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# Amicus Curiae Participation--At the Courts Discretion

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# Notes

## AMICUS CURIAE PARTICIPATION—AT THE COURT'S DISCRETION

### I. INTRODUCTION

In 1736, an amicus curiae was permitted to stray from the obligation existing between the parties to a law suit and defend the interests of one not a party to that suit.<sup>1</sup> Since that date, a substantial conflict over the scope of the amicus curiae's role has arisen and caused dissension among the courts. Theoretically, friendly intervention for the purpose of reminding the court of some legal matter which has escaped its notice and concerning which it is doubtful is the *raison d'être* of the amicus.<sup>2</sup> Some courts have failed to adequately use the amicus, for they have refused to advance his role beyond the theoretical and increasingly impractical idea that he is one without an interest in the litigation, a mere bystander whose sole mission is to aid the court and to act for the sole benefit of the court.<sup>3</sup> Some jurists have become so linguistically resigned to the "amicus curiae" label<sup>4</sup> that they have even recommended, "The court's attention should be drawn to obvious error or facts that the parties have failed to present due to ineptitude or self-interest. In so doing, the amicus may prove a true friend of the court."<sup>5</sup> If this stringent attitude is unwaveringly followed, the role of the amicus will quite likely be jeopardized by disuse in the courts.

At the other end of the spectrum, however, some courts have sought

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<sup>1</sup> *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736).

<sup>2</sup> BLACK, LAW DICTIONARY 107 (4th ed. 1957).

<sup>3</sup> *Burger v. Burger*, 298 S.W.2d 119 (Tex. 1957).

<sup>4</sup> See *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871, 877 (E.D. La. 1961), where the court stated as follows:

[O]rdinarily an amicus curiae merely tenders a brief advising the court on the law applicable to the case. But . . . the United States is no ordinary amicus. Whether "amicus curiae" is the proper title is a quibble over labels. However, we think it singularly appropriate here since the role of the United States in this proceeding is more truly that of a friend of the court than is often the case with so-called "amici," who are rather friends of one party or the other.

Compare generally, Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 705 (1963).

<sup>5</sup> Covey, *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 37 (1959-60).

to rejuvenate the role of the amicus by allowing him to represent the public interest,<sup>6</sup> "to contribute anything to the court by his participation in the cause,"<sup>7</sup> and to have "the *right* to be heard . . . within the court's discretion."<sup>8</sup> (Emphasis added.) In line with this trend, many jurists have cogently noted that "the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy,"<sup>9</sup> and they have even recommended that an amicus should be allowed in court not only when there is evidence of some weakness in the legal talent of a principal party,<sup>10</sup> but also when the interest of the amicus is very sharply differentiated from that of the litigant.<sup>11</sup>

The significance of the controversy over the scope of the amicus curiae's role, then, is that while both sides, at least conceptually, feel that the amicus should be a friend of the court, they differ as to the manner in which he should display his friendship. Although both sides accept the proposition that an amicus's privilege to participate in litigation is a matter of favor, not right, and thus falls within the discretion of the court,<sup>12</sup> the first side seeks to restrict the court's exercise of discretion while the second side hastens to liberalize it.<sup>13</sup> Since the first group is rapidly losing influence, this discussion is confined to the second view.

Within the group which is concerned with allowing greater participation of the amicus, there is a cleavage between the federal and state courts. Many of the federal courts, while approving amicus participation as a valuable part of our court system, have been somewhat chary in making drastic changes in their amicus procedures; but many state courts have taken large strides in allowing greater participation by the amicus. This Note compares the trend toward greater amicus participation on the federal level with that on the state, interprets this trend, and analyzes the criteria that have been adopted by the federal and state courts when they determine whether to allow amicus participation. Finally, it attempts to indicate the meaning of the trend as to future litigation on the federal and state levels. In treating these problems, the discussion is confined to voluntary amicus participation<sup>14</sup> in

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<sup>6</sup> *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958).

<sup>7</sup> *Keating v. Florida*, 157 So. 2d 567, 569 (Fla. 1963).

<sup>8</sup> *Ohlhauser v. Branaugh*, 101 N.W.2d 827, 829 (S.D. 1960).

<sup>9</sup> *Krislov*, *supra* note 4, at 704.

<sup>10</sup> See *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>11</sup> *Krislov*, *supra* note 4, at 711.

