The Amicus Curiae: A Powerful Friend for Poverty Law Advocates

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I. Introduction

The role of the amicus curiae has evolved from impartial advisor and "friend of the court" /1/ to that of a partisan advocate for otherwise unrepresented interests. /2/ The amicus currently serves a vital function and enjoys increased acceptance and expanded influence at all levels of the state and federal judicial systems. /3/ Unlike their colleagues in more traditional public interest law firms, poverty law advocates do not often file amicus briefs in litigation involving other parties, nor do they routinely seek the support of sympathetic allies to participate as amici in significant cases brought on behalf of low-income clients. /4/ However, through amicus briefs poverty lawyers can represent their clients’ interests and provide the court with a critically different perspective, often in the context of precedent-setting decisions, without formally initiating or intervening in the underlying litigation. Amicus advocacy thus avoids the financial and time demands imposed by direct representation, while affording advocates the opportunity to influence directly and immediately the outcome of cases that may dramatically affect the lives of their clients.

Amicus briefs filed on behalf of the client’s position by professional associations, sympathetic government agencies, or other advocacy groups with an interest in the issue can provide powerful and, from the court’s perspective, extremely credible support for the client’s cause. /5/ The participation of appropriate amici can also lend the court additional perspectives in support of a low-income client’s claims, which can be particularly important in cases where a decision of broad import is anticipated.

The purpose of this article is to (1) encourage poverty lawyers to influence the outcome of significant decisions involving other parties through the filing of amicus briefs on behalf of their clients’ interests; and (2) strengthen their own litigation positions in important cases by encouraging sympathetic amici to present arguments in support of their clients’ claims. Given the expanded role and increased success of amicus briefs filed by a wide variety of interest groups, /6/ including conservative public interest organizations, /7/ it seems clear that poverty law advocates, no less than their private counterparts, should fully utilize this effective advocacy tool. /8/
II. History

Scholars have traced the origin of the amicus curiae back to fourteenth-century Anglo-American common law and Roman law. Initially, the amicus was an impartial judicial advisor called upon only in rare or unique circumstances. The amicus curiae first appeared in the United States in 1821 when Henry Clay represented the landholding interests of the State of Kentucky. The Supreme Court granted Clay’s motion for a rehearing and allowed him to argue on behalf of Kentucky at the new hearing.

The amicus curiae originated at common law in response to the absence of a mechanism for representation of third-party interests in the adversary system. The adversarial nature of the Anglo-American judicial system, combined with the strong belief that parties have a right to litigate their cause without interference from nonparties, has tended to marginalize third-party rights. Many nonparties are unable to intervene formally in ongoing litigation due to the relatively stringent requirements of Fed. R. Civ. P. 24 and its state counterparts. However, such parties may opt to participate as amici curiae.

There are several benefits to participating as amicus curiae rather than intervening. For example, res judicata and collateral estoppel do not apply to amici. Moreover, legal services advocates and interest groups may present their clients’ positions to the court without the additional responsibilities that formal representation or intervention entail. In these circumstances, amicus advocacy offers a simple, direct, and relatively inexpensive vehicle through which groups may influence and inform the court.

Since the advent of the amicus in the United States in the 1800s, it has developed into a flexible tool through which interested individuals or entities lacking party standing may nevertheless represent third-party interests. Modern amici act as lobbyists, advocates, and vindicators of the politically powerless. As one commentator has noted, "The amicus is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle."

III. The Impact of Amicus Participation

There is little consensus about the nature or extent of the impact amicus briefs have on judicial decisions. Although several formal studies have concluded that the impact is negligible, there is strong anecdotal evidence of direct impact by amicus briefs on courts’ decisions. In the 1987 - 88 term, the Supreme Court cited amicus briefs in over 35 percent of its opinions when at least one amicus brief had been submitted. Several commentators argue that, in many cases, amicus briefs are more effective and influential than briefs filed by the parties.

One of the most famous cases in which an amicus brief greatly influenced a Supreme Court opinion is Mapp v. Ohio. In Mapp, the Ohio American Civil Liberties Union (ACLU), as amicus, successfully persuaded the Court to overrule prior precedent and apply the exclusionary rule of the Fourth Amendment to the states, even though the petitioner had not raised the incorporation issue. The Court relied exclusively on the ACLU’s amicus brief, and its own inherent power, to change dramatically Fourth Amendment law.
also have achieved significant litigation successes through the creative use of the amicus curiae vehicle. /26/

IV. Current Role of Amicus Curiae

A. General Considerations

The original mission of the amicus curiae "was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest." /27/ Early courts adhered to this neutral notion of the amicus role; /28/ some courts are often still reluctant to depart from this "orthodox" definition and allow only "a very limited adversary support of given issues through brief and/or oral argument." /29/ Nevertheless, the role of the modern amicus curiae is now generally understood to encompass some amount of advocacy on behalf of the amicus organization’s legal position, which almost always includes active support for one or more parties to the litigation. /30/ Indeed, under current federal rules, an amicus seeking leave to participate in a case must articulate its specific interest in the litigation and identify the party it supports. /31/ Thus the courts now recognize that "there is no rule that amici must be totally disinterested" /32/ and, accordingly, an amicus who "takes a legal position and presents legal arguments in support of it" fulfills "a perfectly permissible role." /33/ However, any effort to expand the parameters of that role is subject to the "broad discretion" of the court. /34/

B. The Amicus Brief

A typical amicus simply submits a brief in support of its legal position. Under the federal appellate rules, such briefs may be filed "only if accompanied by written consent of all parties, or by leave of court granted on motion, or at the request of the court." /35/ Generally an amicus who is unable to obtain the requisite consent will file a motion for leave to file its brief and at the same time "conditionally file" the brief itself, a procedure permitted under Rule 29. /36/ The motion must identify the "interest of the applicant," and the brief should be filed (or conditionally filed) within the same time allowed for the party whose position the amicus supports. /37/ States, territories, commonwealths, and federal government officers and agencies need not obtain consent of the parties or leave of court. /38/ Most states have analogous rules governing the submission of amicus briefs on appeal. /39/

The procedure governing the filing of amici briefs in the Supreme Court is set forth in S. Ct. R. 37. One important distinction from the appellate rule is the explicit admonition that motions for leave to file an amicus brief after the parties have refused to consent are "disfavored." /40/ The specific interest and position of amicus must be clearly stated in the petition. /41/

No express procedure in the Federal Rules of Civil Procedure governs amicus participation in the district courts. However, those courts might well look for guidance to Fed. R. App. P. 29, and an amicus seeking to be heard in the district court should follow the process set forth in Rule 29. /42/

An amicus brief can serve a variety of purposes. It can target a weakness in a party’s argument, introduce subtle variations on the arguments made by the parties, present emotive or otherwise
"risky" arguments that parties cannot or should not address, or serve as a factual supplement to the proceedings. /43/ The most consistent advice offered by practitioners, scholars, and former Supreme Court clerks is that amicus briefs should not merely rephrase arguments raised by the parties but should either address unique aspects of the issues or furnish supplemental data not otherwise available to the court. /44/ Briefs that fail to add substantively to the issues before the court are a distracting waste of time and could diminish the court’s receptiveness to an advocate’s future briefs. /45/

Excessively argumentative or partisan briefs will be ineffective, and the Supreme Court has admonished amici to stick to the legal issue: "The stated desires of amici concerning the outcome of this or any litigation . . . are not evidence in the case, and do not influence our decision; we examine an amicus curiae brief solely for whatever aid it provides in analyzing the legal questions before us." /46/

