WHAT IS AN AMICUS BRIEF?

The Original Amicus Curiae

An amicus brief is filed by an “amicus curiae,” a term defined as: “A friend of the court. A term applied to a bystander who, without having interest in the cause, of his own knowledge makes a suggestion on a point of law or fact for the information of the presiding judge.”¹ The submission of amicus briefs precedes even the common law, having its roots in ancient Rome. The role of the original amicus was to provide a court with legal information that was beyond its notice or expertise.² In England, the amicus brief first appears in the 17th century,³ and its role was principally to assist judges in avoiding errors.⁴ For example, a Member of Parliament filed an amicus brief to advise the court of the meaning of a statute based on his personal knowledge of the relevant legislative history.⁵

The first amicus brief in the United States was submitted when the Supreme Court requested Henry Clay’s assistance in determining the application of the commerce clause to a land agreement between Kentucky and Virginia.\(^6\) To this day, courts may appoint amici curiae to assist them. After Clay’s service to the Supreme Court, amicus briefs began to be filed by the United States, state governments, attorneys for client organizations, and lobbyists representing private and trade organizations.\(^7\) Governmental entities filed amicus briefs even in private disputes, when public interests were implicated.\(^8\)

The function of the amicus curiae at common law was to advise the judge of relevant opinions, to prevent any manifest error.\(^9\) The amicus curiae had the further role of informing the judge of a relevant fact, such as a party’s death or the collusive or fraudulent nature of a suit.\(^10\) Traditionally, then, the sole objective of the amicus was to prevent an uninformed legal or factual error. Analogous was the status of the original jury—namely, members of the community who were knowledgeable about the parties and the relevant facts.\(^11\) Example 13 is an amicus brief that provides facts relating to the case in a Counter-Statement of Facts section of the brief.

Such traditional participation by an amicus occurs even today. A law professor or an attorney in a specialized field may submit an unsolicited brief or letter to the court suggesting that the court has made a legal error in a recent decision or simply providing “neutral” data that may assist the court in making its decision without advocating whether one side is favored by the data.\(^12\) That type of amicus submission was contemplated by the United States Supreme Court when it promulgated its first written

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6. *Id.* (citing Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823)).
8. Walbolt & Lang, *supra* n.4, at 270; *see*, e.g., Gibbons v. Ogden, 22 U.S. I (1824); Martin v. Hunter’s Lessee, 14 U.S. 304 (1816).
rule on the subject of amicus briefs in 1937. A variant of the traditional amicus brief is one submitted by a law professor or specialist who advocates a policy choice but does not do so because of any allegiance to a party.

**The Modern Friend**

The amicus submission has evolved into something very different from its original role. The modern-day amicus is rarely a neutral friend of the court. To the contrary, an interest in the litigation is one of the factors that courts use to decide whether to accept an amicus brief, although that interest cannot be a direct pecuniary one. Thus, a more recent definition of amicus curiae is: “A person with strong interest in or views on the subject matter of an action [who] . . . petition[s] the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.”

In the last several decades, attorneys acting as amici often represent private clients who are either interested in the case or in the manner in which the court will dispose of it. Amici are sometimes disparagingly referred to as “lobbyists of the court.” The amicus brief has become a means of advocacy for interest groups, private individuals, and business concerns that are nothing more than extensions of the parties; they are friends of the litigants rather than of the courts. That type of amicus participation began with industry trade groups and later expanded into minority

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18. Wohl, *supra* n.2, at 46; see also Daniel A. Farber, *When the Court Has a Party, How Many “Friends Show Up” – A Note on the Statistical Distribution of Amicus Brief Filings*, 24 CONST’L COMMENTARY 19, 36 (Spr. 2007) (noting that lobbying by means of amicus briefs is different in two respects—it is more formal, and the lobbyist cannot offer the decision maker any benefits in return for support).
19. *Id.;* Rustad & Koenig, *supra* n.3, at 96 (observing that many amici are now lobbyists for private interests with a direct or indirect stake in the outcome of the litigation).
groups. An example is an amicus brief filed by Michael Crichton, Larry David, Scot Turow, other writers, and the Authors Guild, Inc., in support of the petitioner concerning the right to use a real person’s name in a work of fiction. The International Trademark Association regularly files amicus briefs and publishes them in its Trademark Reporter. The expanded nature of amicus briefs reflects Justice Black’s observation, that “[m]ost cases before this Court involve matters that affect far more people than the immediate record parties.”

Private parties are by no means the only amici. The United States Government has often filed amicus briefs, dating back to 1812 in Schooner Exchange v. McFadden. Indeed, the rules of the United States Supreme Court and Courts of Appeals do not require the government to obtain consent from the parties to file amicus briefs, as is the case with private amici.

One commentator has decried the politicization of amicus practice by representatives of the federal government, citing examples of amicus briefs filed by the Solicitor General espousing views of the current presidential administration. “One window into the soul of a presidential administration is the work of the Office of the Solicitor General.” Another commentator argues that the Solicitor General should confine its amicus practice to cases directly involving federal interests and that the Solicitor General’s amicus briefs should be given deference in cases involving foreign relations and areas of government enforcement or policy that Congress has dedicated to the President. The SEC is another example of a governmental amicus

20. Wohl, supra n.2, at 46–48; Walbolt & Lang, supra n.4, at 273.
22. See, e.g., Amicus Brief of International Trademark Association in Special Effects, Ltd. v. L’Oreal SA et al., 97 Trademark Rptr. 793 (May–June 2007).
24. 11 U.S. (7 Cranch) 116, 118 (1812).
curiae. From 1981 to 1989, the Supreme Court adopted the SEC’s argument as amicus in eight of nine cases.29 Professional groups, such as the American Association for Justice (see Appendix Example 8) and the Defense Research Institute (DRI) (see Appendix Example 9), have filed amicus briefs.