<sup>12</sup> 4 AM. JUR. 2d *Amicus Curiae* § 2 (1962).

<sup>13</sup> See generally, *Krislov*, *supra* note 4, at 705.

<sup>14</sup> A party acquires the privilege of entering court as an amicus curiae either by invitation of the court or by grant of a counsel's application. 4 AM. JUR. 2d *Amicus Curiae* § 2 (1962).

appellate courts,<sup>15</sup> and is as concerned with criminal litigation as with civil.<sup>16</sup>

## II. THE RULES OF THE SUPREME COURT

The Supreme Court has always been quite concerned with amicus participation in areas ranging from racial minority interests<sup>17</sup> to liquor interests,<sup>18</sup> but the Court has not applied its discretion consistently. In 1952, two justices expressed their dissatisfaction with Rule 27 of the Rules of the Supreme Court.<sup>19</sup> In *On Lee v. United States*,<sup>20</sup> Mr. Justice Frankfurter submitted a memorandum which, in part, stated as follows:

The rule governing the filing of *amici* briefs clearly implies that such briefs should be allowed to come before the Court not merely on the Court's exercise of judgment in each case. On the contrary, it presupposes that the Court may have the aid of such briefs if the parties consent. . . . Mr. Justice Black concurs in the foregoing views, but desires to state that he is of the opinion that the Court's rule regarding the filing of briefs *amicus curiae* should be liberalized.<sup>21</sup>

As a result of such virulent attacks, by 1954 the Rules of the Supreme Court were amended so that rule 42 replaced rule 27 with respect to the amicus curiae, but the amendment made such microscopic changes<sup>22</sup> in the amicus section that the total effect of the 1949 rule

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<sup>15</sup> An amicus curiae may intervene on the trial as well as the appellate level. See 4 AM. JUR. 2d *Amicus Curiae* § 2 (1962).

<sup>16</sup> *But see*, *City of Columbus v. Tullos*, 204 N.E.2d 67, 68 (Ohio 1964), where the court stated as follows:

Examination of text materials and cases suggests that the amicus curiae appears most generally in civil processes and trials. The appearance of such in criminal matters is extremely rare and it seems appropriate to observe that the very rarity of its occurrence urges the gross impropriety of such an action.

<sup>17</sup> See *Guinn & Beal v. United States*, 238 U.S. 347 (1915).

<sup>18</sup> See *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U.S. 146 (1919).

<sup>19</sup> U.S. Sup. Ct. R. 27(9) (1949) provided:

A brief of an amicus curiae may be filed . . . when accompanied by written consent of all parties to the case . . ., except that consent . . . need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of a member of the bar of this court.

<sup>20</sup> 343 U.S. 747 (1952).

<sup>21</sup> *Id.* at 924.

<sup>22</sup> The 1954 rule substantially retained rule 27 and has indicated that consent of the parties is almost mandatory: "Such motions are not favored." Where the parties do not consent, the rule is vague and uninformative. See also, note 23 *infra*.

was unchanged.<sup>23</sup> In point of fact, this amendment evoked the following dissent from Mr. Justice Black:

Finally, I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.<sup>24</sup>

In criticizing the 1954 rule, Black was assuredly upset by its apparent vagueness and its dismal failure to prescribe sound criteria to assist the Court in its discretionary acceptance or denial of an *amicus* applicant.

Rule 42 prescribes essentially two requirements to guide the Court

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<sup>23</sup> Compare the following with the passages quoted in note 19 *supra*. U.S. SUP. CT. R. 42 (1954) provides:

1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the Court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an *amicus curiae* in cases before the Court on the merits may be filed only after order of the Court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the Court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may reasonably file an objection concisely stating the reasons for withholding consent.

4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its Attorney General; or for a political subdivision of a State, Territory or Commonwealth sponsored by the authorized law officer thereof.

5. All briefs, motions and responses filed under this Rule shall be printed; shall comply with the applicable provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument if required by Rule 40(1)(f), and the conclusion; and shall be accompanied by proof of service as required by Rule 33).

