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AMICUS CURIAE — MINISTER OF JUSTICE

EDMUND RUFFIN BECKWITH & RUDOLF SOBERNHEIM†

*"It is for the honour of the Court to avoid error in their judgments. . . . The Court ex officio ought to examine . . . into errors, though not moved. Barbarism will be introduced, if it be not admitted to inform the court of such gross and apparent errors in offices."*¹

THIS declaration, made nearly 300 years ago, of a broad concept of justice then very ancient,² is more important today than it ever was and more so in the United States than anywhere else. It is not only "for the honour of the court" that right judgment shall be rendered. It is also vitally necessary that the citizen of a free country shall have the law correctly decided not only in his own immediate interest but also to continue its rational development as a safeguard against judicial arbitrariness and for the preservation of free government.³ This applies equally to the law developed in the traditional courts and to the law as it is developed in proceedings before administrative agencies.

An efficient means to improve the likelihood of correct decision is the intervention of *amicus curiae* to assist the court so that it may the more certainly "avoid error in judgment."⁴ This essay is concerned with the manner of his intervention, and the limitations presently applied thereto by the courts. It is concerned with the effect of such intervention upon the administration of justice as it presently occurs and with what it might be under a systematic extension of the powers of *amicus*.

The hackneyed saying, usually attributed to a former chief justice of the Supreme Court, that "the law is what the judges say it is,"⁵ con-

† Members of the New York Bar.

1. *Protector v. Geering*, Hardres 85, 86, 145 Eng. Rep. 394 (1656).

2. To decide the point involved in *Protector v. Geering*, *supra* note 1, the court relied on a Year Book case, 7 Edw. IV (1449). For other early cases see notes 10, 66 and 71 *infra*.

3. COLLINGWOOD, *THE NEW LEVIATHAN* c. XXXIX, XLI (1942); McIVER, *THE WEB OF GOVERNMENT* 74 (1947) *passim*; MERRIAM, *SYSTEMATIC POLITICS* 123 *et seq.*, 127 (1945).

4. See note 1 *supra*. For more recent American pronouncements see *Garland Co. v. Filmer*, 1 F. Supp. 8 (N. D. Cal. 1932); *In re Perry*, 83 Ind. App. 456, 148 N. E. 163 (1925); *In re Roff's Estate*, 226 Mo. App. 1203, 50 S. W. 2d 156 (1932).

5. See *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 139 (1908). The remark made by (then) Governor Hughes was limited to the Constitution and in its context conveyed a different meaning from the one commonly ascribed. See editorial in *The Christian Science Monitor*, March 20, 1937, p. 16, col. 2. See also TRAIN, *BY ADVICE OF COUNSEL* 97 (1925): "What is the law, anyhow? It's what some judge says is the law—until he's reversed."

tains when taken out of its context no more than a half truth. It is much nearer the fact to say that judicial decision operates on the content, form and persuasiveness of the data submitted to the judge, and that the law is the end-product of the submission as well as of the decision.⁶ This involves the historic justification of the advocate in the judicial process and for the present purpose it involves particularly the function of amicus.

Everyone knows that the decision in any case may prove to be erroneous either because of the limited skill or knowledge of the tribunal or because of the inadequacy or personal interest of either or both of the contending parties or attorneys. The effort to forestall error resulting from such causes has taken many forms, such as the so-called "Brandeis brief"⁷ which produces relevant facts *dehors* the record, or perhaps also the recent notion that administrative agencies may safely be permitted to "expertise" with only limited judicial review. The evolution of an ideal rationale of judicial decision may be greatly assisted by the systematic intervention of skilled and well-informed *friends of the public interest* on a much larger scale than heretofore realized, in spite of the fact that in many cases the intervenor acting as amicus may have some eventual axe to grind, self-interest being often the best assurance of skill and diligence.

What problems this may raise in the traditional management of litigation will be considered below, after a discussion of the present state of the law. It suffices here to indicate that the principal difficulty grows out of the need to determine the extent to which the parties shall "control the suit" when amicus takes a position different from any of theirs.

The rules governing amicus vary among the several jurisdictions. To the extent that this may have any importance, an effort will be made below to show how a greater uniformity may be reasonably obtained. But first it is desirable to examine the procedural matters upon which agreement is more or less general.

I. HOW TO BECOME AMICUS

In modern American practice an amicus may be invited by the court to advise it, or he may volunteer. The former method was the one best

6. Llewellyn, *The Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COL. L. REV. 167 (1946).

7. So named after the private brief filed by the late Justice Brandeis as attorney in *Muller v. Oregon*, 208 U. S. 412, 419 n. 1 (1908), supplying copious factual data in support of the constitutionality of social legislation under the due process clause of the Federal Constitution. For the relevancy of this approach to the amicus problem see p. *infra*.

known to Roman law, where the judges were accustomed to seek the assistance of a *consiliarius* in arriving at the correct solution of difficult questions of law.⁸ But the contrary practice appears in England, from the earliest mention of the amicus in the Year Books, when the right was recognized to volunteer advice which had been unsought and may have been undesired by the court or the parties.⁹

It developed early under this English practice that amicus need not be a lawyer but may be any bystander,¹⁰ and it is also probable that some modern problems respecting the powers of amicus have grown at least in part out of the fact that the initiative for his acting may be either the court's or his own. Criteria will be suggested below for the purpose of distinguishing certain powers which it may be proper to use in some situations but not in others, depending upon the nature of the case or the character of amicus.

A. Who May Become Amicus

Modern American law recognizes the rule that any individual or organization is as such entitled to apply for leave to act as amicus,¹¹ provided other procedural requirements are fulfilled. The favorable attitude of most state courts towards the latter approach is well expressed in the oft-referred-to statement of the Supreme Court of Michigan in *Grand Rapids v. Consumers' Power Co.*,¹² that:

"In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae. . . ."¹³

8. WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 202 *et seq.* and *passim* (Fisk Transl. rev. ed. 1940).

9. Early cases beginning with the reign of Edward III in the middle of the 14th century are found in SIMON THELOALL, *LE DIGEST DES BRIEFES ORIGINALS ET DES CHOSES CONCERNANTS EUX* lib. 13, cap. 14 (London 1579), and in Rolle's and Viner's Abridgements. The reference to a statute of Henry IV in *United States v. Gale*, 109 U. S. 65 (1883), and in 1 BOUVIER'S *LAW, DICTIONARY* 188 (Rawle's 3d rev. 1914) as recognizing the right of *amicus curiae*, appears to be based on a misunderstanding. *Cf.* Note, 34 *HARV. L. REV.* 773 (1921).

10. *Y. B. 5 Edw. IV* 124, *Brev. des Plees*, pl. 23 cited in Theloall, *op. cit. supra* note 9; *Beard v. Travers*, 1 *Ves. Sr.* 313, 27 *Eng. Rep.* 1052 (1749).

11. Amici appointed by the court are as a rule attorneys. *E.g.*, *Whitney v. Randall*, 70 *Idaho* 49, 70 *P. 2d* 384 (1937); *State v. Jefferson Iron Co.*, 60 *Tex.* 312 (1883). *But cf. In re Hamilton*, 37 *F. 2d* 758 (C. C. P. A. 1930), denying leave to file brief as amicus on the ground that applicant is not an attorney of the court and admittedly a stranger to the proceeding.

12. 216 *Mich.* 409, 185 *N. W.* 852 (1921); *Myer v. Children's Aid Ass'n*, 73 *Ind. App.* 489, 127 *N. E.* 835 (1920); *Colmes v. Fisher*, 151 *Misc.* 222, 271 *N. Y. Supp.* 379 (*Sup. Ct.* 1934).

13. 216 *Mich.* 409, 415, 185 *N. W.* 852, 854 (1921).

Numerous individuals¹⁴ and interested organizations of the business and professional world are constantly using the privilege.¹⁵ It is understood, of course, that as amici they must be represented by attorneys where the local law so requires. Provided that the court's procedural rules permit the intervention, no other personal qualification is generally required of amicus.¹⁶

These principles are not, however, extended with equal freedom to the representative of the government. When officials having authority in the matter at hand, usually the attorney general,¹⁷ offer to intervene, no other government agencies will be permitted to oppose them in the guise of amici.¹⁸ Nor will amicus be appointed to represent the public interest where a public official has the power or duty to act.¹⁹

14. Sometimes this privilege has even been extended to the trial judge defending his position on the law and arguing for its clarification by the appellate tribunal. *People v. Hopkins*, 70 Colo. 163, 197 Pac. 1020 (1921). *Contra: In re Pina*, 112 Cal. 14, 44 Pac. 332 (1896). And see p. 45 *infra* and cases cited in note 43 *infra*.

