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AMICUS CURIAE: FRIEND OF THE COURT

FRANK M. COVEY, JR.

AN AMICUS CURIAE has been defined as one who, as a by-stander, may inform the court when the judge is doubtful or mistaken in a matter of law.¹ The term includes both attorneys and laymen who interpose in a judicial proceeding to assist the court.

The amicus curiae should be, as the term implies, a friend of the court. He should attempt to aid the court rather than the parties. "It is for the honour of the court to avoid errors in its judgment. . . ." He should aid the court by bringing forth only the truth, not false information. As the bench reprimanded an amicus in *The Prince's Case*³ "[I]n truth the Serjeant and his son have not performed the office of a friend or of a good informer, for they have omitted one clause in [the grant]. . . ." The term implies the friendly intervention of counsel to remind the court of some matter of law which might otherwise escape its notice, and in regard to which it might go wrong.⁴

The ordinary purpose of an *amicus curiae* brief in a civil action is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation.⁵

The status of the amicus curiae ends when he has pointed out the error or made his suggestion to the court. Such intervention is granted not as a matter of right but of privilege, and the privilege ends when the suggestion has been made.⁶

In defining the role of the amicus curiae it may be helpful to point out three things that he is not. He is not an agency or arm of the court; he can not perform the functions of the court. He is not a

¹ 2 Am. Jur., Amicus Curiae § 2 (1936).

² Counsel's argument, *Protector v. Geering*, Harde 85, 86, 145 [1656] 145 All E.R. 394 (Ex.).

³ [1606] 77 All E.R. 496, 516.

⁴ *Hamlin v. "Peticuler Baptist Meeting House,"* 103 Me. 343, 69 Atl. 315 (1907).

⁵ *State v. Finley*, 242 Minn. 288, 294, 295, 64 N.W. 2d 769, 773 (1954).

⁶ *Bayley v. Clark*, 153 Ill. App. 154 (1910).

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party and is not bound by the resulting judgment. Finally, he is not an intervenor or intervening party to the suit.

An amicus curiae cannot perform the functions of the court. In a divorce proceeding the court cannot refer the cause to an amicus to make findings upon which the decree will be based.⁷ Yet the courts have allowed the appointment of an amicus to make investigations and conduct hearings in a contempt citation.⁸

An amicus is not a party to the suit and is not bound by the resulting judgment.⁹ But if the amicus takes an active part in the law suit, such as making motions, he may be found to have become a party.¹⁰ Neither is the amicus an intervenor.¹¹ There are two principal distinctions between the intervenor practice and the amicus practice, and the first flows from the second. In an intervention, the intervening party is bound by the resulting judgment; an amicus is not bound in any way except by the precedent of the case.¹² The principal difference between the two lies in the requirement of interest for each. To act as an amicus, one must have some interest in the outcome of the suit. This interest may consist in being the attorney of record in a pending suit involving similar questions,¹³ a specific public interest,¹⁴ the desire to protect a minor's estate,¹⁵ the desire to prevent a collusive suit,¹⁶ pointing out error to the court¹⁷ or the protection of a criminal defendant.¹⁸ However, to intervene, one must have a direct interest in the *res* of the suit.¹⁹ There must be an interest in the sub-

⁷ *Traistar v. Traistar*, 306 Ill. App. 509, 29 N.E. 2d 286 (1940).

⁸ *People v. Goss*, 10 Ill.2d 533, 141 N.E.2d 385 (1957); *Anderson v. Macek*, 350 Ill. 135, 182 N.E. 745 (1932).

⁹ *Clark v. Sandusky*, 205 F. 2d 915 (C.A. 7th, 1953); *Pueblo de Taos v. Archuleta*, 64 F. 2d 807 (C.C.A. 10th, 1933). This rule does not apply in Texas, which recognizes no special appearance, where the amicus paid by the defendant appears to suggest the lack of jurisdiction over the person of the defendant. *Burger v. Burger*, 298 S.W. 2d 119 (Tex., 1957).

¹⁰ *Dean v. Gerlach*, 34 Ill. App. 233 (1889).

¹¹ See *Walker v. Reynolds Metals Co.*, 87 F. Supp. 283 (Ore., 1949).

¹² *Galbreath v. Metropolitan Trust Co.*, 134 F. 2d 569 (C.C.A. 10th, 1943).

¹³ *Northern Securities Co. v. United States*, 191 U.S. 555 (1903).

¹⁴ *Carazalla v. State*, 269 Wis. 593, 71 N.W. 2d 276 (1955).