<sup>24</sup> Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954).

in its discretion. First, the applicant must "concisely state the nature of [his] . . . interest." Secondly, he must "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case. . . ." Although Black was unhappy with the apparent vagueness of the rule, it is this vagueness perhaps which has allowed the Court to effectively keep out those propaganda briefs that amici once sought to railroad through the Court.<sup>25</sup> More importantly, the Court has given itself sufficient latitude to permit the American Civil Liberties Union to intervene in *Mapp v. Ohio*<sup>26</sup> with a brief which urged the overruling of *Wolf v. Colorado*.<sup>27</sup> In *Miranda v. Arizona*, the Court even used great portions of the amicus's argument in its opinion.<sup>28</sup> Obviously, the "nature of the interest," "inadequate presentation," and the "relevancy to the disposition of the case" guidelines are nebulous and uninformative, and they indicate that the Supreme Court is going to determine within its broad discretion, rather than within a set of strict procedural rules, whether to allow an amicus to participate. Rule 42 on its face, however, is a feeble model for other courts, for its tenuous guidelines have so diluted the amicus's privilege of getting into court that his success might well rest upon the whims, rather than the discretion, of the lower courts. While the Rules of the Supreme Court are in no way binding upon other courts, they are ordinarily a model throughout the country. Despite its uninformative nature, rule 42 has enjoyed a great deal of influence on federal and state courts which, in following, interpreting and re-defining its vague guidelines, have given various aspects of the rule new meaning.

### III. THE INFLUENCE OF RULE 42

#### A. *The Nature of the Amicus Interest*

As rule 42 indicates, the amicus applicant must first concisely state the nature of his interest. This requirement has engendered various interpretations throughout various jurisdictions. One federal court has stated that the amicus applicant must have a direct interest in the *res* of the suit.<sup>29</sup> But this statement was made prior to rule 42. In the

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<sup>25</sup> See *Craig v. Harney, Sheriff*, 331 U.S. 367, 397 (1947); *Gironard v. United States*, 328 U.S. 61 (1946).

<sup>26</sup> 367 U.S. 643 (1961).

<sup>27</sup> 338 U.S. 25 (1949).

<sup>28</sup> 384 U.S. 436 (1966). See generally, MEDALIE, FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION (1966).

<sup>29</sup> *Pure Oil Co. v. Ross*, 170 F.2d 651, 652 (7th Cir. 1948).

*Matter of Oskar Tiedemann and Company*, however, a federal court found that the tanker industry did not have standing on the ground that the decision would have "a far-reaching, adverse effect upon the Tanker industry [sic],"<sup>30</sup> and was not allowed to intervene *amici curiae*. Despite the fact that the effect of the decision might have proved "far-reaching" and "adverse" to the entire tanker industry, the industry's interest was not sufficient to allow any kind of entry into court. This very questionable decision demonstrates wanton abuse of discretion on the federal level.

While the federal courts have indicated a rather strict construction of the *amicus curiae*'s interest, some state courts, at the other end of the spectrum, have forewarned that they are willing to relax such an interpretation. In New Jersey, for example, the application to appear as an *amicus curiae* was denied because "the petitioner's attitude toward the litigation [was] . . . *patently partisan*. . ."<sup>31</sup> (Emphasis added.) The Supreme Court of Michigan indicated a similarly liberal attitude toward the *amicus curiae* even though the applicant was denied the privilege to come in as an *amicus* in this particular case, apparently on the grounds that he was too partisan to be anything other than an intervenor. The court said, "In cases involving questions of *important public interest*, leave is generally granted to file a brief as *amicus curiae*. . ."<sup>32</sup> (Emphasis added.) The "patently partisan" and "important public interest" tests, however, are hardly the most liberal. In Pennsylvania, for example, there is every indication that

Any one interested in the questions involved in an appeal, though not a party to it, may, before the time fixed for argument and without applying for leave so to do, serve upon appellant and appellee a brief in regard to those questions, and file thirty (30) copies thereof with the prothonotary for distribution as provided in Rule 66.<sup>33</sup>

This "any one interested" test (as compared with the phraseology in the Rules of the Supreme Court: "*concisely* state the *nature* of the interest" requirement) fairly clearly indicates that the trend in Pennsylvania is toward a very liberal interpretation of the "nature of the interest" requirement. Finally, in Kentucky, an *amicus* brief, within the knowledge of Judge Clay,<sup>34</sup> has never been denied regardless of the

<sup>30</sup> 183 F. Supp. 129, 131 (D. Del. 1960).

<sup>31</sup> *Casey v. Male*, 63 N.J. Super. 255, 164 A.2d 374, 377 (1960).