15. For recent cases in New York see *Dry Dock Sav. Inst. v. 103 E. 75th St. Apts.*, 296 N. Y. 280, 72 N. E. 2d 894 (1947); *Koussevitzky v. Allen, Towne & Heath*, 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947); *Shielcrawt v. Moffett*, 294 N. Y. 180, 61 N. E. 2d 435 (1945). For recent federal examples see *Del Guercio v. Delgadillo*, 159 F. 2d 130 (C. C. A. 9th 1947), *cert. granted*, 331 U. S. 801 (1947); *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S. D. Cal. 1946).

16. In one instance at least, leave to become amicus was denied because of excessively partisan attitude. *First Citizens Bank & Trust Co. v. Saranac River Power Corp.*, 246 App. Div. 672 (3d Dep't 1935). See also *In re Stolen*, 193 Wis. 602, 214 N. W. 379 (1927), rejecting amicus brief of sixty attorneys containing no analysis of facts or law, felt by the court to be an improper attempt at pressure to obtain clemency in disbarment proceedings against local judge guilty of misconduct. The brief was returned to the petitioners. An attempt to restrict access to the courts by amicus was recently indicated in the remarks of Hill, J., in *Maloney v. Board of Education*, N. Y. Times, Jan. 10, 1948, p. 30, col. 1 (Sup. Ct. Kings County, N. Y.), requiring the Communist Party of Crown Heights to deny charges of subversion, before being heard either as amicus or as party. While in fact the court did not give effect to this statement as a pre-condition to being heard, such restrictions would be wholly contrary to the spirit of the institution of amicus and would deprive it of its effectiveness as a protection of the citizenry against proceedings contrary to law. See II. A. *infra* and note 1 *supra*.

17. *The Gray Jacket*, 5 Wall. 370 (U. S. 1867); United States Supreme Court Rule 27 (9), 8 F. C. A. 214 (Cum. Supp. 1946). For a recent instance, see *Flournoy v. Wiener*, 321 U. S. 253 (1944). (United States Attorney General submitting amicus brief upholding constitutionality of § 402 (b) (2) of Revenue Act of 1942).

18. *But cf.* *The Gray Jacket*, *supra* note 17, permitting the United States Treasury Dep't as amicus to defend its position in a prize case against the official government position subsequently adopted by the Attorney General. See *Matter of Fay*, 291 N. Y. 198, 52 N. E. 2d 97 (1943), permitting a state senator to act as amicus, although the legislative committee of which he was chairman was represented by the state attorney.

19. *Sternberg v. Vineland Trust Co.*, 107 N. J. Eq. 255, 152 Atl. 370 (Ch. 1930). This decision seems to overlook the possible need for public-spirited amici to supplement inactive or sluggish public officials.

Probably, however, authorized officers of the government will always be admitted as so-called amici,²⁰ even over the objection of one or both of the parties.²¹ Their status is based on the view that they perform an official duty;²² in some instances this duty has been given the sanction of statute, custom or administrative rule and its performance no longer falls within the scope of the true amicus problem.²³

B. *When Application Must be Made*

No narrow procedural rules seem to govern the time when amicus should apply for leave to act. It has been held that since his being heard is wholly a matter within the discretion of the court and cannot be deemed detrimental to the parties, notice need not be given of the application²⁴ and that filing is timely if there is an opportunity for the parties to answer his brief.²⁵ This practice both on theoretical and on practical grounds would be preferable to the narrow views expressed recently in the New York case of *Kemp v. Rubin*.²⁶ That case in sub-

20. *United States v. California*, 332 U. S. 19 (1947) (National Association of Attorneys General and American Association of Port Authorities); *Gardner v. New Jersey*, 329 U. S. 565 (1947) (city of Jersey City); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940) (forty-one states by their attorneys general); *Stephens v. First Nat. Bank of Nevada*, 182 P. 2d 146 (Nev. 1947) (United States Attorney as amicus in lower court). *But cf.* *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570 (W. D. Ky. 1935).

21. *Fahey v. Mallonee*, 332 U. S. 245 (1947) (State of California by special leave of court); *Fulton v. Schannen*, 64 N. E. 2d 798 (Ind. 1946) (public defender).

22. *Cf.* *Sternberg v. Vineland Trust Co.*, 107 N. J. Eq. 255, 152 Atl. 370 (Ch. 1930).

23. Important examples:

(1) The functions of the United States Attorney General under 50 STAT. 751 (1937), 28 U. S. C. § 401 (1940), authorizing him to intervene for the presentation of evidence and argument in all cases where a party raises the issue of the constitutionality of a federal statute.

(2) Suggestions of sovereign immunity, formerly presented by the diplomatic representatives of the country concerned as *amici curiae* (*In re Muir*, 254 U. S. 522 (1921)) or by way of suggestion (*The Pesaro*, 255 U. S. 216 (1921)); *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*, 303 U. S. 68 (1938), presented by the Attorney General or the United States attorneys on behalf of the Department of State. *Republic of Mexico v. Hoffman*, 324 U. S. 30 (1945); *United States of Mexico v. Schmuck*, 294 N. Y. 265, 62 N. E. 2d 64 (1945). For a suggestion disavowing sovereign immunity, see *The Beaton Park*, 65 F. Supp. 211 (W. D. Wash. 1946).

(3) The intervention of the appropriate government department before the Board of Contract Appeals where claims of subcontractors against the prime contractors are presented under the Renegotiation Act. 56 STAT. 245 (1942), 50 U. S. App. § 1191 (Supp. 1946), as amended, 61 STAT. 133, 50 U. S. C. A. § 1191 (Supp. 1947).

24. *Spice Valley School Township v. Rizer*, 1 N. E. 2d 289 (Ind. 1936).

25. *Stanton v. Ruthbell Coal Co.*, 34 S. E. 2d 257 (W. Va. 1945).

26. 187 Misc. 707, 64 N. Y. S. 2d 510 (Sup. Ct. 1946).

stance holds that a motion for leave to appear as amicus made in motion term is premature and will be denied without prejudice to a renewal before any judge sitting on any actual proceeding in the case, where an action is awaiting trial and no motion or other proceeding is actually pending in the court. The reason given that the judge sitting in motion part "cannot direct any justice to accept this assistance without his consent,"²⁷ disregards the fact that the assistance of amicus is offered to the court as such and not to the individual judge who may decide one or another part of the case. Since the granting of leave to intervene is entirely discretionary with the court and his admission deemed to be a matter of the administration of justice beyond the reach of the parties, no error is committed by either granting or denying the application, and no appeal either by amicus or the parties lies from such order.²⁸

Where the court takes the initiative to invite amicus to examine and brief a matter specified by the court, there is no doubt that such assignment will stand against any possible objection.²⁹

C. How Application is Made

Almost all courts require their permission to file a brief as amicus.³⁰ The application is usually in the form of a motion, with³¹ or without³² notice to the parties, setting forth the basis of economic or other social or political interest on which the applicant acts or his connection with the pending litigation.³³

27. *Id.* at 709, 64 N. Y. S. 2d at 512.

28. The *Claveresk*, 264 Fed. 276, 279 (C. C. A. 2d 1920), where the court said: ". . . it is assigned for error that the court below permitted its friend to speak. Such seeking of advice cannot with propriety be called error; the act is the right of the court. . . . That application was made 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 and useful or otherwise. . . . The question whether the trial judge should or should not have received and considered this suggestion is not reviewable. . . ."

29. See *In re Utilities Power & Light Corp.*, 90 F. 2d 798 (C. C. A. 7th 1937); *Detroit Trust Co. v. Mason*, 309 Mich. 281, 15 N. W. 2d 475 (1944).

30. *E.g.*, *Froehler v. North American Life Ins. Co.*, 374 Ill. 17, 27 N. E. 2d 833 (1940); *Spice Valley School Township v. Rizer*, 1 N. E. 2d 289 (Ind. 1936); *Grand Rapids v. Consumers' Power Co.*, 216 Mich. 409, 185 N. W. 852 (1921); *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 223 N. W. 123 (1929). The Court of Appeals of New York requires application by motion with notice to the parties. For supreme court rules requiring application to the court see note 34 *infra*.

31. *Matter of Guernsey*, 21 Ill. 442 (1859).

32. *Spice Valley School Township v. Rizer*, 1 N. E. 2d 289 (Ind. 1936).

33. Ore. Sup. Ct. Rule 14, 9 ORE. COMP. LAWS ANN. § 331 (1940).

Few state supreme courts have written rules on the subject,³⁴ but a similar practice prevails throughout. While in contested applications the United States Supreme Court requires the proposed brief of amicus to be annexed to the application,³⁵ other courts prohibit the filing of the brief until permission has been granted.³⁶

On the other hand, the extremely liberal Rule 61 of the Supreme Court of Pennsylvania permits any person interested in the question involved in an appeal—though not a party to it—to file a brief, serving the same upon the parties to the appeal without either leave of the court or the consent of the parties. The word “interested” as used in this rule obviously means nothing more than the desire of a prospective amicus to have his say on the question involved in the appeal.³⁷

While the state courts generally follow the liberal practice of admitting amicus on application to the court, the Supreme Court of the United States will in fact not grant permission under its Rule 27³⁸ unless the parties to the action have consented, or unless the application is made by the United States or one of its officers or agencies and sponsored by the United States Attorney General, or by a state or political subdivision thereof.