Stephen Shapiro interviewed former Supreme Courts clerks to solicit their advice about successful strategies and mistakes to avoid when filing amicus briefs. He summarized their description of effective amicus briefs as follows:

[T]o be effective, an amicus brief must bring something new and interesting to the case. This might be better research, an explanation of the connection between the particular case and other pending cases, an improved discussion of industry practices or economic conditions, a more penetrating analysis of the regulatory landscape, or a convincing demonstration of the impact of the case on segments of society apart from the immediate parties. /47/

C. Reply Briefs

The Supreme Court expressly prohibits the filing of amicus reply briefs, /48/ and other courts have adopted the same rule. /49/ However, where a court has granted leave for an amicus to file its initial brief, and thereafter orders or invites supplemental briefs from the parties, the amicus may request permission to participate in the supplemental briefing. /50/ Moreover, amicus that has been granted leave to file a brief in support of a petition for certiorari or other discretionary review (e.g., rehearing or rehearing en banc in the court of appeals) certainly may request leave to participate in the briefing on the merits, if review is granted. /51/

D. Beyond the Brief: Expansion of the Amicus Role

Courts generally have recognized "a bright-line distinction between amicus curiae and named party/real parties in interest in a case or controversy." /52/ The judiciary has "rarely given party prerogatives to those not formal parties," /53/ and in theory an amicus cannot be "recognized, elevated to, or accorded the fully litigating status of a named party or a real party in interest" absent compliance with one of the various procedural rules through which formal party status is conferred. /54/ Notwithstanding these traditional limitations upon the role of the amicus, /55/ it remains within the discretion of the individual court "to determine the fact, extent, and manner of participation by the amicus." /56/ This element of discretion, coupled with the lack of formal guidelines defining the
boundaries of amicus participation, has led to significant variations in the parameters of amicus advocacy on a case-by-case basis. The courts (including the Supreme Court) have not ruled consistently on specific issues where amici have sought a more proactive role in the litigation, and thus the possibility exists for amici to assume such a role in appropriate cases.

1. New Issues or Arguments

Often an amicus may seek to argue a legal theory or raise a legal issue that the parties themselves have not argued or raised. As a general rule, courts are reluctant to permit an amicus "to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." /57/ This principle is merely a corollary to the more basic jurisprudential prohibition against the consideration of issues not argued in the lower court /58/ or raised in the appellant’s opening brief. /59/ However, courts often exercise their discretion to rule upon new issues raised by amici when "the issue is purely one of law and either does not affect or rely upon the factual record developed by the parties," /60/ or where "exceptional circumstances" warrant consideration of the argument. /61/ Courts will find such "exceptional circumstances" when the issue presents "a significant question of general impact," /62/ where the issue implicates "substantial public interest," /63/ or where failure to consider the issue would cause an "unduly harsh" result. /64/ Furthermore, since the federal courts have an independent and continuing obligation to resolve jurisdictional questions, even when not raised by the parties, an amicus who presents such issues will be "welcomed." /65/

Applying the general principles described above, the Supreme Court on occasion has expressly declined to "pass" on arguments offered by amici but not raised by the parties, beginning with its decision in Knetsch v. United States. /66/ However, just one year after Knetsch, the Court in Mapp v. Ohio reached out to overrule prior Fourth Amendment case law, and thereby establish a sweeping constitutional precedent, noting with no elaboration (and without citation to Knetsch) that the constitutional issue had been raised only in an amicus brief. /67/ Justice Harlan, in dissent, emphasized that only the amicus had urged the Court to reach the constitutional question and criticized the majority’s decision to overrule prior precedent when neither party had asked the Court to do so. /68/

In its 1989 decision in Teague v. Lane, the Court again decided an important issue (the retroactive application of a newly announced constitutional rule) that had been raised only in an amicus brief. The plurality explained that the question of retroactivity was "not foreign to the parties," because they had briefed the possible retroactive application of another issue in the case, and that the Court had previously addressed questions that "had not been presented by the petition for certiorari or addressed by the lower courts." /69/ Justice Brennan, in a sharp dissent, found the plurality’s resolution of the issue "without benefit of oral argument on the question and with no more guidance from the litigants than a three-page discussion in an amicus brief" to be "astonishing." /70/

An analysis of federal appellate court decisions indicates that, like the Supreme Court, the courts of appeals will decide issues raised solely by an amicus if the issue is deemed sufficiently important or otherwise appropriate for immediate resolution in the case under consideration. /71/ It is certainly advisable for a prospective amicus to confer in advance with counsel for the allied party or parties to the appeal, in order to determine briefing strategy and the specific issues to be raised. /72/ However, where such collaboration is not possible, the amicus nevertheless should present all of its
arguments to the court. Clearly, the reviewing court will decide for itself which issues, however raised, are worthy of consideration.

Finally, it is worth noting that an amicus (or any other party on appeal) who offers new legal theories or alternative legal grounds in support of the lower court’s judgment will benefit from the "settled rule" that holds "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." /73/ Thus a reviewing court "may affirm on any ground supported by the record, even if it differs from the reasoning of the district court." /74/ An amicus who argues in support of the lower court’s disposition therefore should be accorded greater latitude in presenting new or alternative claims on appeal.

2. Participation in Oral Argument

Counsel for an amicus who seeks to participate in oral argument before the Supreme Court must first obtain the consent of the party whose position the amicus supports, and then obtain permission from the Court as well. /75/ The Court generally does not favor "divided" argument. /76/ An amicus who fails to obtain consent of the allied party must file a motion for leave to participate in the argument, and such motions "will be granted only in the most extraordinary circumstances." /77/

Private amici now rarely take part in oral argument before the Supreme Court because counsel for the parties refuse to part with argument time. /78/ The Solicitor General is far more likely to receive permission to participate in oral argument than a private amicus. /79/ An amicus who is invited by the Court to participate in oral argument is not subject to the restrictions of Rule 28. /80/

Federal appellate rules admonish that "[a] motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons." /81/ However, in significant cases the courts of appeals are probably more likely than the Supreme Court to permit argument by an amicus. /82/ Obviously, a request to participate in oral argument will be more favorably received if the amicus has obtained permission in advance to share argument time with an allied party. /83/

3. The Amicus Curiae as Litigator

Occasionally an amicus may be permitted to perform litigation functions traditionally reserved only to parties. Governmental amici, in particular, have been granted expansive powers by the courts, including the right to submit pleadings, conduct discovery, file motions, introduce evidence, participate at trial, seek substantive relief, and pursue issues on appeal. /84/ The Supreme Court has noted that "a federal court can always call on law officers of the United States to serve as amici." /85/ During the early civil rights era it was not uncommon for the federal courts to invite or appoint appropriate federal officials to serve as amici, "with the full rights of a party," /86/ in cases implicating important federal or constitutional rights. /87/ Many courts viewed the participation of the United States in institutional reform litigation as necessary

not only to vindicate the federal interests we have outlined above, but to insure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they
claim they have been deprived. . . . Without the participation of the United States, meritorious claims might fail for sheer lack of legal manpower. I would not be comfortable with the obvious result -- that only minor constitutional deprivations on a small scale could be successfully vindicated, while wide-spread, multifaceted deprivations went uncured due simply to the awesome magnitude of their evil. /88/

While at one time it may have been "customary" /89/ for the federal courts to confer wide-ranging litigation privileges upon their executive branch counterparts, by the early 1980s the exercise of such broad powers, even by governmental amici, was viewed as unusual. /90/ Nevertheless, reviewing courts were still willing to uphold extensive amicus participation so long as the district court did not permit the amicus to control the litigation or use the original plaintiffs as "mere straw men to confer standing so that the amicus could litigate its views." /91/