<sup>32</sup> *Grand Rapids v. Consumers' Power Co.*, 216 Mich. 409, 185 N.W. 852, 854 (1921).

<sup>33</sup> PA. SUP. CT. R. 65.

<sup>34</sup> This information was provided by Judge Watson Clay, Commissioner of the Kentucky Court of Appeals, through an interview in his office on January 17, 1967. He is the author of *The Rules of Civil Procedure Annotated* in KENTUCKY PRACTICE.

insubstantial nature of the interest. The liberal attitude of the Kentucky Court of Appeals surpasses even that of the Pennsylvania Court.

*B. Inadequate Presentation of Questions of Law and Their Relevancy*

That clause of rule 42 which requires the applicant to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case" is not to be construed as meaning that the Supreme Court condones an advancement beyond the issues as presented by the interested parties. In fact, the generally accepted rule is that the amicus curiae must take the case as he finds it and cannot inject new issues.<sup>35</sup> In most federal courts, then, the "inadequate presentation" and "relevancy" requirements are tests that the applicant must meet within the framework of the general rule. In general, federal courts have allowed exceptions only when the applicant's material has been extremely compelling, necessary and reflective of widespread interest.<sup>36</sup> In *Faubus v. United States*, for example, the Attorney General and a United States Attorney were allowed to intervene as amici because "they were acting under the authority and direction of the court to take such action as was necessary to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice."<sup>37</sup> But this was a case of great public interest, namely, a civil rights problem.

In some state courts the public interest does not have to be great for the amicus to come in and raise points outside the immediate issues. This is to say, some state courts might well interpret phraseology similar to that of the "inadequate presentation" and "relevancy" requirements to mean that the amicus can go outside the general rule whenever he meets either one of these requirements regardless of the gravity of the public interest. In point of fact, the Supreme Court of South Dakota in *Ohlhauser v. Branaugh* indicated such an attitude toward the general rule: "It [amicus curiae] ordinarily implies the friendly intervention of counsel to call the court's attention to a legal matter which has escaped or might escape the court's consideration."<sup>38</sup> In this case, involving the contest of a will, the court has represented itself as being in agreement with the very liberal belief that the amicus may raise any issue that the court could have raised of its own accord.

Illinois, more than any other jurisdiction, indicates that there is a growing trend in the state courts to permit the amicus to go outside

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<sup>35</sup> 4 AM JUR. 2d *Amicus Curiae* § 3 (1962).

<sup>36</sup> Comment, 55 NW. U.L. REV. 469, 472 (1960).

<sup>37</sup> 254 F.2d 797, 805 (8th Cir. 1958).

<sup>38</sup> 101 N.W.2d 827, 829 (S.D. 1960).



the issues of the case whenever he can meet such requirements as the "inadequate presentation" or the "relevancy to the disposition of the case" tests. In *Froehler v. North Am. Life Ins. Co. of Chicago*, for example, the court mapped out the following criteria for allowing an amicus into court:

Intervention by counsel as a friend of the court is only justified when the intervenor can show to the court that, to protect it in the consideration of the case, such aid seems necessary or advisable. . . . Further, no such motion, except in unusual cases, will be allowed unless it be shown that the parties to the litigation have overlooked or insufficiently briefed points and authorities essential to a proper consideration of the cause.<sup>39</sup>

It should be noted that the Illinois court has in no way indicated that the amicus must stay within the framework of the interested parties' issues. In placing emphasis upon those "points . . . essential to a proper consideration of the cause," the Illinois court has expressed an interest in getting the amicus into court even at the expense of additional issues, rather than in keeping the amicus out of court. As early as 1948, two jurists pointed out that it was difficult to reconcile such an affirmative precept with the negative rule that the amicus must take the case as he finds it. They went on to point out a number of deviations from the negative rule and suggestions for further departures. Uppermost in their thinking were such considerations as public interest, economic interest in the question in issue or in a like case, and inadequacy of presentation. In such situations they submitted that the discretion of the court should be generous.<sup>40</sup>

#### IV. THE EXTENT OF THE TREND

In looking back over the influence of rule 42 on the federal and many of the state courts, one can readily understand why Mr. Justice Black was unhappy with the rule: it failed to encourage the Court to treat the amicus liberally, and it failed to establish a sound rule for lower courts to adopt. In interpreting the broad guidelines of the Supreme Court, the federal courts have become little more lenient than the Supreme Court while such state courts as the Illinois Supreme Court have eagerly sought to encourage amicus participation under the same guidelines. Although the Supreme Court has reason to limit amicus participation, there seems to be no justification for other federal and state courts to do so. One writer has completely misunderstood the contemporary benefit of amicus participation in the following exhortation: "It is hoped that by a more liberal application of admission re-

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<sup>39</sup> 374 Ill. 17, 27 N.E. 833, 838 (1940).