This rule embodied in the revision of the Supreme Court Rules in 1939 appears to preclude utilization of the channel towards more liberal practice created by the decision in *Northern Securities Co. v. United States*³⁹ which laid down the test that the applicant need only show a particular relationship to, or interest in, the case. While there is a dearth of authorities defining the requisite interest of amicus, it would seem to be primarily his economic or jurisprudential interest as party⁴⁰ or attorney for a client,⁴¹ or a claim or defense in common with the main action, though it should not involve an extreme degree of partisanship in the outcome of the litigation as affecting the decision in his own

34. Colo. Sup. Ct. Rule 16, 211 Pac. VIII (1922); Idaho Sup. Ct. Rule 3, 62 Idaho XVII (1941); Ore. Sup. Ct. Rule 14, .9 ORE. COMP. LAWS ANN. § 331 (1940); Pa. Sup. Ct. Rule 61, construed in *Commonwealth v. Quaker City Cab Co.*, 286 Pa. 224, 133 Atl. 228 (1926).

35. See letter of the Clerk of the United States Supreme Court to E. R. Beckwith, June 15, 1945.

36. *Froehler v. North American Ins. Co.*, 374 Ill. 17, 27 N. E. 2d 833 (1940).

37. *Commonwealth v. Quaker City Cab Co.*, 286 Pa. 224, 133 Atl. 228 (1926). The court speaks of the indirect effect on petitioner “under the rule of stare decisis” as contrasted with direct effect required for intervention. *Id.* at 225, 133 Atl. at 228.

38. 8 F. C. A. 214 (Cum. Supp. 1946).

39. 191 U. S. 555 (1903).

40. See notes 33 and 37 *supra*.

41. “It does not appear that applicant [an attorney] is interested in any other case which will be affected by the decision in this case. . . .” 191 U. S. 555, 556 (1903).

case.⁴² There is some indication that mere general interest in the subject-matter of the case may not always be deemed sufficient even in courts having a liberal practice.⁴³

Attempts to formulate an objective test for admission of amicus not based on his "interest," such as inadequate presentation of the law by the parties,⁴⁴ seem even less satisfactory in dealing with the problem involved. While the Supreme Court in the *Northern Securities* case rejected the advice of an attorney as amicus who was merely an innocent bystander, it recognized and reserved its power to admit amicus in any case when justified by the circumstances. It has not been possible to discover any instances of such exercise of discretion.⁴⁵ Those referred to by the Supreme Court were all examples of truly exceptional circumstances in the long distant past.⁴⁶

Considering the variations in these rules, from the consent requirement of the United States Supreme Court to the most liberal state practice, the Pennsylvania rule clearly would appear to be the most satisfactory from a practical viewpoint.

On the other hand it seems desirable to call attention to the important decision of the Federal District Court for the Western District of Virginia, in *Jewell Ridge Coal Corp. v. Local 6167*,⁴⁷ where the right "to participate in the trial, present arguments and file briefs as an amicus curiae"⁴⁸ was conceded as a substitute for permissive intervention under Federal Rule 24(b).⁴⁹ Although the applicant Southern Coal Producers Association had neither a common defense or claim nor a statutory duty

42. See note 16 *supra*.

43. See note 41 *supra*. For the Court of Appeals of New York see *Hobbs v. Dairy-men's League*, 282 N. Y. 710, 26 N. E. 2d 823 (1940) (American Mutual Alliance of Chicago denied leave to act as amicus in workmen's compensation case for lack of sufficient interest); *People v. Bellows*, 281 N. Y. 67, 22 N. E. 2d 238 (1939).

44. *Froehler v. North American Ins. Co.*, 374 Ill. 17, 27 N. E. 2d 833 (1940).

45. Letters of the Clerk of the United States Supreme Court to E. R. Beckwith, June 7 and June 15, 1945. According to this correspondence immediately after the enactment of Rule 27 (9) in 1939 practice in rejecting applications of non-official amici unaccompanied by consent of the parties was very strict; and few, if any, instances of leniency would appear to have occurred since then. *But cf.* p. 47 *infra* on requests of the Court for briefs and argument by amicus.

46. *The Gray Jacket*, 5 Wall. 370 (U. S. 1867); *Georgia v. Florida*, 17 How. 478 (U. S. 1854); *Greer v. Biddle*, 8 Wheat. 1 (U. S. 1823).

47. 3 F. R. D. 251 (W. D. Va. 1943) (involving portal-to-portal pay in the coal mines).

48. *Id.* at 255. The district court relied in this decision on *Northern Securities Co. v. United States*, 191 U. S. 555 (1903).

49. 8A F. C. A. c. 15, Rule 24. The rule prescribes that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

with regard to the subject matter of the action to permit intervention under Rule 24(b), its general economic interest in the question at issue as the representative of its members justified its participation in the trial as amicus even in the absence of that direct personal or pecuniary interest supposed to be required of intervenors.⁵⁰ Analogy to the right to intervene of one charged with public duty under the *United States Realty* case seemingly provides a sound basis of general policy for the admission of amici, because it permits the court to distinguish between those who are mere interlopers and those who can be expected to perform their important function so adequately that more extensive rights may be allowed to them.

In so far as one may become amicus at the court's request, recent state court cases seem to indicate only three major fields in which the courts exercise this power:⁵¹

- (1) Where some matter involving the jurisdiction of local courts⁵² or an important matter of practice in the state⁵³ is involved. Once appointed the powers of amicus extend to any question involved and are not limited to the one which he is asked to brief.⁵⁴
- (2) In corporate reorganization proceedings coming before the state courts—particularly involving real estate corporations—friends of the court have been appointed to work out a plan of reorganization or adjustment almost in the manner of a master or a referee.⁵⁵
- (3) In many localities, in domestic relations cases and in cases of juvenile delinquency, the courts have called upon members of the bar as individuals or through Legal Aid Bureaus to render assistance in the representation of parties or in the adjustment of personal difficulties.⁵⁶

50. *SEC v. United States Realty & Improvement Co.*, 310 U. S. 434 (1940).

51. *Cf.*, however, the general recognition of the practice in Rule 14 of the Oregon Supreme Court, 9 Oregon Compiled Laws Annotated § 331 (1940), and similar rules in Colorado and Idaho (Colo. Sup. Ct. Rule 16, 211 Pac. VIII (1922); Idaho Sup. Ct. Rule 3, 62 Idaho XVII (1941). A rare example of counsel called upon in open court to act as amicus (see *In re* Opinion of the Justices, 87 N. H. 492, 179 Atl. 357 (1935)) was reported by the lawyer concerned as due solely to his accidental presence in court when the case was reached. Letter of Louis E. Wyman, Esq., to E. R. Beckwith, April 27, 1945.

52. *Whitney v. Randall*, 70 Idaho 49, 70 P. 2d 384 (1937) (lower court vacating own judgment for alleged want of jurisdiction without opposition of the parties).

53. *In re Mumma's Estate*, 2 Pa. Dist. R. 592 (Orphans' Ct. 1893) (Proper clerk's fees in Lancaster County Orphans' Court). *Morrow v. Morrow*, 62 Nev. 492, 156 P. 2d 827 (1945) (propriety of striking answer of divorce defendant because filed by non-resident attorney).

54. *Morrow v. Morrow*, *supra* note 53.

55. *In re Utilities Power & Light Corp.*, 90 F. 2d 798 (C. C. A. 7th 1937); *Detroit Trust Co. v. Mason*, 309 Mich. 281, 15 N. W. 2d 475 (1944).

56. That this practice is fairly widespread throughout the country is clear from an

However, the Supreme Court of the United States has on rather rare occasions requested legal advice from the other coordinate branches of the Government where the pervading importance of the question involved⁵⁷ or its technical aspects seemed to the Court to warrant it.⁵⁸

D. Right to Compensation

As a general rule, amicus being a volunteer is not considered entitled to compensation for his services,⁵⁹ nor can he recover such costs as may be allowed to a party to the action.⁶⁰

This is particularly true in the federal courts which can at all times call on federal law officers, particularly the Department of Justice, to assist them⁶¹ in unearthing fraud or in other functions performed frequently by amicus.