¹⁵ *Ex parte Guernsey*, 21 Ill. 442 (1859).

¹⁶ *McAdams v. People*, 179 Ill. 316, 53 N.E. 1102 (1899).

¹⁷ *The Claveresk*, 264 Fed. 276 (C.C.A. 2d, 1920).

¹⁸ 3 *Coke's Institutes* 29 (Brooke ed., 1779).

¹⁹ *Pure Oil Co. v. Ross*, 170 F. 2d 651 (C.A. 7th, 1948).

ject-matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment.

POWER OF THE COURT TO SEEK OR PERMIT AN AMICUS

A court has the power to seek the services of an *amicus curiae* where it feels the practice is necessary or advisable.²⁰ The power extends to assisting or advising the court; calling to its attention factors that may have escaped its attention; making suggestions in matters in which the court may proceed on its own motion, or in matters of practice and aiding the court by the performance of certain labors and examinations necessary to guide the court to a proper conclusion.

The American courts have long exercised this prerogative, e.g., in 1833 a representative of the government was asked to appear in a case involving the status of a naval officer.²¹ In terms of present practice, the appearance of an *amicus* is most common in cases involving the fields of domestic relations, jurisdiction and practice, corporate reorganizations²² and civil rights cases.²³ There remain, however, remnants of the contrary practice, including a rare example of counsel being called upon in open court to act as *amicus* solely due to his accidental presence in the court when the case was reached.²⁴

It is also clear that the court has the power to accept the services tendered to it by one who wishes to act as *amicus curiae*. It is not error for the trial judge to receive the suggestions of an *amicus curiae*.

[The] application . . . for the privilege of so appearing is of no personal concern to the parties, and the court may grant or refuse the request, according as it deems the proffered information timely or useful or otherwise.²⁵

Such acceptance of advice is the right of the court, even though both parties should object.²⁶ The parties to the case should be informed of the suggestions of the *amicus* and time should be given to them to resist or explain the matter brought forward by the *amicus*.

²⁰ Pokorny, "Friend of the Court" Aids Detroit Judges in Divorce Cases, 29 J. Am. Jud. Soc. 166, 167 (1946).

²¹ *Ex parte Randolph*, 20 Fed. Cas. 242, No. 11558 (C.C.A. Va., 1833).

²² Beckwith & Sobernheim, *Amicus Curiae—Minister of Justice*, 17 Ford L. Rev. 38, 46 (1948).

²³ Bernstein, *Volunteer Amici Curiae in Civil Rights Cases*, 1 N. Y. Stud. L. Rev. 95 (1952).

²⁴ *In re Opinion of the Justices*, 87 N.H. 492, 179 Atl. 357 (1935).

²⁵ *The Claveresk*, 264 Fed. 276, 279 (C.C.A. 2d, 1920).

²⁶ *Sampson v. Commissioners of Highways*, 115 Ill. App. 443 (1904); *Ex parte Guernsey*, 21 Ill. 442 (1859). But see *Charleston v. Cadle*, 167 Ill. 647 (1897).

Since the acceptance of the services tendered by an amicus is the right of the court, the parties can in no way complain. The granting or denial of the privilege to appear lies wholly within the discretion of the court and is not reviewable.²⁷ However, the admission of the amicus' suggestion as evidence may be assigned as error if it was in any manner legally inadmissible.

In short, it is the inherent right of the court to seek or permit the services of an amicus curiae, and the parties or intended amicus have no grounds for appeal from any decision on the matter since it is wholly within the discretion of the court.

ORIGIN OF THE AMICUS PRACTICE

In the early Common Law the practice of allowing any person present in court to step forward as amicus curiae and inform or advise the court is as old as the reported cases themselves. The Year Book cases as far back as 1353 deem it an accepted practice.²⁸ In 1468 the court stated: "Any man can inform the court in the case so that the court will not render judgment on an insufficient record."²⁹ In this case the court used the terms "amicus curiae & amicus juris."

In a 1573 abridgement, there are three references to the amicus practice.³⁰ In one reference the author states: "[I]n an improper indictment any man, as amicus curiae, can inform the court of error in order to prevent the court from suffering the mistake."³¹

In 1656, on the verge of modern practice, a case reports the practice as being based on the honor of the court to avoid error and to prevent barbarism resulting from gross and apparent errors.³²

There can be no doubt as to the age and wide acceptance of the amicus curiae. As to its origin, on the other hand, there is a great deal of doubt. Like so many things of great age, its roots are lost even though the practice still continues. There is little material available on the beginnings of the amicus practice. One writer contends that the practice is based on the Roman *consilium*, an officer of the Roman court appointed by the judge to advise him on points on which he

²⁷ Clark v. Sandusky, 205 F. 2d 915 (C.A. 7th, 1953).