<sup>40</sup> Beckwith and Sobernheim, *Amicus Curiae—Minister of Justice*, 17 *FORDHAM L. REV.* 38, 56, 61, 62 (1948).

quirements in the Supreme Court of the United States, and by a more stringent one in the Supreme Court of Illinois, the *amicus curiae* will become once again truly a friend of the court."<sup>41</sup> This is the advice of an incurable legal Pollyanna. By the time counsel has made his way to the Supreme Court of the United States, he should be able to brief the Court on all pertinent issues and thereby render it unnecessary for that Court to allow propaganda briefs that offer "arguments that might anger the Justices, doctrines that have not yet been found legally acceptable, and emotive presentations that have little legal standing."<sup>42</sup> Such arguments, on the other hand, might prove quite beneficial to other federal and state courts which require all the assistance they can get to render a fair decision. The Illinois Supreme Court has accomplished too much in its development of the *amicus curiae* role to thwart a beneficial trend. Hopefully, the federal courts will hurriedly get in step.

Such jurisdictions as Illinois and Pennsylvania have removed the emphasis from the *amicus applicant's* precise interest in the case and have transferred the emphasis to a consideration of the completeness and effectiveness of the information before the court. Such a transfer of emphasis has dictated to the courts that they, in their discretion, should allow every *amicus* to come forward who can make any contribution "essential to a proper consideration of the cause." In their discretion, the courts should never place great weight on the interest of the *amicus* or adherence to the issues of the litigants if the *amicus* can advance the ends of justice—even at the expense of extra administration. Illinois and Pennsylvania have sought to give positive guidelines to their courts, and Florida has indicated a penchant to eventually follow their examples. In allowing an *amicus curiae* brief in a liquor licensee's proceeding against the Director of the State Beverage Department, for example, the Supreme Court of Florida made the following statement:

[A]micus is not confined solely to arguing the parties' theories in support of a particular issue. To confine *amicus curiae* to arguing a parties' theories regarding a particular issue is to place him in a position of parroting "me too" which would result in his not being able to contribute anything to the court by his participation in the cause.<sup>43</sup>

"Contribution" to the case, then, is becoming somewhat of a rallying point for the *amicus*, and this addition perhaps gives new life to the historic concept of friendly assistance. The question is just how much

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<sup>41</sup> Comment, 55 Nw. U.L. Rev. 469, 482 (1960).

<sup>42</sup> Krislov, *supra* note 4, at 712.

<sup>43</sup> Keating v. Florida, 157 So. 2d 567, 569 (Fla. 1963).

freedom with respect to the issues of the litigants should the courts, in their discretion, allow the amicus.<sup>44</sup>

#### V. CONCLUSION

Most courts on both the federal and state levels have recognized the fact that amicus curiae participation, even when it serves two masters, a client and the court, is a valuable tool in the judicial machinery of this country. It has been referred to as a form of "judicial lobbying" that reflects a change in tactics and structure of interest articulation in American politics.<sup>45</sup> Consequently, the state courts have been in the vanguard of encouraging amicus participation. It is of paramount importance that state and federal courts encourage most legal arguments of the parties to be supplemented, even if the amicus has "a weak legal argument, with a moral quality, forcefully presented by an 'outsider' [it] . . . will not detract from the force of the main argument. . . ."<sup>46</sup> Since the strategies of the amicus are necessarily different from those of the interested parties, greater amicus participation cannot help but more thoroughly inform the court of all the intricacies of a given case and even provide the court with additional legal ammunition for opinions of great public interest.

*George C. Piper*

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<sup>44</sup> *But cf.* Keating v. Florida, *supra* note 43, at 569: "amicus is not at liberty to inject new issues in a proceeding. . . ."

<sup>45</sup> Krislov, *supra* note 4, at 705 (1963).

<sup>46</sup> VOSE, CAUCASIANS ONLY 166-67 (1959).