During the Reagan era, the inclination of federal agencies to seek or accept invitations to participate as amici on behalf of plaintiffs in civil rights litigation waned rather substantially. /92/ At the same time, however, some district courts were according nongovernmental amici extensive powers of participation in certain types of cases. /93/ The use of these "litigating amicus curiae" in complex litigation "tied the common law amicus device with the equitable principles of flexibility and representation of third parties" and promoted various concerns of judicial efficiency without elevating the amici to the status of full parties to the litigation. /94/

Adverse judicial reaction against the expansion of the "litigating amicus curiae" concept was strikingly illustrated by the Sixth Circuit’s 1991 opinion in United States v. State of Michigan. /95/ This litigation originally involved various federal claims brought by the United States Department of Justice against the State of Michigan over conditions in three Michigan state prisons. /96/ Simultaneously with the filing of the complaint, the United States requested the trial court to approve a settlement agreement and plan of implementation negotiated by the parties that disposed of all of the issues raised in the complaint. /97/ Prior to approval of the consent decree, however, the National Prison Project of the American Civil Liberties Union (NPP-ACLU) and the American Civil Liberties Union Foundation of Michigan (ACLU-FM) sought permission to "intervene" as "litigating amicus curiae" on behalf of prisoners in the institutions at issue. /98/ Eventually the district court formally granted "litigating amicus curiae" status, "with the full litigating rights of a named party in the case," to a class of inmates, who had filed their own related civil rights action and who were represented by the NPP-ACLU and the ACLU-FM, at one of the affected institutions. /99/ During the ensuing years of litigation, in the court of appeals’ view, the amicus "assumed effective control of the proceedings in derogation of the original parties to the controversy" and "impressed upon the United States and Michigan a third-party legal interloper in the persona of the NPP-ACLU and ACUL-FM, acting through their structured willing surrogate, the [prisoner] class, all of whom had been denied real-party-in-interest status and whose efforts to achieve that end had been earlier barred by the trial court." /100/

In a blistering opinion that included a far-ranging discussion of the history and appropriate role of the amicus curiae, the court of appeals resoundingly rejected any effort to formalize or legitimate "this elusive trial-court created legal mutant" characterized as a "litigating amicus curiae." /101/ The endorsement of such a "legal fiction" would, in the court’s view, convert the trial court "into a free-wheeling forum of competing special interest groups" that would frustrate and undermine the
ability of the real parties "to expeditiously resolve their own dispute." /102/ Concluding that the amicus "has never been recognized, elevated to, or accorded the full litigating status of a named party or real party in interest," the court stripped the amicus of its litigation prerogatives. /103/ The amicus was thus relegated to its "traditional role," through which it could "argue its adversarial position either orally or by written briefs." /104/

Recently one district court, in a thoughtful opinion, has rejected efforts to draw a bright line between "traditional" and "litigating" amicus curiae. In Wyatt v. Martin, the district court found that "the concept of amicus curiae is flexible and that, so long as the amicus does not intrude on the rights of the parties, it can have a range of roles, from a passive one of providing information, to a more active participatory role." /105/ The court identified eight factors to weigh in determining the permissible parameters of an amicus’ participation. These include (1) whether the litigation presents issues of widespread public concern; (2) the nature of the amicus (i.e., a federal government amicus can "bring to the litigation a helpful neutral and national perspective"); (3) whether the court has invited the participation of the amicus; (4) whether the parties have objected to the participation of the amicus; (5) the history and utility of the amicus’ prior participation in the litigation; (6) whether the amicus has handled its role responsibly in the past; (7) whether current participation by the amicus will be helpful to the court and not prejudicial to the parties; and (8) whether the amicus is "manipulating" its role as a substitute for intervention. /106/ Upon consideration of these factors, in the context of a long-running civil rights action involving the constitutionality of conditions in state facilities for the mentally ill and developmentally disabled, the court "reinstated" the United States to its "historical" amicus role in the case and explicitly permitted the government to "conduct discovery and participate fully in trial, including examining witnesses and presenting its own witnesses." /107/

The district court’s analysis in Wyatt offers a reasoned counterpoint to the Sixth Circuit’s blanket rejection of any expanded amicus role. Nevertheless, any effort by poverty lawyers to venture beyond the litigation role traditionally accorded amici curiae should be reserved for cases where the participation of amicus counsel is invited (or at least welcomed) by the court, where the issues implicate policies of broad public concern, and where the party whose position the amicus supports is unrepresented or otherwise lacks the requisite resources or expertise to litigate its claims competently. /108/

4. Appeals and Rehearings

It is now generally well settled that an amicus curiae lacks standing, on its own, to appeal a lower court judgment, /109/ nor may it seek rehearing or other discretionary review. /110/ Similarly, an amicus will generally be denied standing to broaden the scope of the remedy, /111/ pursue relief not requested by the parties, /112/ or otherwise seek "substantive individualized relief." /113/

An amicus may, of course, appropriately participate in an appeal or rehearing in support of a party or parties to the proceedings.
5. Attorney Fees and Costs

Courts are quite reluctant to award attorney fees to amici curiae. Most courts have held that, regardless of their contribution to the outcome of the litigation, an amicus curiae is a mere "volunteer" and, absent formal intervention, cannot qualify as a prevailing "party" under fee-shifting statutes such as 42 U.S.C. Sec. 1988. /114/

At common law, an amicus appointed by the court could be awarded fees from the party that "caused the situation prompting the appointment." /115/ Such awards are extremely rare, but a court that solicits the participation of an amicus may provide, in the terms of the appointment, that the amicus may seek compensation from the court itself. /116/

Occasionally courts have awarded fees to entities that successfully participated as amicus curiae in cases involving the same or similar issues that they were litigating as parties in other cases, /117/ or to counsel who initially participated in an amicus role and subsequently became counsel of record for a successful party. /118/ As a general rule, however, neither fees nor costs /119/ are likely to be recoverable by a volunteer amicus, and their reward will likely be no more tangible than the gratitude of the court. /120/ Since successful intervening parties may be eligible to claim statutory fees and costs, /121/ the potential recoverability of attorney fees and litigation expenses should be a relevant consideration in determining whether to seek intervention or amicus status. /122/

V. Amici Advocacy by Poverty Law Advocates

A. Participation of Amici in Cases Initiated by Poverty Law Advocates

Poverty lawyers should encourage the participation of sympathetic amici in order to support their claims in major litigation. In Bowen v. Yuckert, /123/ a legal services attorney represented the plaintiff in a case that challenged the validity of the so-called "severity" regulations used to evaluate disability claims arising under the Social Security Act. /124/ Although the facial validity of the regulations was upheld, /125/ Justice O’Connor’s concurring opinion cited "empirical evidence" offered by 29 states that filed an amici brief on plaintiff’s behalf, strongly suggesting that "the regulation has been used in a manner inconsistent with the statutory definition of disability." /126/ Justice O’Connor’s opinion in Yuckert became the cornerstone of a number of subsequent decisions holding that the severity regulations had been systematically misapplied to deny disability claims wrongly and resulting in readjudications for thousands of disabled claimants. /127/

In 1992, a class of Aid to Families with Dependent Children (AFDC) recipients, represented by various legal services organizations, challenged the validity of the waiver granted by the federal government allowing California to reduce its AFDC levels substantially in order to test the efficiency of a "work incentive experiment." /128/ Plaintiffs contended, inter alia, that the state’s "experiment" violated various federal laws prohibiting experimentation on human research subjects without the participants’ informed consent. /129/ In support of this theory, attorneys for plaintiffs’ lead counsel, the Western Center on Law and Poverty, enlisted the aid of 19 distinguished professionals who served on either the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, the President’s Commission for the Study of Ethical
Problems in Medicine and Biomedical and Behavioral Research, or the staff of these committees. /130/