Perhaps adopting a view similar to the commentators critical of agency amicus briefs, the First Circuit considered an agency amicus brief in Lawson v. FMR LLC,30 but expressly stated that the court “owed no deference” to the agency’s brief.31 In Christopher v. SmithKline Beecham Corp.,32 the Supreme Court discussed at some length whether and under what circumstances courts should defer to agency interpretations in briefs, noting that the Department of Labor had submitted inconsistent amicus briefs on an issue whose resolution could impose substantial compliance burdens.33 In a Fair Labor Standards Act case, the Fifth Circuit expressed interest in an issue by asking for briefing on whether to approve a two-step process for collective actions that had been used by a number of district courts, with the first step being a fairly lenient one. The Department of Labor and the EEOC filed an amicus brief endorsing the two-step process for policy reasons, and the court of appeals then denied mandamus relief without oral argument.34

More generally, a commentator has identified seven groups within modern amici: (1) special interest groups and trade organizations; (2) parties in other, similar cases; (3) government; (4) non-litigants potentially affected by the case; (5) law professors and practitioners in specialized fields; (6) bar organizations; and (7) quasi-parties that have in some way participated in some phase of the case.35

Amicus participation is especially valuable to non-parties, allowing them to “have their say.”36 When legislatures make law, everyone has an opportunity to weigh in on the issue. Not so in courts, which open their doors

29. Lucas, supra n.2, at 1609 & n.35 (citing the nine cases).
30. 670 F.3d 61 (1st Cir. 2012).
31. Id. at 83.
33. Id. at 2165–67 (discussing deference under Auer v. Robbins, 519 U.S. 452 (1997), and concluding that the agency’s position was not entitled to deference).
only to actual litigants. So the amicus process allows others to comment on issues of importance to them. This modern amicus practice was noted over forty years ago by Professor Samuel Krislov, who explained the reason for the evolving role of amici. Professor Krislov discussed the holding in Strawbridge v. Curtiss that “each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the federal courts.” As Krislov noted, this rule of limiting the case to the parties at hand has the effect of excluding non-parties from direct participation in federal court litigation and continues the common law history of hostility to intervenors. The common law tradition was to decide specific disputes, but its decisions often had effects beyond the parties. The amicus evolved into the vehicle of expression for those other affected interests. Amicus participation may even be allowed as an alternative to intervention.

The evolution of the amicus submission was also precipitated by the development of what Krislov called “bureaucratically sophisticated groups” that are able to exercise influence in the judicial sphere. Organizations have the flexibility to respond with written material and information. Professor Krislov concludes:

The amicus curiae brief represents a prime example of a legal institution evolving and developing while maintaining superficial identity with the past. It has been a catch-all device for living with some of the difficulties presented by the common law system of adversary proceeding. The United States, in particular, has allowed representation of governmental and other complex interests generated by the legal involutions of federalism. In addition, the United States Supreme Court has helped foster its development as a vehicle for broad representation of interests, particularly in disputes where political ramifications are wider than a narrow view of common law litigation might indicate. Groups inherently weak in the political arenas and unequally

37. *Id.*
38. 7 U.S. (3 Cranch) 267 (1806).
39. *Id.* at 267.
40. *Supreme Court Practice, supra* n.12, at 426–28.
41. *Id.* (discussing amicus briefs as alternative to intervention); *Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012).
endowed with resources of wealth or skills have quite naturally been the leaders in the use of the brief.\textsuperscript{42}

Such sophisticated groups have only grown since Krislov’s observations. Moreover, the ability to create the printed word has grown with technology. Thus, the general rule these days is that the amicus is an advocate. That was suggested in \textit{Jaffe v. Redmond},\textsuperscript{43} by Justice Scalia, who noted that there is “no self-interested organization out there devoted to the pursuit of truth in the federal courts.”\textsuperscript{44} His comment echoes the First Circuit’s conclusion that the amicus curiae is usually not disinterested or impartial.\textsuperscript{45} As an illustration, the First Circuit cited a humorous anecdote:

As an attorney of our acquaintance once told the court, when asked for his response to the argument of the amicus: “That fellow isn’t any more a friend of the court than I am.”\textsuperscript{46}

In some cases, the amicus is simply another litigant. In other cases, the amicus is an interest group, which may have an agenda very different from any of the litigants in the case. Thus, a distinction can be made between true amicus briefs and adversarial amicus briefs, and it is possible to discern at least three classifications of amici:

- the true disinterested amicus;
- the endorsing amicus; and
- the interest group amicus.

In 1990, the United States Supreme Court issued a rule discouraging the filing of redundant amicus briefs. As Rule 37 unmistakably advises the bar, amicus briefs that do not add something to the case are not favored and are

\textsuperscript{42} Krislov, supra n.1, at 720.
\textsuperscript{43} 518 U.S. I (1996).
\textsuperscript{44} Id. at 35–36 (Scalia, J., dissenting).
\textsuperscript{45} Strasser v. Dooley, 432 F.2d 567, 569 (1st Cir. 1970).
\textsuperscript{46} Id. at 567 n.2.