Actually, there are important exceptions to this broad rule. The first arises where amicus was appointed by the court to perform some service for the court and is rather in the position of a master. In such cases he is indeed clearly not a volunteer but an officer of the court which appointed him to perform his work and which should allow him compensation. The leading case is the early Missouri decision of *In re St. Louis Institute*⁶² where an attorney was appointed by the court to examine as amicus the corporate charter of the applicant institution and was held entitled to compensation by analogy with commissioners appointed by the court under a statute authorizing their appointment to hear depositions, and whom the courts were held to possess inherent power to compensate. The principle of this decision was recently recognized in *Detroit Trust Co. v. Mason*,⁶³ and can now be considered established, particularly in the apparent absence of conflicting decisions. In that case, involving a real estate reorganization proceeding in equity, conflicting plans of reorganization were proposed and when a hearing yielded no results an attorney was appointed to determine their feasibility, and to report thereon to the court. On subsequent objection to

inquiry made by E. R. Beckwith in 1946. Examples were found in California, Georgia, Illinois, Minnesota, New York, Pennsylvania and Wisconsin.

57. *Myers v. United States*, 272 U. S. 52 (1926) where the Court requested argument and brief from Senator George W. Pepper of Pennsylvania on the Senate's right to require its consent to removal of executive employees. See PEPPER, PHILADELPHIA LAWYER 361 (1944).

58. *Morris v. McComb*, 16 U. S. L. WEEK 4017 (U. S. Nov. 18, 1947).

59. *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575, 581 (1946).

60. *Colmes v. Fisher*, 151 Misc. 222, 271 N. Y. Supp. 379 (Sup. Ct. 1934).

61. *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575 (1946).

62. 27 Mo. App. 633 (1887).

63. 309 Mich. 281, 15 N. W. 2d 475 (1944).

compensation of the amicus, the court not only reaffirmed its power to appoint him, but also its inherent power to compensate those whose labor it seeks.

The most important development, however, is the recent holding of the Supreme Court in *Universal Oil Products Co. v. Root Refining Co.*^{63a} that amicus may be compensated if the result of his labors falls within the scope of *Sprague v. Ticonic Nat. Bank*,⁶⁴ primarily where he creates a fund for recovery or establishes the right of claimants to recover. However, the *Root* case on its facts did not involve a situation where this principle could be applied. On the contrary, the connection of amicus as attorney with the parties actually interested in reopening the particular decision for fraud, and the fact that amicus had received compensation for his activities in the earlier stages of the case, were held to be "not consonant with that regard of fastidiousness which should govern a court of equity"⁶⁵ in applying equitable principles of compensation; granting compensation, the court found, would only have resulted in repaying the clients of the amicus for the fees formerly paid by them. Regardless of the actual outcome of the *Root* case, it now appears clear that in the federal courts amicus may obtain compensation for services rendered, whether he acts at the request of the court or on his own initiative if special circumstances can be shown, such as that aid cannot be had from the Department of Justice or other law officers or that the facts fall within the principles of the *Sprague* case.

II. POWERS OF AMICUS

At the height of the Middle Ages amicus must have been a familiar figure in the King's Bench, the highest court of law in England. Frequent references are found in the Rolls of Edward III, Henry IV and later.⁶⁶ But amici in medieval and post-medieval England not only spoke (as Lord Coke later said) "*ut amici Curiae*, and to inform the Court of the truth"⁶⁷ on the correct text of an ancient statute or the intent of Parliament in enacting more recent ones,⁶⁸ or to advise on

63a. 328 U. S. 575 (1946).

64. 307 U. S. 161, 167 (1939).

65. 328 U. S. 575, 581 (1946).

66. Y. B. Mich. 5 Edw. IV 8 (1466); Y. B. Mich. 19 Hen. VI 10 (1448); Y. B. Hil. 4 Hen. VI 16 (1433); Y. B. 11 Hen. IV 62 (1410); Y. B. Hil. 26 Edw. III 65 (1353) and numerous others.

67. The Prince's Case, 8 Co. 13b, 29a, 77 Eng. Rep. 496, 516 (1606).

68. Horton and Ruesby, Comb. 33, 90 Eng. Rep. 326 (1687), where "Sir G. Treby (ut amicus Curiae) said he was present at the making of the said statute [the Statute of Frauds], and that was the intention of the Parliament" (writ of execution binding from date of issue, not from date of sale of goods seized).

propositions of law in criminal cases, where English law then denied the right to counsel.⁶⁹ Much more frequently and vigorously did amicus guard the courts in the exercise of their jurisdiction against errors appearing on the face of the record,⁷⁰ pertaining to the accuracy and propriety of pleadings;⁷¹ he also suggested abatement of the proceeding where the defendant had died;⁷² he watched out for fundamental irregularities in proceedings such as faulty writs and inquisitions;⁷³ and perhaps most important of all, he called attention to invalid criminal indictments.⁷⁴ Indeed, one of the earliest traditional roles of amicus occurred in the enforcement of the statute on the proper selection of jurors,⁷⁵ the disregard of which any stranger might urge upon the court in order to quash the indictment.⁷⁶

A. *The Fundamental Conflict*

Whether addressed to the substantive or procedural law, the basic function of amicus as conceived by the English law at the threshold of the modern era was finally summarized by counsel's argument in *Protector v. Geering*,⁷⁷ arguing that "gross and apparent errors" should always be brought to the court's attention even if the apparatus of party action which is theoretically adequate has been stalled as it frequently is. Thus this essay becomes an inquiry into the powers which amicus ought to command as a means to assist in arriving at right judgment. There are two quite separate battle grounds. One relates to procedure, the other to substantive power. It will be necessary to examine them piece-meal.

It might appear from what has been said above, and it is repeatedly found in statements defining the status of amicus, that under modern American practice in the majority of the courts any person may offer to act as amicus in any cause and may take therein any position he may choose on any point and may advocate any decision which he thinks

69. *Tilburne's Case*, 4 State Tr. 1270 (1649); *Ratcliffe's Case*, 18 State Tr. 429 (1746); see *Faulkner v. Rex* [1905] 2 K. B. 76.

70. *Smith v. Harman*, 6 Mod. 142, 87 Eng. Rep. 901 (K. B. 1705).

71. Y. B. 5 Edw. IV 124 (1466), *Brev. des Ptees*, pl. 23.

72. *Falmouth v. Strode*, 11 Mod. 137, 88 Eng. Rep. 949 (K. B. 1708).

73. *Protector v. Geering*, Hardres 85, 145 Eng. Rep. 394 (1656); Y. B. 7 Edw. IV 124 (1468).

74. *Rex v. Vaux*, Comb. 13, 90 Eng. Rep. 314 (1687).

75. STAT. 11 Hen. IV, c. 9 (1410).

76. 1 BOUVIER'S LAW DICT. 188 (Rawle's 3d rev. 1914); cf. *United States v. Gale*, 109 U. S. 65 (1883). See note 8 *supra*.

77. Hardres 85, 145 Eng. Rep. 394 (1656).

the court should render.⁷⁸ At least as to questions of law he would appear to have a completely free hand.⁷⁹

But in fact no such condition prevails, and at this point one enters upon the first arena of contest between the parties to litigation and the amicus admitted as adviser of the court, requiring in the end a choice whether control of a lawsuit by the parties is more important than any contribution which an outsider might make to a correct decision of the points involved.⁸⁰ The former choice is generally made by the courts, confining amicus strictly to the form and framework of the case as selected by the parties.⁸¹ The reason for this choice may be the practical one that there should be an early end of litigation and that almost any compromise is a good one; or it may be a product of the deep suspicion of courts and judges which prevailed in the American Colonies, or it may be derived from the nineteenth century tradition of the freedom of enterprise as applied to the lawsuits and the methods of lawyers.

This attitude finds its expression in the formula that amicus not being a party cannot have the rights of a party to control or manage in any way the action in which he participates.⁸² But rarely if ever have the

78. Amicus is "one who gives information to the court on some matter of law in respect of which the court is doubtful." *The Claveresk*, 264 Fed. 276, 279 (C. C. A. 2d 1920). The scope of his advice is also defined as including "matters of judicial cognizance or notice." *United States v. Jabara & Bros.*, 19 Ct. C. P. App. 76 (1931). Perhaps the most frequently quoted definition is found in *In re Perry*, 83 Ind. App. 456, 462, 148 N. E. 163, 165 (1925):

"... amicus curiae is one who, as a stander-by, when a judge is in doubt or mistaken in a matter of law, may inform the court. He is heard only by leave, and for the assistance of the court, upon a case then before it . . . [the practice is] to allow an attorney, or other person, to appear as a friend of the court in a case, to act as an adviser of the court, and to make suggestions as to matters appearing upon the record, or in matters of practice."