Counsel for plaintiffs in Beno sought the support of biomedical and ethical professionals in order to explain the scientific and technical aspects of their legal claims to the court. /131/ An attorney with the University of Southern California Pacific Center for Health Policy and Medicine served as counsel to the academic and professional amici, and the amici brief was drafted in close collaboration with plaintiffs’ counsel. /132/

Clearly the court of appeals was deeply influenced by the arguments of these "impressively credentialed amici." /133/ The amici brief was cited and quoted with approval a number of times in the court’s opinion, particularly with respect to its harsh criticism of the state's "methodologically indefensible" experimental design. /134/ The court also accepted amici’s contention that the state’s proposal would put many AFDC families "at increased risk of homelessness, inadequate nutrition, and a variety of emotional and physical problems." /135/ In the face of these compelling evidentiary submissions and arguments, the defendant Secretary of Health and Human Services was forced to concede that "the issues plaintiffs and amici raise deserve attention." /136/

The court of appeals, which characterized the Secretary’s apparent failure to consider these issues as "stunning," held that the AFDC waiver was invalid under the Administrative Procedure Act and remanded the case to the Secretary "for additional consideration of plaintiffs’ objections." /137/ Plaintiffs’ amici in Beno thus played a significant role in preventing millions of dollars in unlawful welfare reductions.

Counsel for corporate and business entities have long understood the value and importance of amicus advocacy. In Harris v. Capitol Growth Investors XIV, the California Supreme Court granted review of a favorable appellate decision in a case brought by legal services advocates on behalf of low-income tenants. /138/ Plaintiffs had successfully argued in the appellate court that the common business practice by which landlords required prospective tenants to have at least three times the amount of rent in income, as a precondition to even applying for rental housing, constituted unlawful arbitrary discrimination based upon economic status under the state’s civil rights statute. /139/ In the state supreme court, plaintiffs were supported by amici briefs submitted on behalf of a nonprofit housing coalition and the California Department of Fair Employment and Housing. /140/ Defendant property owners, however, attracted a rather more imposing array of substantial statewide financial organizations as amici, including the California Bankers’ Association, the California Apartment Association, the California Association of Realtors, the California League of Savings Institutions, and the California Association of Thrift & Loan Companies, some of which were collectively represented by one of the largest law firms in the country. /141/ Evidently persuaded by the insistence of these amici that plaintiffs’ interpretation of the statute at issue "would generate expense and uncertainty on a massive scale" within the state’s business and lending communities, the supreme court rejected plaintiffs’ arguments and reversed the lower court’s ruling. /142/ The record in Harris thus illustrates that litigation that has the potential to affect broad social or economic interests will likely attract amici on both sides of the issue. Poverty lawyers in such appeals should prepare for this possibility in developing their strategy for the case. /143/
B. Participation of Legal Services Advocates as Amici Counsel

1. Intervention Considerations

Advocates sometimes become aware of significant cases in which the opportunity to intervene formally in the underlying litigation on behalf of affected clients has passed or is otherwise impractical. /144/ However, in appropriate cases intervention should be pursued at the trial court level in order to preserve the intervenors’ ability to appeal a judgment that is adverse to their interests, particularly if it appears that no current party to the litigation is inclined to appeal. /145/ Indeed, intervention may be sought for the specific purpose of appealing an adverse judgment. /146/ Amici curiae, who lack formal party status, have no standing to appeal in their own right and generally must rely upon another party’s appeal in order to present their views to the reviewing court. /147/ In addition, successful intervenors are far more likely to be awarded attorney fees and costs than amici curiae /148/ and are not constrained by the judicial limitations that restrict the participation of amici in litigation. /149/ However, where efforts to intervene are either not possible or unsuccessful, /150/ poverty lawyers should consider amicus status as an alternative to intervention, so long as some party to the litigation is motivated to appeal a judgment adverse to the putative intervenors’ interests and will raise the issues of importance to the intervenors in the appeal. /151/

2. Examples of Amici Advocacy

Watchful advocates may discover significant opportunities to present effectively their clients’ legal position in the context of litigation between other parties, especially with respect to subject areas where the private bar is also engaged in advocacy on behalf of clients with similar issues. Accordingly, in recent years legal services advocates have represented their client’s interests through amicus appearances in important cases involving bankruptcy, consumer protection, civil rights, and social security issues. /152/

Disability appeals arising under the social security and supplemental security income (SSI) programs present particularly appropriate contexts for effective amicus advocacy by legal services attorneys. The sheer number of published, precedential appellate decisions in this field, and the strong supportive relationship many legal aid advocates enjoy with their counterparts in the private disability bar, offer rich opportunities for amicus appearances in significant cases. Legal services attorneys thus can have a substantial impact upon issues of importance to their disabled clients by appearing as amici on behalf of plaintiffs represented by private counsel in selected appeals.

For example, prior to 1990 the Ninth Circuit, like most others, had held that an administrative law judge (ALJ) could not discredit a claimant’s pain testimony "solely on the ground that [the degree of pain allegedly] is not fully corroborated by objective medical findings." /153/ In 1990, however, two judges of the court, in a strange concurrence to the "majority" opinion in Bates v. Sullivan, rejected the circuit’s well-settled pain evaluation standard and held that an ALJ was free to reject any subjective complaints of pain that were not fully verified by objective medical evidence. /154/
Immediately, the Bates concurrence was widely cited in district court opinions and even ALJ decisions throughout the Ninth Circuit to discredit a claimant’s testimony of severe and disabling pain if (as is common) the intensity of all the pain alleged could not be "objectively" verified. Advocates with Legal Services of Northern California, Inc., and the National Senior Citizens Law Center, in conjunction with private practitioners in the social security field, began a search for an appropriate case to seek en banc review of the Bates concurrence.

Not long after the decision in Bates, a panel majority Bunnell v. Sullivan (one of whom was a coauthor of the concurring opinion in Bates) adopted the statutory analysis of the Bates concurrence and concluded that a claimant will "never be found disabled unless he [can] point to a medical condition which cause[s] him to suffer from the degree of pain" alleged. /155/ The dissenting judge in Bunnell "sharply disagree[d]" with the Bates analysis, because it "redefine[s] pain as a purely objective phenomenon and render[s] pain testimony, 'in the final analysis, almost superfluous.'" /156/ The claimant in Bunnell was represented by a private attorney, who contacted a colleague in private practice for assistance in requesting rehearing en banc. That attorney, in turn, contacted legal services advocates for potential support as amici curiae.

On behalf of the many claimants for disability benefits that both programs represent, Legal Services of Northern California, Inc., and the National Senior Citizens Law Center successfully sought leave to file a joint amici curiae brief in support of rehearing and rehearing en banc in Bunnell. /157/ Amici also were invited to participate in court-ordered supplemental briefing regarding the propriety of rehearing en banc. /158/ After rehearing en banc was granted, /159/ amici were granted leave to file a third brief, addressing the merits on rehearing, and also were granted leave to participate at the en banc oral argument. /160/

In a seven-to-four decision, the en banc court decisively overruled the pain evaluation standard enunciated in the Bates concurrence as "inconsistent with the relevant statutory language, the legislative history, the Secretary’s regulations, the Secretary’s interpretation of the regulations, and our pre-Bates case law." /161/ Adopting amici’s arguments, the majority stated, "[W]e cannot conclude that Congress intended to require objective medical evidence to fully corroborate the severity of pain while aware of the inability of medical science to provide such evidence. . . . Our cases, except for the Bates concurrence, have never adopted this view." /162/

Given the frequency with which the pain evaluation issue arises in the thousands of disability appeals processed through the Social Security Administration and the federal courts each year, the Bunnell court’s en banc reaffirmation of its prior pain standard was certainly one of the most important pronouncements in the social security field issued by the Ninth Circuit over the past ten years.

