Commitment Appeals Before the California Supreme Court

Organization	**Case**
Independent Juvenile Defender Program & Pacific Juvenile Defender Center	*People v. Padilla* (May 26, 2022, S263375)
Disability Rights California, California Association of Mental Health Patients' Rights Advocates, California Public Defenders Association, American Civil Liberties Union, American Civil Liberties Union of Northern California, Disability Rights Education and Defense Fund, Law Foundation of Silicon Valley and Mental Health Advocacy Services	*Conservatorship of Eric B.* (2022) 12 Cal.5th 1085
California Appellate Defense Counsel	*In re Christopher L.* (2022) 12 Cal.5th 1063
California Public Defenders Association & NAACP Legal Defense & Educational Fund, Inc	*People v. Superior Court (Jones)* (2021) 12 Cal.5th 348
California Attorneys for Criminal Justice, Senator Nancy Skinner and The Justice Collaborative Institute, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California and American Civil Liberties Union of San Diego and Imperial Counties	*People v. Lewis* (2021) 11 Cal.5th 952
Office of the State Public Defender	*People v. Valencia* (2021) 11 Cal.5th 818
Attorneys for Constitutional Law	*In re Friend* (2021) 11 Cal.5th 720
The California Innocence Project, The Project for the Innocent at Loyola Law School and The Northern California Innocence Project, Office of the State Public Defender	*People v. Lemcke* (2021) 11 Cal.5th 644
ACLU Foundation of Southern California, ACLU Foundation of Northern California and ACLU Foundation of San Diego and Imperial Counties, The Immigrant Legal Resource Center, Public Counsel, University of California Irvine Law Immigrant Rights Clinic, University of California Irvine Law Criminal Justice Clinic, East Bay Community Law Center, Community Legal	*People v. Vivar* (2021) 11 Cal.5th 510

Services in East Palo Alto and University of California Davis Immigrant Rights Clinic	
Mental Health America and National Alliance on Mental Illness	*People v. Steskal* (2021) 11 Cal.5th 332
California DUI Lawyers Association, Human Rights Watch, Crime Survivors for Safety and Justice, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, National Law Professors of Criminal, Procedural, and Constitutional Law, The Bar Association of San Francisco, The Los Angeles County Bar Association and The Santa Clara County Bar Association, California Public Defenders Association, California Association of Pretrial Services, National Association of Pretrial Services Agencies, Pretrial Justice Institute and National Association for Public Defense, American Bar Association, Institute for Constitutional Advocacy and Protection	*In re Humphrey* (2021) 11 Cal.5th 135
Pacific Juvenile Defender Center and Independent Juvenile Defender Program Los Angeles County Bar, California Public Defenders Association, Human Rights Watch, Anti-Recidivism Coalition and W. Haywood Burns Institute, Attorney General, The Equal Justice Initiative	*O.G. v. Superior Court of Ventura County* (2021) 11 Cal.5th 82
Alliance for Constitutional Sex Offense Laws, Inc.	*In re Gadlin* (2020) 10 Cal.5th 915
California Commission on Access to Justice, Academy of Appellate Lawyers, California Appellate Projects	*In re A.R.* (2021) 11 Cal.5th 234