79. *City of Winter Haven v. Gillespie*, 84 F. 2d 285 (C. C. A. 5th 1936), *cert. denied sub nom. Hartridge-Cannon Co. v. Gillespie*, 299 U. S. 606 (1936); *Denver v. Denver Tramway Corp.*, 23 F. 2d 287 (C. C. A. 8th 1927), *cert. denied*, 278 U. S. 616 (1928); *Klein v. Liss*, 43 A. 2d 757 (Munic. Ct. App. D. C. 1945); *Dodd v. Reese*, 216 Ind. 449, 24 N. E. 2d 995 (1940). *But cf.* the limiting doctrine of *State v. Albuquerque*, 31 N. M. 576, 249 Pac. 242 (1926), and similar cases, discussed on p. 54 *infra*.

80. *Cf. People v. Coleman*, 53 Cal. App. 18, 127 P. 2d 309, 318 (1942), where in a capital criminal case new objections to the instructions to the jury brought forth by amicus are considered "in the interest of justice."

81. See p. 52 *infra*.

82. *Parker v. State ex rel. Powell*, 133 Ind. 178, 32 N. E. 836 (1892); *Taft v. Northern Transp. Co.*, 56 N. H. 414 (1876); *Kemp v. Rubin*, 187 Misc. 707, 709, 64 N. Y. S. 2d 510, 512 (Sup. Ct. 1946); *Dawe v. Silberman*, 185 Misc. 335, 336, 56 N. Y. S. 2d 902, 903 (Munic. Ct. 1944).

courts stated the corollary to this proposition, that the powers and privileges of amicus who is not a party to the action should logically be developed in terms of his function as an adviser to the court.⁸³ In some cases the courts have allowed amicus a broad scope. They will be examined below⁸⁴ as possible precedents for the view advocated here that his powers should be enlarged, so that he may be in a position truly to "advise" in the general interest of justice.

B. *The Theory of Limited Powers*

The view that the parties should control their litigation, rather than that amicus should intervene to prevent indirect injustice to others or in any way at all to contribute to a correct decision, usually finds expression in the rule that amicus may not have party status in the litigation. This has several logical results. Amicus cannot be made a party by service of papers upon him.⁸⁵ Amicus who intervenes to suggest lack of jurisdiction of the court on behalf of a party is properly deemed not to have appeared for the party so as to have submitted him to the jurisdiction.⁸⁶ Nor does the judgment in the case where amicus has presented his views on the law bind him if adverse, so that he is not prevented from relitigating the issue;⁸⁷ and if amicus has appeared in the trial court, he may again appear as such in the appellate tribunal.⁸⁸

But amicus has been denied the right to demand service of papers,⁸⁹ a decision quite difficult to justify because one permitted to advise the court should have every facility for knowing the facts and pleadings, the more particularly if in a particular case amicus takes a position on the law different from those advanced by both parties.

83. Cf. *Jewell Ridge Coal Co. v. Local 6167*, 3 F. R. D. 251 (W. D. Va. 1943).

84. See p. 54 *infra*.

85. *Pueblo De Taos v. Archuleta*, 64 F. 2d 807 (C. C. A. 10th 1933); *Spinnler v. Armstrong*, 63 S. W. 2d 1071 (Tex. Civ. App. 1933).

86. *Flinn v. Krotz*, 293 S. W. 625 (Tex. Civ. App. 1927); *Jones v. City of Jefferson*, 66 Tex. 576, 1 S. W. 903 (1886). *But cf.* *Walker County Lumber Co. v. Edmonds*, 298 S. W. 610 (Tex. Civ. App. 1927), holding that attorney for deceased defendant cannot appear as amicus to urge dismissal of suit on behalf of defendant's widow so as to permit her not to appear. On similar facts the same ruling was made in *Olcott v. Reese*, 291 S. W. 261 (Tex. Civ. App. 1927). Successful use of this local Texas practice by Texas attorney appearing as amicus in New York court is found in *Karutz v. Karutz*, No. 8615, Sup. Ct. Queens County, N. Y., 1947 (amicus directing attention of official referee to overlooked New York case showing lack of jurisdiction with regard to non-resident infant's custody).

87. *Garland Co. v. Filmer*, 1 F. Supp. 8 (N. D. Cal. 1932); *Blanchard v. Boston & M. R. R.*, 86 N. H. 263, 167 Atl. 158 (1933); *Baird v. City of Williston*, 58 N. D. 478, 226 N. W. 608 (1929).

88. See *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638 (1947), *cert. granted*, 331 U. S. 804 (1947).

89. *Kemp v. Rubin*, 187 Misc. 707, 64 N. Y. S. 2d 510 (Sup. Ct. 1946).

It has been held that amicus not being a party may not file a pleading,⁹⁰ make a procedural motion,⁹¹ offer evidence of his own,⁹² examine or cross-examine witnesses,⁹³ assign error,⁹⁴ appeal⁹⁵ or apply for rehearing.⁹⁶ Some of these rules fall clearly enough within the principle that amicus ought not to manage the suit; but some of them, such as restrict the introduction of evidence or deny the right to assign error on appeal, are of much more dubious justification. Even within the limited field allowed him under these rules he is usually allowed to address the court only by brief and not in oral argument.⁹⁷ This goes directly counter to the age-old habit of the legal profession to regard the oral address as the highest form of presentation. Finally the courts are almost unanimous in holding that amicus cannot raise any issue not raised by the parties,⁹⁸ in spite of the converse principle that amicus

90. *Baker v. Baker*, 59 Nev. 163, 87 P. 2d 800 (1939).

91. *In re Pina*, 112 Cal. 14, 44 Pac. 332 (1896) (motion to reduce the record); *Taft v. Northern Transp. Co.*, 56 N. H. 414 (1876) (motion in opposition to discontinuance); *Matter of Bar Ass'n of Erie County*, 182 Misc. 529, 47 N. Y. S. 2d 213 (County Ct. 1944) (motion to expunge grand jury minutes); *Ikard v. City of Henrietta*, 33 S. W. 2d 578 (Tex. Civ. App. 1930) (motion to strike statement of fact filed by a party); *Kempf v. Kempf*, 128 Wash. 228, 222 Pac. 485 (1924) (motion for final decree).

92. See *Florida v. Georgia*, 17 How. 478 (U. S. 1854); *Dinet v. Orleans Dredging Co.*, 149 So. 126 (La. App. 1933).

93. *Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry.*, 45 F. 2d 715, *cert. denied*, 283 U. S. 837 (C. C. A. 10th 1930); see *Dawe v. Silberman*, 185 Misc. 335, 336, 56 N. Y. S. 2d 902, 903 (Munic. Ct. 1944).

94. *Phoenix v. Drinkwater*, 46 Ariz. 470, 52 P. 2d 1175 (1935); *cf. In re Kootz' Will*, 228 Wis. 306, 280 N. W. 672 (1938).

95. *Denver v. Denver Tramway Corp.*, 23 F. 2d 287 (C. C. A. 8th 1927), *cert. denied*, 278 U. S. 616 (1928); *Douglas v. Trust Co. of Georgia*, 147 Ga. 724, 95 S. E. 219 (1918).

96. *New Orleans v. Liberty Shop*, 157 La. 26, 101 So. 798 (1924).

97. *Grand Rapids v. Consumers' Power Co.*, 216 Mich. 409, 185 N. W. 852 (1921); *Ore. Sup. Ct. Rule 14*, 9 ORE. COMP. LAWS ANN. § 331 (1940). *Contra: The Employers' Liability Cases*, 207 U. S. 463 (1908); *Jewell Ridge Coal Corp. v. Local 6167*, 3 F. R. D. 251 (W. D. Va. 1943); *Reed v. Blakley*, 115 Colo. 559, 176 P. 2d 681 (1947), and numerous other instances. Even where freely granted, participation of amicus in oral argument is clearly discretionary with the court. *Commonwealth v. Quaker City Cab Co.*, 286 Pa. 224, 138 Atl. 228 (1926). Private amici, differently from governmental representatives, are rarely allowed to argue. See letter of the Clerk of the United States Supreme Court to E. R. Beckwith, May 20, 1947. For one of the rare current examples see *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638 (1947), *cert. granted*, 331 U. S. 804 (1947) (Protestant Council of the City of New York permitted to argue orally. N. Y. Times, Dec. 8, 1947, p. 31, col. 5).