Close collaboration between poverty lawyers and private disability law specialists also gave rise to important amicus advocacy by legal services counsel over the proper application of the attorney fee provisions of the Equal Access to Justice Act (EAJA) to social security cases. /163/ The Supreme Court’s 1991 decision in Melkonyan v. Sullivan had generated intense confusion and litigation over the proper timing of EAJA fee applications in disability cases that had been remanded by district courts for further administrative proceedings. /164/ The government had seized upon dicta in Melkonyan to argue that EAJA fees were now time-barred for thousands of disability claimants
across the country whose counsel had done no more than follow pre-Melkonyan case law, which dictated that EAJA applications should not be filed until after the administrative proceedings on remand had concluded. /165/

After the Supreme Court granted certiorari to review the issue, legal services advocates worked closely with the claimant’s counsel during the drafting of both the claimant’s brief and the amici briefs. The legal services amici brief argued, inter alia, that the government’s position would "pierce the heart of the intent of the EAJA," by creating strong disincentives for private counsel to represent those most in need of competent representation to vindicate their disability claims under Title XVI of the Social Security Act (the SSI program), who by definition are needy and seeking only a subsistence level income . . . because those (already few) attorneys willing to represent such claimants have no effective incentive to do so apart from the possibility of EAJA fees. /166/

The Supreme Court accepted in part the government’s version of the proper time period for filing an EAJA fee claim in remanded disability cases but agreed with amici’s argument that the "logical corollary" to the government’s theory, which the agency sought "to avoid at all costs," compelled the conclusion that the issuance of a "remand order alone is sufficient to confer prevailing party status under the EAJA." /167/ Moreover, the Court confirmed that the claimant’s EAJA application in Schaefer was timely filed in any event because the EAJA filing period cannot be triggered by a remand order that fails to comply with the formal requirements of Fed. R. Civ. P. 58. /168/ The district court’s remand order in Schaefer, like the vast majority of similar remand orders potentially subject to the Supreme Court’s newly announced EAJA filing period, failed to meet the "separate document" requirement of Rule 58. /169/ The Court’s acceptance of the Rule 58 argument to "save" the now technically untimely fee petition in Schaefer ensured that thousands of similarly situated disability claimants would not be unfairly foreclosed from seeking EAJA fees simply because they followed the filing rules in effect at the time their cases on the merits were remanded. /170/ Once again, collaboration between private counsel and legal services amici had resulted in effective advocacy on behalf of their common clients. /171/

3. Legal Services Advocates as Court-Appointed Amici

The judiciary has inherent authority to appoint an amicus curiae to advise, inform, assist, or otherwise benefit the court, and such an amicus may be a governmental or private entity. /172/ The Supreme Court on occasion has invited attorneys to accept appointments as amici curiae to brief and argue cases on behalf of unrepresented parties; /173/ such appointments occur in the lower courts as well. /174/ Under such circumstances, the role of the amicus is governed by the terms of the appointment, not the rules of court that address amicus participation. /175/ A court-appointed amicus generally will enjoy more expansive litigation powers and may be entitled to seek attorney fees under either the express terms of the appointment or common law. /176/

Poverty lawyers whose work in specific subject areas is respected by the courts may be invited to participate in cases involving their fields of expertise. Such participation may provide an opportunity to advance effectively the interests of low-income clients. /177/
For example, in 1990 the Ninth Circuit Court of Appeals, on its own motion, decided to grant rehearing en banc of an individual social security appeal in order to resolve some perceived conflicts in the circuit’s case law governing the evaluation of medical evidence, and the so-called "treating physician rule," in disability claims. /178/ There was concern among disability advocates that a conservative contingent on the court had sought rehearing in order to restrict some of the circuit’s favorable precedent on these issues. Although the claimant in the case had been represented by a private attorney on appeal, the en banc court invited a legal services attorney to accept an appointment as amicus curiae to represent the claimant in en banc proceedings. /179/ The order of appointment provided that amicus would file both an opening brief and a reply brief, would argue the case for the claimant before the en banc court, and could submit a claim for attorney fees to the court after the conclusion of the proceedings. /180/

Following the briefing, the Secretary of Health and Human Services decided, upon review of "the comprehensive analysis of the field" presented in the amicus briefs, that the claimant was "entitled to benefits" after all; the Secretary then issued full payment to the claimant on the disability application at issue. /181/ The en banc proceedings were vacated by the court as moot, /182/ and amicus counsel subsequently applied for and received $21,768 in fees from the court of appeals. /183/

Poverty lawyers certainly should be open to opportunities to accept judicial amicus appointments. Indeed, there is no reason not to alert the courts to a legal services organization’s willingness to consider such advocacy in appropriate cases. /184/

VI. Practical Considerations

Poverty lawyers who engage in advocacy as amici curiae, or who enlist the participation of third parties as amici in support of their own litigation, should be aware of some practical and strategic considerations. First and foremost, of course, is to comply with all the relevant procedural rules governing amicus participation.

Since an amicus is most effective when it presents a distinctive legal or factual perspective to the court, legal services counsel should look outside the poverty law community and invite appropriate professional, academic, governmental, or even business interests (i.e., the Chamber of Commerce) to participate as amici in significant litigation raising issues of common concern. /185/

If a party represented by legal aid counsel is supported by an amicus that also has obvious ties to a legal services organization, the amicus brief should certainly add "something new and interesting" to the party’s own arguments. /186/ Accordingly, where the supporting amicus is an entity whose interests are closely aligned with those of the parties already represented by legal services counsel, it may be advantageous for private counsel to represent the amicus. /187/ In any event, the legal services advocate must be prepared to work closely with the amicus or amicus counsel in developing the strategy for the amicus brief and may be required to do extensive drafting of the brief itself.
Poverty lawyers who seek to participate as amici in appropriate litigation should decide, at the threshold, whether formal intervention would be preferable to amicus status. Counsel who choose the amicus alternative will need to collaborate as closely as possible with the party whose position will be supported, and it is critical, in the context of an appeal, to ensure that the allied party preserves or raises all the issues and arguments that are important to the amicus.

As noted above, it is virtually certain that, as a result of impending congressional restrictions, grantees of the federal Legal Services Corporation (LSC) will be unable to engage in various types of litigation after January 1, 1996. Some of these prohibitions may be read broadly to preclude appearances as amicus curiae in addition to conventional representation. LSC-funded advocates therefore must carefully review the new restrictions to determine their impact upon potential amicus advocacy.

Obviously any amicus advocacy must be done on behalf of a current legal services client or clients, with appropriate retainers, who have an interest in the outcome of the litigation at issue. Clients may be named individually as the amici, but more often the amicus is an organization or association with goals or interests relevant to the issues in dispute. Where the legal services agency itself carries significant credibility with the court, it may appear as amicus in its own right.

VII. Conclusion

As the poverty law community enters a period of increasingly scarce resources, the availability and importance of the amicus curiae as an advocacy strategy merit close attention. Counsel who comply with the prescriptions set forth herein may find opportunities to advocate forcefully for their clients' interests while simultaneously serving a more encompassing judicial goal. Since "time immemorial," the "general attitude of the courts [has been] to welcome" the amicus, because "it is for the honor of a court of justice to avoid error."