²⁸ Y.B. Hil. 26 Ed. III, 65 (1353).

²⁹ Y.B. 7 Ed. IV, 16 (1486).

³⁰ Brooke, Le Grande Abridgement (1573).

³¹ Ibid., Errors § 49.

³² Protector v. Geering, Hardes 85, 86 [1656] 145 All E.R. 394 (Ex.).

was in doubt. It is then contended that this practice became incorporated into the English system as the *amicus curiae*.³³

This explanation does not seem sufficient. First, the *consilium* could not inform the court on his own initiative, as the *amicus curiae* may, but could only act on the request of the court.³⁴ The *consilium* when requested by the court could act against a criminal defendant, while an *amicus curiae* may never appear against a criminal defendant.³⁵ This constitutes two significant differences between the *amicus* practice and the *consilium* practice; in the latter, counsel may act only at the request of the court, and may appear against a criminal defendant, while in the former, counsel may appear either at the request of the court or on his own initiative and may not appear against a criminal defendant. These differences raise a serious doubt to the contention that the *amicus* practice is merely an off-shoot of the Roman *consilium* practice. These differences would not preclude the possibility that the *consilium* practice was the source of those facets of the *amicus* practice that are similar to it.

There is another source from which the *amicus* practice may have arisen. In the scant historical data there is no direct confirmation or denial, but there is some secondary confirmation that would tend to show its validity.

At the early Common Law and until the middle Common Law, the defendant in a serious criminal charge was not allowed the benefit of counsel. "It was a very ancient principle that no counsel was allowed to persons charged with treason or felony against the Crown. . . ."³⁶ However, a criminal defendant must be protected from any errors of law, and unless he were a lawyer himself, he would be unable to provide this protection. It is probable that the *amicus* practice, or at least one phase of it, sprang up to fill this gap. Since the court would be unaware of the error of law, for if they were aware of it they could remedy it themselves, the *amicus curiae* could not wait to be asked for his advice, as the *consilium*, but must be able to thrust it upon the court.

This theory finds some justification in the early writers. Although

³³ 1 Bouvier's Law Dictionary 188 (3rd ed., 1946).

³⁴ Wenger, *Institutes of the Roman Law of Civil Procedure* 32, 202 (1925).

³⁵ *State v. Finley*, 242 Minn. 288, 64 N.W. 2d 769 (1954). See *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill., 1945).

³⁶ Plucknett, *A Concise History of the Common Law* 385 (3rd ed., 1940).

the amicus was common in civil cases, the only mention of the amicus practice made by Coke is in the Criminal Law section of the *Institutes*. Further concerning the practice he writes:

And after the plea of not guilty, the prisoner can have no counsel assigned to him to answer the king's counsel learned, nor to defend him. * * * [A]ny learned man that is present may inform the court for the benefit of the prisoner of anything that may make the proceedings erroneous.³⁷

Coke also states "[A]ny man that is in the court may inform the court of any of these matters, lest the court should error and the prisoner unjustly for his life proceeded with."³⁸ Chitty also describes the practice only under the criminal law.³⁹

This theory of the origin of the amicus, a means of assuring substantive due process to a criminal defendant who could not have the benefit of counsel, would explain how the amicus can act on his own motion and not merely on the request of the court and would explain why he cannot appear against a criminal defendant.

It is more than likely that the amicus practice by 1600 was shaped by both of these factors. Whichever predated the other in influence, the Roman or the criminal law practice, was significantly modified by the other, with the modern amicus practice as a result of the two.

THE AMICUS CURIAE IN AMERICA

The amicus practice crossed the Atlantic with the first lawyer to bring along his Coke's *Institutes*. The practice appears in several early cases. In *Green v. Biddle*,⁴⁰ Henry Clay appeared as an amicus in a case resulting from a boundary dispute between Kentucky and Virginia. In *Ex parte Randolph*,⁴¹ R. C. Nicholas, a representative of the United States government appeared at the request of the court in a case concerning the status of a naval officer. The practice was recognized in Illinois as early as 1859.⁴²

The amicus curiae has been a familiar sight in the Supreme Court of the United States. In the *Employer's Liability Cases*,⁴³ the Attor-

³⁷ 3 Coke's *Institutes* 29 (Brooke ed., 1779).

³⁸ 3 Coke's *Institutes* 137 (Brooke ed., 1779).

³⁹ 1 Chitty, *Criminal Law* 308 (2d ed., 1832).