98. *Corning v. Patton*, 236 Ala. 354, 182 So. 39 (1938); *Eggert v. Pacific States Savings & Loan Co.*, 136 P. 2d 822 (Cal. App. 1943); *Givens v. Gollstein*, 52 A. 2d 725 (Munic. Ct. App. D. C. 1947); *Samuel Herzig Corp. v. Gibbs*, 295 Mass. 229, 3 N. E. 2d 831 (1936); *Union Steam Pump Sales Co. v. Deland*, 216 Mich. 261, 185 N. W. 353 (1921); *Matter of Roff*, 226 Mo. App. 1203, 50 S. W. 2d 156 (1932); *Davis v. McCasland*, 182 Okla. 49, 75 P. 2d 1118 (1938).

may raise any matter which the court may interject *ex mero motu*.⁹⁹ This negative principle is applied with special strictness to constitutional objections raised by amicus but not by the parties.¹⁰⁰ Some courts have even limited amicus at appellate level, regardless of the issues and the record, to the matters set forth in the party's brief and the specific legal reasons urged therein.¹⁰¹

The most extreme departure along this line is found in a Missouri case¹⁰² where the court held that a showing that election laws had been violated could not be made by amicus where the party who would benefit had failed to suggest the point, and therefore even if true it need not be denied by the other party.

The above rules are generally rationalized on the basis that amicus is not a party to the litigation and must take the case as he finds it.¹⁰³ But at least one court has managed to formulate a more sophisticated approach to the problem, basing the result on procedural grounds of waiver. Defendants there initially made the point of law that due to the effect of a constitutional amendment allegedly causing the implied repeal of an earlier statute public bathing rights in Lake Ponchartrain had been lost, making all bathers on its shores trespassers. Later defendants waived this point but amicus continued to stress it in the brief. The court held that it need not pass on the question of statutory construction, because defendants had waived it and therefore amicus—conceived as standing in the shoes of the party whose contentions he happens to support—was likewise foreclosed from making the point even though it might have been decisive of the question.¹⁰⁴

99. For the scope of this rule see p. 55 *infra*. It would seem, however, that since a court can always draw the attention of the parties to aspects of law overlooked by them, the two rules conflict head-on and that amicus should be entitled to raise points of law freely.

100. *Higbee v. Housing Authority of Jacksonville*, 143 Fla. 560, 197 So. 479 (1940); *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 S. W. 2d 65 (1939); *State v. Albuquerque*, 31 N. M. 576, 249 Pac. 242 (1926); *Davis v. McCasland*, 182 Okla. 49, 75 P. 2d 1118 (1938); *In re Kootz' Will*, 228 Wis. 306, 280 N. W. 672 (1938).

101. *Cook v. Harry Dobson Sheet Metal Works*, 157 Kan. 576, 142 P. 2d 709, 710 (1943): "Without more, we hold that amici curiae may not urge in this court as a ground for reversal, a matter not presented in the brief of the appellant." *Accord*, *Indiana State Board v. Suelean*, 219 Ind. 321, 37 N. E. 2d 935 (1941) (as to grounds of unconstitutionality of a statute); *State v. Martin*, 210 Iowa 376, 228 N. W. 1 (1929) (same).

102. *State ex rel. Bates v. Remmers*, 325 Mo. 1175, 30 S. W. 2d 609 (1930).

103. *Union Steam Pump Sales Co. v. Deland*, 216 Mich. 261, 185 N. W. 353 (1921); *State ex rel. News Corp. v. Smith*, 353 Mo. 845, 184 S. W. 2d 598 (1945); *Kemp v. Rubin*, 187 Misc. 707, 64 N. Y. S. 2d 510 (Sup. Ct. 1946).

104. *Dinet v. Orleans Dredging Co.*, 149 So. 126 (La. App. 1933); *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 S. W. 2d 65 (1939). Constitutional objection of amicus

Where amicus attempts to question the constitutionality of a statute not contested by the parties, additional reasons have been advanced to foreclose him. Thus in the absence of an assignment of error a court has refused to consider constitutional questions raised by amicus upon "mere suggestions" in his brief,¹⁰⁵ or has blandly denied amicus a constitutional *locus standi* of his own because he is not a party adversely affected by the statute¹⁰⁶ or lacks sufficient personal interest to raise it.¹⁰⁷

In this troubled context it is not greatly surprising that the formula limiting the powers of amicus is generally accepted, and that exceptions tending toward a more effective scope of activity have not been more commonly followed. These restrictive decisions seem to be susceptible to the generalization that the economy of the process and the autonomy of the parties make it preferable to limit control of the action rather than to allow greater latitude to an intervenor who may contribute to correct decision but may also delay or complicate the progress of the litigation.

This amounts to saying that here, as in so many other phases of judicial operation, there is a tug-of-war between the immediate efficiency of the process and the wider public interest. Efficiency may seem to require that the parties should be few and the issues limited, or that the machinery of judicial administration should not be manipulated by one who will not be bound by the result; but conversely the ends of right judgment should not be defeated by the neglect of obvious errors, by the self-interest of the parties, the incompetence of their attorneys or the judge, nor by collusion or fraud perpetrated anywhere along the line.

The foregoing serves to illustrate the views of those courts which are not hospitable to the advice of amicus and which, whether consciously for that reason or in strict pursuance of the logical syllogism relating to the parties' rights, have tended to restrict the manner and extent of the assistance they will entertain. There are, however, other jurisdictions which view the subject differently.

C. *Existing Avenues towards Broader Power*

As stated in the preceding section, the rule limiting amicus to the issues, and in some jurisdictions even to the arguments, raised by the

in appellate court held inadmissible, since party had waived it by failure to make timely objection in trial court.

105. *In re Kootz' Will*, 228 Wis. 306, 280 N. W. 672 (1938), as if substantiality of form of objection were of the essence.

106. *Higbee v. Housing Authority of Jacksonville*, 143 Fla. 560, 197 So. 479 (1940); *State v. Albuquerque*, 31 N. M. 576, 249 Pac. 242 (1926).

107. *Davis v. McCasland*, 182 Okla. 49, 75 P. 2d 1118 (1938).

parties meets with another rule that amicus may address to the court suggestions on any point on which the court may act on its own motion.¹⁰⁸

Postponing for the moment an examination of the scope of this affirmative rule, it should be noted that at least one court, though paying lip-service to the rule restricting the range of amicus' action, has none the less found an overriding public interest in the case at bar to justify consideration of additional points raised by amicus.¹⁰⁹ The public interest so found, in one case involving the disbursement of public funds and in another the life and liberty of a man accused of rape, might well have been found earlier in the election case of *State ex rel. Bates v. Remmers*¹¹⁰ by the same Missouri court, and certainly so then because one of the parties had a *locus standi* to raise constitutional questions as a matter of general law.¹¹¹

Regardless of any question of public interest which may induce a court to hear arguments of amicus to which its ears would otherwise be closed, the courts have in fact often permitted amicus to raise any question which the court¹¹² may raise on its own motion. It does not appear that the generic subject of what a court may do or inquire into in this manner has been given systematic treatment, and none is attempted here. The rule is generally stated to apply to defects in the proceedings of which the court must take notice at any stage and to involve such matters as lack of statutory jurisdiction in the lower court,¹¹³ inadvertent entry of judgment,¹¹⁴ or that the case is moot¹¹⁵ or conclusive¹¹⁶ or that facts on which jurisdiction must be based are

108. *Moring v. Lisenby*, 241 Ala. 626, 4 So. 2d 4 (1941); *Stewart v. Herten*, 125 Neb. 210, 249 N. W. 552 (1933); *State v. Jefferson Iron Co.*, 60 Tex. 312 (1883).

109. *People v. Coleman*, 53 Cal. App. 18, 127 P. 2d 309 (1942); *State ex rel. News Corp. v. Smith*, 353 Mo. 845, 184 S. W. 2d 598 (1945).

110. See note 102 *supra*.

111. As to this problem see *Ashwander v. TVA*, 297 U. S. 288 (1936).

112. *But cf. United States v. Brokaw*, 60 F. Supp. 100 (S. D. Ill. 1945) (amicus cannot move to vacate *nolle prosequi* because prosecution of cases is under control of the United States Attorney and not of the court).

113. *Stewart v. Herten*, 125 Neb. 210, 249 N. W. 552 (1933).

114. *Revell v. Dishong*, 129 Fla. 9, 175 So. 905 (1937) (mandamus proceedings).

115. *Morrow v. Morrow*, 62 Nev. 492, 156 P. 2d 827, 829 (1945). If the fact that the case is moot comes to the attention of the court "it is as much the duty of the court to dismiss it in this case as in the other." See also *Lemp v. Lemp*, 62 Nev. 91, 141 P. 2d 212 (1943).