Footnotes

/1/ The traditional definition of amicus curiae is provided by 3 A.C.J.S.2d Amicus Curiae Sec. 2 (1993): "The term amicus curiae literally means a friend of the court; technically he is a friend of the court as distinguished from an advocate. An amicus curiae is a bystander; he is one who, as a standby, when a judge is doubtful or mistaken, may inform the court."


Traditional public interest firms such as the American Civil Liberties Union (ACLU), the NAACP Legal Defense Fund, and the Lawyers’ Committee for Civil Rights Under Law have filed amicus briefs for several decades. Indeed, the Mexican American Legal Defense and Education Fund (MALDEF) considers amicus advocacy to be a central component of its overall litigation strategy. Notes from author’s conversation with Manuel Romero, former MALDEF Regional Counsel (Nov. 16, 1995).

In an important recent decision analyzing federal waivers of certain Aid to Families with Dependent Children program requirements, the court was clearly influenced by the "impressively credentialed amici," which included 19 "biomedical and social scientists, physicians, and other health care professionals, philosophers, and lawyers," who participated in the case at the behest of plaintiffs’ lead counsel, the Western Center on Law and Poverty. Beno v. Shalala, 30 F.3d 1057, 1072 n.39 (9th Cir. 1994) (Clearinghouse No. 48,727). See infra notes 123 -- 32 and accompanying text.

Stephen L. Wasby, The Supreme Court in the Federal Judicial System, 110, 152 (3d ed. 1988). (noting increased amicus participation since the 1960s); Karen O’Connor & Lee Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman’s "Folklore," 16 Law & Soc’y Rev. 311, 317 (1981 -- 82) (in contrast to Hakman’s 1969 study that concluded that small numbers of amicus briefs were filed with the Supreme Court, between 1970 and 1980 amicus briefs were filed in more than half of all noncommercial, full-opinion cases, and in two-thirds of the cases when criminal cases are excluded). In the 1987 term, 80 percent of the cases formally decided by the Supreme Court included at least one amicus. Lee Epstein, Courts and Interest Groups, in The American Courts: A Critical Assessment 335, 350 (John B. Gates & Charles A. Johnson eds., 1991).


As this article went to press, Congress was poised to impose significant new restrictions upon the litigation activity of federally funded legal services organizations. Advocates should carefully consider the impact of the new restrictions upon potential amicus curiae advocacy. See infra section VI & note 191.

Lowman, supra note 3, at 1244. Under Roman law, the amicus was often a court-appointed attorney who offered nonbinding opinions on law unfamiliar to the court. Id. at 1244 n.4 (citing Comment, The Amicus Curiae, 55 Nw. U. L. Rev. 469, 469 n.3 (1960)).

At early common law, amicus curiae acted on behalf of infants, called attention to manifest error, alerted the court to the death of a party to the proceeding, informed the court of existing precedent or statutes with which the court was unfamiliar, attested to the legislative intent of a statute, and, in its earliest use, called attention to collusive suits.

Krislov, supra note 2, at 696.

Id. See Fed. R. Civ. P. 24. Rule 24 reads:
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless that interest is adequately represented by existing parties. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. 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. Many state court intervention rules mirror Rule 24. See, e.g., Cal. Code Civ. P. Sec. 387.

Lowman, supra note 3, at 1257. Recently, legal services advocates sought to intervene on behalf of low-income persons whose local health care programs could be adversely affected by the relief sought in a case brought by a coalition of antitobacco groups against the state, alleging wrongful expenditures of money appropriated through a voter-initiated tobacco tax. Although the motion to intervene was denied, the putative intervenors were granted amici status by the court. American Lung Ass’n v. Wilson, No. 379257 (Cal. Super. Ct. Sacramento County Feb 16, 1995).

Lowman, supra note 3, at 1260, 1261 n.104. Courts generally have held that, as nonparties, amici are not bound by the outcome of the proceedings. See, e.g., Munoz v. County of Imperial, 667 F.2d 811, 816 (9th Cir. 1982). However, nonparty status also carries disadvantages. E.g., amici may not appeal an adverse judgment, and attorney fees may not be recoverable. See infra at section IV.D.4 -- 5.

Epstein, supra note 6, at 346. Interest groups file amicus briefs for diverse reasons, including publicity, coalition building, long-term strategy, and the advantage of increased freedom to craft the issue presented in the brief. The ACLU views amicus briefs as a fairly easy method of advancing its interests. Other groups find that amicus briefs allow them to present a broader perspective on issues before the court. Still others note the ability to supply the court with detailed empirical data on narrow issues. Id.
See Donald R. Songer & Reginald Sheehan, Interest Group Success in the Courts: Amicus Participation in the Supreme Court, 46 Pol. Res. Q. 339, 340, 351 -- 52 (1993). Some commentators have estimated the cost of printing amici briefs filed in the Supreme Court to be as high as $10,000. Gregory Caldeira & John Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1112 (1988). However, one of the coauthors herein filed an amicus brief in the Supreme Court in 1993 at a cost of approximately $1,300. File Notes of Gary F. Smith for Shalala v. Schaefer; see infra at notes 163 -- 71 and accompanying text.

Lowman, supra note 3, at 1245.

Krislov, supra note 2, at 703.

Numerous studies have attempted to measure the impact of amicus briefs, especially on the Supreme Court. Most have concluded that there is little measurable impact. See Songer & Sheehan, supra note 17, at 350. However, many researchers recognize the limitations inherent in quantitatively measuring the complex process of decision making by judges. They also note that, due to the expense of the briefs, those filing them must perceive some tangible benefits. Id. at 340.

Epstein, supra note 6, at 361.

Ennis, supra note 7, at 606 -- 7. See also Leo Pfeffer, Amici Participation in Church-State Litigation, 44 Law & Contemp. Prob. 83 (1981).


Lowman, supra note 3, at 1259; Krislov, supra note 2, at 712. See also the Supreme Court’s note of this in Teague v. Lane, 489 U.S. 288 (1989). In paraphrasing its decision in Mapp, the Court noted that it had applied the "exclusionary rule to the States even though such a course of action was urged only by amicus curiae." Id. at 300.

It is interesting that, notwithstanding the Court’s decision in Mapp, many federal appellate courts refuse to address issues raised solely in an amicus brief. As discussed infra at section IV.D.1, this may be due to the discretionary nature of the court’s tolerance for and use of the amicus; courts give the amicus broad powers when they are impressed by or agree with its arguments, or when the parties themselves supply inadequate briefing or analysis.

See, e.g., infra at section V and cases cited therein.


See, e.g., Central Hanover Bank & Trust Co. v. Saranac, 278 N.Y.S. 203 (1935) (refusing to consider an amicus brief because it was excessively partisan).

State of Michigan, 940 F.2d at 165.
For a discussion of the amicus’ transition from disinterested friend of the court to advocate and lobbyist, see Krislov, supra note 2, at 694.


Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043, 1049 (5th Cir. 1993) (Clearinghouse No. 44,608) (quotation omitted).


Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (Clearinghouse No. 8098) (“it is solely within the discretion of the trial court to determine the fact, extent, and manner of participation by the amicus.”).


Id.

Id.

Id.; see Resident Council of Allen Parkway Village, 980 F.2d at 1049.

See, e.g., Cal. R. of Ct. 14(b).

S. Ct. R. 37.2. It is therefore important to try and obtain the parties’ written consent prior to filing an amicus brief in the Supreme Court. In the author’s experience, the consent of the Solicitor General, where the United States or one of its agencies is a party, is rarely refused.

S. Ct. R. 37.3, 37.4. Again, federal and state governmental amici need not obtain consent prior to filing. S. Ct. R. 37.5.