⁴⁰ 8 Wheat. (U.S.) 1 (1823).

⁴¹ *Ex parte Randolph*, 20 Fed. Cas. 242, No. 11558 (C.C.A. Va., 1833).

⁴² *Ex parte Guernsey*, 21 Ill. 442 (1859).

⁴³ 207 U.S. 463 (1908).

ney-General appeared as an amicus to argue for the validity of the Employer's Liability Act. In *Myers v. United States*,⁴⁴ on the request of the Court, Senator Pepper presented a brief and an oral argument concerning the Senate's view on the presidential removal power. In the *Pocket Veto Case*,⁴⁵ at the request of the House Judiciary Committee, Representative Summers was granted leave to appear and argue as amicus curiae. Of course, the practice is not limited to government officials. In the first *Flag Salute Case*,⁴⁶ the Committee on the Bill of Rights of the American Bar Association and the American Civil Liberties Union appeared as amici.

In the current Supreme Court battle over civil rights, the amicus has played an influential role. In the school segregation cases the amicus was a frequent contributor to the thinking of the court. The Attorney-General was invited by the court to file a brief and participate in oral argument.⁴⁷ He was also invited to participate in the re-argument on the specific relief to be granted, and the Attorneys-General of the states permitting or requiring segregation were allowed to appear as amici curiae if they so requested.⁴⁸

Such appearances are not limited to courts of last resort. The Supreme Court of New York, Trial Term, allowed seven amici curiae to file briefs in a case involving the specific performance of racial restrictive covenants in a deed.⁴⁹

MODERN AMICUS CURIAE PROCEDURE

To secure the services of an amicus curiae on its own motion the court need only make the request, either informally and merely signifying in the listing of counsel of record that the party appears as amicus curiae or by formally entering the request in the record.

The procedure by which the services of volunteer amicus curiae are permitted is closely regulated. In the early Common Law any man could inform the court as amicus, but with the increase in the use of the practice its limitation became necessary.

In Illinois, the mere fact that the case will affect the interests of the

⁴⁴ 272 U.S. 52 (1926).

⁴⁵ 279 U.S. 655 (1929).

⁴⁶ 310 U.S. 586 (1940).

⁴⁷ *Brown v. Board of Education*, 345 U.S. 972 (1953).

⁴⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴⁹ *Kemp v. Rubin*, 64 N.Y.S. 2d 510 (1946).

amicus in another pending litigation does not necessarily justify intervention as amicus curiae. The motion for leave to file as amicus curiae must be made unaccompanied by a brief. Appearance as amicus curiae is only allowed where the court feels that such aid is necessary or advisable to protect the court in the consideration of the case.⁵⁰

In the federal courts the volunteer amicus curiae is met by similar restrictions, both by case law⁵¹ and by rule of court.⁵² The United States Supreme Court does not favor the filing of amicus curiae briefs without consent of parties to the suit except when done by the United States and individual states by their respective Attorneys-General.⁵³

Under modern restrictions, the amicus curiae may appear only by leave or at request of the court. His motion for leave to appear, unaccompanied by his brief, must convince the court that it would be to the court's advantage to receive the brief.

The original cause or occasion for the introduction of the amicus curiae practice into the common law has completely disappeared. If the cause was the Roman *consilium* practice, then the power of the court to require the counsel in a case to brief any point the court may deem important plus the practice of providing law clerks for the appellate judges would obviate the necessity of having the power to appoint someone else to do the same thing. If the cause was the nature of the early common law criminal proceedings, the safeguards of the United States and Illinois Constitutions and appellate review of criminal convictions makes the practice unnecessary for that purpose.

There still remains justification for the practice under the restrictions placed on the practice. It is an appropriate means to protect a party's interest when the interest is not sufficient to justify intervention in the suit.⁵⁴ Further, in a common law system it is a matter of public interest that each precedent which makes up the body of the law shall be as close to right as skillful and disinterested effort can make it. 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 curiae may prove a true friend of the court.

⁵⁰ Froehler v. North American Life Insurance Co., 374 Ill. 17, 27 N.E.2d 833 (1940).

⁵¹ Northern Securities Co. v. United States, 191 U.S. 555 (1903).

⁵² 28 U.S.C.A., Sup. Ct. R. 27(9) (Supp., 1958).

⁵³ 28 U.S.C.A., Sup. Ct. R. 27(9)(b)(d) (Supp., 1958).

⁵⁴ United States v. Du Pont de Nemours & Co., 13 F.R.D. 487 (N.D. Ill., 1953).

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