116. *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64 (1891); *Judson v. Flushing Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126 (C. P. 1895); *Muskogee G. & E. Co. v. Haskell*, 38 Okla. 358, 132 Pac. 1098 (1913); *Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573 (1898). In that regard the courts even speak of a *duty* of members of the bar to bring the facts before them as amici. *Ward v. Alsup*, *supra* at 574.

absent.¹¹⁷ Amicus may also suggest the quashing of an unauthorized attachment, the setting aside of a summons served on an improper person because the court had not acquired jurisdiction over the party,¹¹⁸ and he may act where the court has lost jurisdiction once acquired as by abatement of the action.¹¹⁹ Other matters have also been held within the plenary powers of the courts, *e.g.*, the status of personal representatives.¹²⁰ In all these cases amicus may act by motion¹²¹ and in a proper case a reference will be ordered to ascertain the facts.¹²²

It has been held that amicus may submit evidence in affidavit form to present the necessary facts to support his suggestion or motion.¹²³ Even when amicus has made a simple suggestion as adviser to the court on a matter where action *ex mero motu* is not involved in the technical sense and notwithstanding any contrary rule, some courts have allowed him to submit evidence of his own,¹²⁴ either documentary¹²⁵ or by affidavit¹²⁶ or by examination of witnesses introduced by the parties;¹²⁷ and it would be equally logical that in proper cases amicus should be granted the right to introduce his own witnesses. Generally speaking, the existence of a sufficient public interest such as protection of the general public against rent-gouging would seem to justify departure from the commonly accepted rule.

117. *Moring v. Lisenby*, 241 Ala. 626, 4 So. 2d 4 (1941).

118. *Boyd v. Lemmerman*, 11 N. J. Misc. 701, 168 Atl. 47 (1933) (improper service on non-resident motorist); *Spinnler v. Armstrong*, 63 S. W. 2d 1071 (Tex. Civ. App. 1933).

119. *Boyd v. Lemmerman*, *supra* note 118; *Falmouth v. Strode*, 11 Mod. 137, 88 Eng. Rep. 949 (K. B. 1708); *cf.* *King v. Bruckenridge*, 2 Show. K. B. 297, 89 Eng. Rep. 950 (1685).

120. *Moring v. Lisenby*, 241 Ala. 626, 4 So. 2d 4 (1941) (removal of personal representative). See also *In re Perry*, 83 Ind. App. 456, 148 N. E. 163 (1925). *Contra*: *Sullivan v. Dunne*, 198 Cal. 183, 244 Pac. 343 (1926) (appointment of personal representative).

121. *Helmbright v. John A. Gebelein, Inc.*, 19 F. Supp. 621 (D. C. Md. 1937) (motion by United States Attorney as amicus to dismiss); *Moring v. Lisenby*, 241 Ala. 626, 4 So. 2d 4 (1941); *Waits v. Black Bayou Drainage Dist.*, 185 So. 577 (Miss. 1939) (on appeal by attorney general as amicus); *Morrow v. Morrow*, 62 Nev. 492, 156 P. 2d 827 (1945).

122. *Judson v. Flushing Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126 (C. P. 1895).

123. *Revell v. Dishong*, 129 Fla. 9, 175 So. 905 (1937). If the matter goes to reference, presumably evidence could be presented in other forms too. *Cf.* *Judson v. Flushing Jockey Club*, *supra* note 122.

124. *Parker v. State ex rel. Powell*, 133 Ind. 178, 32 N. E. 836 (1892); *Morrow v. Morrow*, 62 Nev. 492, 156 P. 2d 827 (1945); *Bass v. Fountleroy*, 11 Tex. 698 (1854); see note 123 *supra*, and notes 125-27 *infra*.

125. See *Florida v. Georgia*, 17 How. 478 (U. S. 1854) (maps in boundary dispute).

126. *Robinson v. Lee*, 122 Fed. 1010 (C. C. S. C. 1903).

127. *Dawe v. Silberman*, 185 Misc. 335, 56 N. Y. S. 2d 902 (Munic. Ct. 1944); *Ladue v. Goodhead*, 181 Misc. 807, 44 N. Y. S. 2d 783 (County Ct. 1943).

Finally, the courts have recognized the power of amicus to advise on matters of judicial notice¹²⁸ and the technique of the so-called "Brandeis brief" would therefore seem available to bring before a court the political, economic and social data which would permit it to rest its decision on a sound factual formulation. It would be reasonable to suppose that a court would be willing to receive such a brief based on facts of which it might take judicial notice or adducing material necessary or useful to a decision of broad constitutional issues or of questions of statutory construction. The parties are sometimes not able to present such data. But the courts have tended to avoid this problem by finding that the facts when presented by amicus are outside the scope of judicial notice.¹²⁹

In a recent decision the court sidestepped the issue by ostensibly limiting itself to the facts appearing in the record. It said:

"The several amicus curiae briefs indulge in considerable amplification and elaboration upon appellants' arguments on public policy and the constitutional questions involved in this appeal. In addition, these briefs contain valuable material with respect to the related social and economic problems. We are impressed with the fact that the Negro population of Detroit has increased from 40,438 in 1930 to approximately 210,000 in 1944 and that it then was approximately 12 per cent of the population of the city.

"The arguments based on the factual statement pertaining to questions of public health, safety and delinquency are strong and convincing. However, we must confine our decision to the matters within the record submitted to us and the questions raised in the briefs of the parties to the cause."¹³⁰

It thus appears that the technical instruments in the form of precedents and procedural rationalization are at hand to give amicus any amount of influence that a court really wishes him to have, and that a restatement of the rules in terms of powers commensurate with his proper position is possible. The remainder of this essay will be devoted first to a search for the principles justifying such enlarged powers, and secondly to a brief restatement of what these powers should be in the various types of situations to which they may be applied.

128. *United States v. Jabara & Bros.*, 19 Ct. C. P. App. 76 (1931), *cert. denied*, 284 U. S. 623 (1931).

129. *State ex rel. Froedtert Grain & Malting Co. v. Tax Commission*, 221 Wis. 225, 265 N. W. 672 (1936) (amicus brief with statistical data on incidence of dividend income tax).

130. *Sipes v. McGhee*, 316 Mich. 614, 627, 25 N. W. 2d 638, 644 (1947), *cert. granted*, 331 U. S. 804 (1947).

III. THE ARGUMENT FOR ENLARGED POWERS

If it were correctly said that the outcome of litigation is only a matter of private convenience or interest, affecting none other than the parties, then obviously no general philosophical or metaphysical principles are relevant. The parties may select the issues, present such facts as they deem advantageous and may even keep back those which they deem deleterious to their respective causes. They are then free to present such points of law as suit their claims, to make such arguments, however specious, as may weaken their opponent's case; and it is nobody's business whether the decision arrived at creates harm to other actual or prospective litigants, overthrows a settled course of action theretofore relied on, or leads to inequitable rules of law, because this lawsuit is to be carried on as a duel in which the public may be hurt but may not defend or protect itself.

Contrariwise, however, it has been recognized since earliest times that under the common law system wherein precedents exercise a potent influence upon the creation of law, it is a matter of grave public interest that each rivulet of judgment flowing into the general stream of juridical history shall be as pure and precisely right as it can be made by skillful and disinterested effort. Judge-made law should therefore be rationally made in honest lawsuits and not in collusive actions, and the courts' integrity should be preserved by preventing any imposition upon it,¹³¹ by having the attention of the judge drawn to obvious errors¹³² and by presenting any weighty aspect of fact and law which one or both of the parties out of ineptitude or self-interest may have failed to argue.¹³³

131. *United States v. Johnson*, 319 U. S. 302 (1943). Even though the Government was notified to defend constitutionality of rent control under the Emergency Price Control Act of 1942 (56 STAT. 23 (1942), as amended, 60 STAT. 664, 50 U. S. C. App. § 901 (Supp. 1946)) pursuant to title 28, § 401 of the United States Code (see note 23 *supra*), the Government obtained dismissal of the suit "as collusive because . . . not in any real sense adversary . . . [*i.e.*, lacking the] 'honest and antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one . . . held to be indispensable to the adjudication of constitutional questions . . ." by the courts. *Id.* at 305.

132. See *Protector v. Geering*, Hardres 85, 86, 145 Eng. Rep. 394 (1656); *Falmouth v. Strode*, 11 Mod. 137, 88 Eng. Rep. 949 (K. B. 1708). For a different solution of the same problem under the entirely different canon law system of the Roman Catholic Church compare the function of the *Advocatus Diaboli* in certain proceedings, thus described in 1 Catholic Encyclopedia 168 (1907): "His duty is to protest against the omission of the forms laid down, and to insist upon the consideration of any objection."

133. *The Claveresk*, 264 Fed. 276, 279 (C. C. A. 2d 1920): ". . . it is for the public interest that the men who happen to be judges shall be well informed in matters of public concern, and the law is always such a matter. That . . . is of no personal concern to the parties. . . ."

The real controversy arises between the economy of judicial administration and the ideal of right judgment.

That the courts have recognized this underlying motivation, even when pronouncing rules designed to limit the powers of amicus, is apparent.¹³⁴ That amicus is not a party to the action and that his powers and disabilities should not be judged by the rights accorded to a party, can be considered as axiomatic. But as a correlative those powers should be commensurate with the advisory functions which he is called upon to perform, and should enable him properly to render in the administration of justice the services implied in his position. The fact is that a court may raise issues of its own, it may emphasize issues not considered by the parties on the facts presented, or it may support its decision by reasons which the parties failed to bring forth. One whom the court has authorized to give his advice and to aid in the finding of a correct solution of a case should have no less scope in advising the court than the entire field which the decision may encompass.