See United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991) (denying leave to file amicus brief after consideration of the factors set forth in Rule 29). It is particularly critical for an amicus seeking to participate in the district court proceedings to do so in a timely manner. Id.

Krislov, supra note 2, at 711.

Robert L. Stern et al., Supreme Court Practice 570, 573 (6th ed. 1986) (in part citing Stephen M. Shapiro, Amicus Briefs in the Supreme Court, 10 Litigation 21 (1984)). S. Ct. R. 37.1 clearly states that redundant briefs are "not favored." See also Gotti, 755 F. Supp. at 1158 (denying leave to file amicus brief that added nothing to defendant’s brief and "would not therefore, assist the court in the least").

Shapiro, supra note 44, at 22.

/47/ Shapiro, supra note 44, at 22.

/48/ S. Ct. R. 27.3.

/49/ See, e.g., Ninth Cir. R. 29-1.

/50/ See infra at notes 153 -- 62 and accompanying text (legal services amici granted leave to file a total of three briefs in social security disability case that was reheard en banc).

/51/ Stern, supra note 44, at 573; Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (en banc) (legal services advocates permitted to file amicus briefs on the merits after filing brief in support of petition for rehearing en banc).

/52/ State of Michigan, 940 F.2d at 165.

/53/ Miller-Wohl Co. v. Comm’r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982).


/55/ See, e.g., State of Michigan, 940 F.2d at 165 (collecting cases imposing restrictions upon the ability of amicus to participate in the litigation to the same extent as parties).

/56/ Alexander, 64 F.R.D. at 155.

/57/ Lane v. First Nat’l Bank, 871 F.2d 166, 175 (1st Cir. 1989); see Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994).

/58/ See, e.g., Service Employees Union Local 102 v. San Diego, 35 F.3d 483, 486 (9th Cir. 1994); McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991).


/60/ Hamilton v. Madigan, 961 F.2d 838, 841 n.6 (9th Cir. 1992).

/61/ Resident Council of Allen Parkway Village, 980 F.2d 1043, 1049 (5th Cir. 1993); Preservation Coalition, 667 F.2d at 862. Courts also will consider whether all parties have had a fair opportunity to brief the issue. Continental Ins., 842 F.2d at 985.

/62/ Service Employees Union, 35 F.3d at 487.
/63/ Continental Ins. Co., 842 F.2d at 985, Consumers Union, 510 F.2d at 662; Platis v. United States, 409 F.2d 1009, 1012 (10th Cir. 1969).

/64/ Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1306 n.1 (9th Cir. 1970).


/66/ See also United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981) (declining to consider argument of amicus "since it was not raised by either of the parties here or below"); Bell v. Wolfish, 441 U.S. 520, 532 n.13 (1979) (Clearinghouse No. 23,349) (same).

/67/ Mapp, 367 U.S. at 645 n.3.

/68/ Id. at 674 n.5 (Harlan, J., dissenting).

/69/ Teague, 489 U.S. at 300 (citing, inter alia, Mapp, 367 U.S. at 646 n.3).

/70/ Id. at 330 (Brennan, J., dissenting).

/71/ See, e.g., Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 808 -- 9 (3d Cir. 1991) ("[W]e will evaluate the alternative claims of error [raised by amicus] to determine whether there are other grounds, not already identified by the [appellant], which would mandate reversal or modification of the district court decree.").

/72/ See infra section VI.


/74/ Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994); see also D.E.L.T.A. v. Humane Society, 50 F.3d 710, 712 (9th Cir. 1995).


/78/ Stern, supra note 44, at 590. A rare example of a private amicus who obtained leave of court to share the oral argument time of a party occurred in Barefoot v. Estelle, 460 U.S. 1067 (1983) (Court permitted amicus NAACP to make part of the argument on behalf of the petitioner).

/80/ Stern, supra note 44, at 574.


/82/ See, e.g., Gerritson v. de la Madrid Hurtado, 819 F.2d 1512, 1514 n.3 (9th Cir. 1987) (granting official of Mexican consul amicus status in order to present oral argument).

/83/ See, e.g., Bunnell v. Sullivan, No. 88-4179 (9th Cir. May 14, 1991) (en banc) (order granting legal services amici leave to participate in en banc oral argument, conditioned upon agreement by appellant’s counsel to divide argument time).

/84/ Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (court holds that expansive participation of United States as amicus in prison conditions lawsuit, while "somewhat more than the usual participation of amici," was not an abuse of discretion, given that the district court had appointed the federal governmental amici to "investigate fully the facts alleged in the complaint, participate in the case with the full rights of parties, and advise the Court on the public interests at issue.").


/86/ In re Estelle, 516 F.2d 480, 482 (5th Cir. 1975), cert. denied, 426 U.S. 925 (1976) (Clearinghouse No. 16,256).

/87/ For a comprehensive review of cases in which governmental amici have been accorded substantial litigation powers, see Lowman, supra note 3, at 1261 -- 63.

/88/ In re Estelle, 516 F.2d at 487 n.5 (Tuttle, J., concurring).

/89/ Faubus v. United States, 254 F.2d 797, 804 (8th Cir. 1958) (approving district court’s grant of amicus status to U.S. Attorney General and permitting amicus to submit pleadings, evidence, arguments, and briefs, and to seek injunctive relief).

/90/ Hoptowit, 682 F.2d at 1260.

/91/ Id. Compare Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973) (denying United States, acting as amicus, ability to control litigation by seeking relief distinct from plaintiff).

/92/ Under the Clinton Administration, it appears the United States is making more frequent appearances as amicus in the lower courts, particularly in cases involving interpretations of new civil rights statutes, such as the Americans with Disabilities Act. See, e.g., Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995).
See, e.g., Equal Employment Opportunity Comm’n v. Boeing Co., 109 F.R.D. 6, 11 (W.D. Wash. 1985) (granting "hybrid" amicus/intervenor status to class of airline pilots who, as matter of law, could not intervene in age discrimination suit brought by EEOC); see generally Lowman, supra note 3, at 1268 -- 70, (describing use of "litigating amicus curiae" in complex case implicating environmental and native fishing rights issues).

Lowman, supra note 3, at 1270 -- 72.


Id., 940 F.2d at 145 -- 46.

Id. at 146.

Id. at 147.

Id.

Id. at 164. See generally Lowman, supra note 3, at 1270 -- 79.

State of Michigan, 940 F.2d at 164.

Id. at 166. Clearly the court’s displeasure was intensified by its conviction that the amicus had demonstrated an "unnecessary, overly intrusive, and indiscriminate course of litigating conduct" and had "exacerbated, if not caused, much of the discord, bitter confrontation, and continuing acrimony" over issues of compliance with the original decree. Id.

Id.

Id.


Id. at 7 -- 10.

Id. at 10.

See infra notes 172 -- 84 and accompanying text.


See Lowman, supra note 3, at 1256 n.76 (collecting cases).
/111/ Bing, 485 F.2d at 452.


/113/ Town of Harrison, 940 F.2d at 808. One court has noted an exception to these general rules in concluding that a court may entertain a request by amicus curiae "to take the action necessary to protect and effectuate its judgment." United States v. State of Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1973) (Clearinghouse No. 30,953).

/114/ Morales v. Turman, 820 F.2d 728, 732 (5th Cir. 1987) (collecting cases), see also Lundin v. Mechan, 980 F.2d 1450 (D.C. Cir. 1992) (doubting, but not deciding, that amici can qualify for fees under the Equal Access to Justice Act); cf. Coleman v. Block, 589 F. Supp. 1411 (D.N.D. 1984) (Clearinghouse No. 37,981) (awarding Equal Access to Justice Act fees to amici whose work was "crucial" to plaintiff’s success).


/116/ See infra notes 178 -- 84 and accompanying text.


/120/ See, e.g., Morales, 820 F.2d at 732 -- 33. On the other hand, the nonparty status of the amicus insulates it from being the target of another party’s claim for fees. League of Women Voters v. Federal Communications Comm’n, 798 F.2d 1255, 1260 (9th Cir. 1986).


/122/ See infra notes 144 -- 51 and accompanying text.


/124/ 20 C.F.R. Secs. 404.1520(c), 404.1522, 416.920(c), 416.922.

/125/ Yuckert, 482 U.S. at 154.
Other amici briefs were filed on behalf of the Epilepsy Foundation of America, the National Multiple Sclerosis Society, and the National Alliance of the Mentally Ill, all in support of plaintiff’s position.


Beno v. Shalala, 30 F.3d 1057, 1062 (9th Cir. 1994) (Clearinghouse No. 48,727).

Id. at 1063.

Id. at 1072 n.39.

Notes from author’s conversation with Clare Pastore, Esq., Western Center on Law and Poverty, Inc. (Mar. 28, 1995).

Id.

Beno, 30 F.3d at 1072.

Id. at 1073 (quoting from amici brief).

Id. at 1073.

Id. at 1076.

Id. at 1074, 1076.


Id. at 1149.

See id. at 1147 -- 48.

See id. at 1148.


See, e.g., Flores v. Rios, 36 F.3d 507, 509 (6th Cir. 1994) (Clearinghouse No. 50,681) (case brought by legal services advocates on behalf of migrant farmworkers, raising issues involving certain "family farm" exceptions under the Migrant and Seasonal Agriculture Protection Act, attracted various amici including the American Farm Bureau Federation and the U.S. Department of Labor).
E.g., even the most conscientious practitioner cannot possibly track, at the trial court level, even a small percentage of the thousands of disability cases arising under the Social Security Act in a given federal circuit. However, at the appellate level, advocates can, through support center and task force networks, private attorney contacts, and federal advance sheet reviews, make an effort to determine which cases may likely result in precedential opinions and keep apprised of significant decisions that may be subject to rehearing petitions.

Intervenors who demonstrate the requisite standing requirements under Article III of the U.S. Constitution are entitled to pursue federal appellate review even if the original party supported by the intervenor declines to appeal. Diamond v. Charles, 476 U.S. 54, 68 (1986); see Stringfellow v. Concerned Neighbors, 480 U.S. 370, 376 (1987). Moreover, in most jurisdictions the complete denial of a motion to intervene is itself subject to immediate appeal by the putative intervenor. See, e.g., Stringfellow, 480 U.S. at 733; Simpson Redwood Co. v. State of California, 196 Cal. App. 3d 1192, 1197 (1987).

See Edwards v. City of Houston, 37 F.3d 1097, 1106 (5th Cir. 1994).

See, e.g., Town of Harrison, 940 F.2d at 808 (3d Cir. 1991); see supra notes 109 -- 13 and accompanying text.

See supra notes 114 -- 22 and accompanying text.

See supra notes 95 -- 104 and accompanying text.

Rulings on motions for "permissive" intervention under Fed. R. Civ. P. 24(b) are reviewed for abuse of discretion. See, e.g., Edwards, 27 F.3d at 1104. Although denials of motions to intervene "of right" under Rule 24(a) are reviewed de novo, the district court’s determination as to the timeliness of the motion is subject to the abuse-of-discretion standard. Yorkshire v. Internal Revenue Serv., 26 F.3d 942, 944 (9th Cir. 1994).

See supra notes 109 -- 13 and accompanying text. A putative intervenor who has appealed the denial of its intervention motion may continue to participate in the underlying proceedings as amicus, during the pendency of the intervention appeal. See McFarland v. City of Sausalito, 218 Cal. App. 3d 908, 912 (1990).


Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986).
The claimant in Bates was represented by private counsel, and rehearing was not sought.

The court granted consolidated rehearing en banc in Bunnell and in Rice v. Sullivan, 912 F.2d 1076 (9th Cir. 1990), overruled & remanded, 947 F.2d 341 (9th Cir. 1991) (en banc).

Leave to take part in the argument was conditioned upon agreement by the claimants’ counsel in Bunnell and Rice to share time with amici. The claimants’ attorneys, who were both sole practitioners, had worked closely with amici counsel throughout the rehearing proceedings and were more than willing to allow amici the opportunity to present oral argument.

Lead counsel for these amici also contributed to the drafting of an amicus brief filed on behalf of the claimant by the National Organization of Social Security Claimant’s Representatives.

"a party who wins a sentence-four remand order is a prevailing party").

During the pendency of Schaefer, legal services advocates had filed an amici brief in a Ninth Circuit case raising the same issues; their analysis of the record and legal arguments had forced the government to withdraw its claim that the claimant’s EAJA application was untimely even under pre-Melkonyan procedures. Engelbrite v. Sullivan, No. 91-16920 (Reply Brief of Secretary of HHS) (9th Cir. May 22, 1992), at 20 n.10. Following the Supreme Court’s decision in Schaefer, amici were invited to file a supplemental brief, and subsequently the government withdrew its appeal and agreed to pay plaintiffs’ counsel his fees for both the district court and appellate work. Id., orders of July 8, 1993, and Sept. 15, 1993.

See generally supra at notes 84 -- 92 and accompanying text; see Universal Oil Products Co., 328 U.S. at 579 -- 81 (private amici appointed to investigate charges of judicial dishonesty).

Stern, supra note 44, at 574.

See, e.g., Beck v. Department of Justice, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (amicus appointed to brief and argue significant issue under the Freedom of Information Act on behalf of unrepresented appellant).

Stern, supra note 44, at 574.

See supra notes 114 -- 18 and accompanying text.

See infra at section VI.

Boyes v. Sullivan, 901 F.2d 717 (9th Cir. 1990) (Clearinghouse No. 46,412).

Boyes v. Sullivan, No. 88-15342 (9th Cir. June 5, 1990) (order appointing Gary F. Smith of Legal Services of Northern California to brief and argue several issues on rehearing en banc). It was not clear why the court chose to appoint an amicus essentially to supplant the claimant’s own counsel. Amicus was contacted by a court of appeals staff member who was familiar with his work in another case.


Brief of Secretary of Health and Human Services, Boyes, No. 88-15342 (9th Cir. filed Aug. 29, 1990), at 1 -- 4, 8.

Boyes v. Sullivan, 920 F.2d 587 (9th Cir. 1990) (en banc).
Such appointments may be quite expansive, as in the Boyes case, or quite narrow in scope, depending on the needs of the court. In Carroll v. Stainer, No. F-90-0680 GEB PAN (E.D. Cal. Jan. 11, 1993), a magistrate judge appointed a legal services attorney to represent a pro se prisoner in a civil rights suit solely to brief and argue a significant discovery issue. After the district court granted the plaintiff’s discovery motion, the amicus appointment terminated.

See supra at notes 131 -- 32 and accompanying text.

Shapiro, supra note 44, at 22. Cf. Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991) (Clearinghouse No. 44,746) (plaintiff's seeking improved child support enforcement procedures were represented by legal services counsel; two supporting amici also were represented by legal services organizations).

See, e.g., Hamilton v. Madigan, 961 F.2d 838 (9th Cir. 1992) (amicus National Coalition for Homeless, supporting low-income plaintiffs represented by legal services counsel, was represented by well-regarded private law firm).

See supra notes 144 -- 51 and accompanying text.

See supra notes 157 -- 71 and accompanying text. Counsel should obtain the approval of the project director and the board of directors before formally involving the program as a named amicus.