The elements involved in this broad problem seem not to have been previously reduced to practicable form. The following considerations are here suggested as indicating the criteria which should be operative in formulating rules to govern the rights, powers, duties and privileges of amicus:

- (1) Whether amicus should have different powers in respect of
 - (a) procedure, as regards the conduct of the case, and
 - (b) substance, as a matter of ultimate justice;
- (2) Whether amicus should have powers of different scope in respect of his reason for participation in the case
 - (a) disinterestedly *pro bono publico*, or
 - (b) privately as or for one having a similar interest.¹³⁵

Without much difficulty a rule can be devised defining a broad power of amicus to intervene in all matters of substance raised by any possible view of the law of the case and to adduce all the facts of which the court should take notice. In regard to other questions of

134. See note 133 *supra*. The need for reconciliation of this conflict may justify the action of some courts in rejecting from consideration points raised by amici, who refuse to become parties by intervention or refuse as amici to put their cards on the table at the trial. *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308, 5 P. 2d 585 (1931). This may be a more doubtful solution where the Government itself is concerned. *Compare R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570 (W. D. Ky. 1935), *with United States v. Johnson*, 319 U. S. 302 (1943).

135. *United States v. Northern Securities Co.*, 191 U. S. 555 (1903). See also *Jewell Ridge Coal Co. v. Local 6167*, 3 F. R. D. 251 (W. D. Va. 1943).

evidence the present practice if liberally interpreted will also furnish a satisfactory basis for a reformulation of the rule. On the other hand further investigation seems necessary before suitable rules could be established to govern amicus' right to do such things as (1) to attempt to correct or supplement the pleadings; (2) to participate in opening and closing the case and in incidental arguments; (3) to move to dismiss or for new trial or for rehearing on other than jurisdictional grounds; (4) to appeal and determine the contents of the record on appeal as an independent or collateral right.

Finally whether left to the court's discretion in each case or formulated as a fixed rule of court it may be possible to lay down a norm to govern situations when amicus should be admitted in the public or private interest and just what rights he should exercise in each case. New forms of participation in proceedings developed in reorganizations under Section 206 of the Bankruptcy Act¹³⁶ or before the Securities and Exchange Commission¹³⁷ and pursuant to Federal Rule 24(b) on permissive intervention¹³⁸ may provide some guideposts.

A representative committee of the bar undertaking to intervene in a matter of public law is probably amicus *par excellence*.¹³⁹ It cannot be

136. 52 STAT. 894 (1938), 11 U. S. C. § 606 (1940). This section gives to any creditor or stockholder of the debtor the right to be heard on all matters arising in a Chapter X proceeding, even though not a party. *In re* 211 East Delaware Place Bldg. Corp., 15 F. Supp. 947 (N. D. Ill. 1936). Nor may the court exercise any discretion under § 206. *In re* Philadelphia & Reading Coal & Iron Co., 105 F. 2d 358 (C. C. A. 3d 1939).

137. SEC Rules of Practice, 17 CODE FED. REGS. § 201.17 (Cum. Supp. 1944), providing for leave to be heard which "may include leave to call and examine witnesses, to offer documentary evidence, to cross-examine witnesses, to file briefs, to submit proposed findings and conclusions and to make oral argument." Rule XVII (c). One to whom such leave is granted is nevertheless not a party. Rule XVII (c) and (d).

138. P. 45 *supra*.

139. The bar associations, as presently constituted, whether voluntary or integrated organizations, show relatively little interest of this kind. Much of their activity is confined to acting as a party proponent in disciplinary or unlawful practice cases. For an occasional activity as amicus in the related field of admission to the bar see *In re* Todd, 208 Ind. 168, 193 N. E. 865 (1935), where the Indiana Supreme Court upheld the passing of bar examinations as a condition for admission to practice. See also *Kuhn v. Curran*, 294 N. Y. 207, 61 N. E. 2d 513 (1945) (constitutionality of statute creating tenth judicial district, Lawyers Association of Suffolk County as amicus against Suffolk County Bar Ass'n as amicus in support of statute); *Cowen v. Reavy*, 283 N. Y. 232, 28 N. E. 2d 390 (1940) (New York County Lawyers Association, New York State Bar Association and National Lawyers Guild as amici in case involving qualifications for lawyers in civil service examination). However, in recent years both the American and New York State Bar Associations and the Association of the Bar of the City of New York have had civil rights committees which acted as amici in civil liberties cases affecting the rights of members of the sect of Jehovah's Witnesses. *Gobitis v. Minersville School Dist.*, 310 U. S. 586

doubted that such an adviser to the court should be able to rely on the broadest powers in every point of substance and be invested with the right to do so. With this in mind, as the norm of the true amicus whose duty and high privilege it is to advise and assist in giving right judgment, it would seem possible to find the necessary gradations in cases of private concern.

IV. DESIRABLE RULES

Public interest, economic interest in the question at issue or in a like case, inadequacy of presentation,¹⁴⁰ these provide illuminating formulas for a standard to guide the court's discretion in granting or denying leave to amicus in any case. But the rule requiring consent of the parties needs to be qualified. It is doubtless well enough to require consent in any merely private litigation, or perhaps in any case on appeal where the law is well settled and the evidence in the record supports the decision below. But surely in any case which patently affects the public interest a party should not have the power to exclude amicus who can show that he is qualified to intervene in behalf of that interest.

It is clearly desirable to affirm the principle that the parties should "control their litigation" and that no outsider should be heard to say that he would conduct it in some other way—unless it is made to appear that the actual state of the case will lead to miscarriage of justice which will be prejudicial to persons other than the parties.

From this it follows that on mere procedural matters not affecting either the scope of the action or the jurisdiction of the court or the reasoning of a decision on general principle, amicus should have no voice at all. But when procedure has reached its end and the ideals of impersonal justice may be at stake, there is a broad basis for saying that the disinterested non-party may effectively intervene in behalf of those ideals.

It also follows that, within the limits suggested, amicus should be allowed to introduce evidence, to cross-examine, to raise all possible issues and on any grounds or reasons, to argue orally and, when an appeal or other step for review is taken by any party, to assign his own

(1940); *People v. Strong*, 294 N. Y. 930, 63 N. E. 2d 119 (1945); *People v. Barber*, 289 N. Y. 378, 46 N. E. 2d 329 (1943). The National Lawyers Guild has also frequently acted as amicus in civil liberties cases. *In re Chirillo*, 283 N. Y. 417, 28 N. E. 2d 895 (1940). For other examples of bar associations acting as amici see *In re Constitutional Convention*, 55 R. I. 56, 178 Atl. 433 (1935) (submitting arguments pro and con as to right of general assembly to call such convention); *Flournoy v. Wiener*, 321 U. S. 253 (1944) (Louisiana and Washington State Bar Associations as amici in defense of tax privileges of community property states).

140. See notes 40-44 *supra*.

errors. It does not follow that in any ordinary case he should be permitted to appeal when no party desires to do so.

So much applies to any amicus whom the court may consent to hear. The question remains whether there ought not to be a different measure of competence between one amicus and another. Assuming, as it is here proposed, that such distinctions exist, there should be a rule requiring every amicus to set forth (perhaps in his verified petition for leave to intervene) the facts defining just what his interest is. Typically, he may be (a) an outsider having an economic or other personal interest in arguing for a particular decision; or (b) one who because of a broader political, economic, social, intellectual or professional viewpoint desires to bring his influence or prestige to the support of one or the other party; or (c) a still more truly disinterested advocate of the public interest.

It is believed that if amicus were required to classify himself according to such standards, the court would know at the outset the motivation and the special expertness of the intervenor, and in the exercise of its discretion it could limit him to his brief or, on points of difficulty within his recognized competence, it could call for his special assistance in additional oral argument or in the actual conduct of the trial or appeal.

To assist in giving right judgment is a high privilege and it is no less a necessary duty, both for those who can assist to do so¹⁴¹ and for the courts to accept such assistance where needfully and properly tendered. The present rules, as they are indicated in most of the decisions here reviewed, are too narrow and restrictive where skill is offered even through self-interest and far too much so where the assistance can be shown to be both competent and disinterested. Revisions along the two lines, first requiring adequate disclosure and then relaxing limitations in every proper case, should bring a new and helpful power to the courts. The immediate result should be a greater utility of the assistance now occasionally offered. In the long run the recognition of its value should cause a more active part in the giving of judgment to be taken by those persons and agencies best qualified to serve the public interest.

141. *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64 (1891).