Always Appealing: Et Tu, Amici? Bringing Transparency to Amicus Curiae Briefs

December 1, 2021 | in General

DECEMBER 2021 BAR BULLETIN

By Jon Collins

In 2017, Seattle SuperSonics legend Kevin Durant announced he was leaving the Oklahoma City Thunder and joining the Golden State Warriors. The news triggered an explosion of activity across the NBA Twitter-verse; many viewed the decision as a kind of concession — Durant knew he couldn't win a championship and wanted to ride the coattails of a burgeoning super team — while others pointed out that it was wise to leave a mismanaged, incompetent team like the Thunder. But amidst the flurry of memes and Hot Takes, Durant suffered an even greater embarrassment when it turned out some of the accounts rushing to his defense were run by *Durant himself*.

Fake accounts like Durant's — known as "burners" or, more aptly, "sock puppets" — mask the true user, who wields them to manipulate the narrative and give the illusion of popular support. Online, sock puppets can be harmless — after all, Senator Mitt Romney's Twitter alias, "Pierre Delecto," accomplished little besides spark mild amusement.1 But when this tactic creeps into appellate practice via "puppet" amicus curiae briefs, it should raise alarm.

Courts across the country have expressed concern about "persons or groups masquerading as amicus curiae when they actually have an interest in the outcome of the litigation or close ties to one of the parties."2 Indeed, nothing in Washington's court rules would prevent a party's attorney from covertly authoring or funding an amicus brief as a way to submit improper additional briefing through a contrived intermediary. As the Seventh Circuit has noted, amicus briefs are sometimes used "to make an end run around court-imposed limitations on the length of parties' briefs."3

In some rare instances, parties have even sought attorney fees for work they performed drafting amicus briefs themselves or to reimburse fees they paid to amici.4 Imagine responding to amicus briefs in an appeal — incurring fees to your client — only to discover later on that the opposing party had solicited and subsidized those briefs all along; should you lose, your client might be on the hook not only for merits briefing fees, but also the amicus briefs' fees, too.

Thankfully, federal courts have rejected this practice. For example, in Glassroth v. Moore, the Eleventh Circuit remarked that while it is "no surprise" that a party might "solicit amicus briefs in support of their position" or even "have a hand in writing an amicus brief," these efforts "should not be underwritten by the other party."5 Washington courts, on the other hand, have not addressed the problem in a published decision. But, if given the opportunity, they would probably (hopefully) agree with the reasoning in Glassroth regarding a party's attorney fees incurred supporting amicus briefs.

But that would not resolve the broader question: what should be done about potential "sock puppet" amicus briefs, if anything? To what extent, and in what circumstances, should parties be allowed to contribute to amicus briefs?

A growing number of jurisdictions have addressed this problem by adopting rules "intended to prevent the courts from being misled about the independence of amici or being exposed to a mirage of amicus support that really emanates from [a party's] word processor."6 One state — Arizona — expressly prohibits a party from participating, requiring that amicus briefs "must be independent of any party to the appeal" and that "[c]ounsel for a party may not author an amicus brief in whole or in part."7

But a bright-line prohibition would be difficult to enforce, as aspiring amicus puppeteers could simply move into the shadows. More importantly, some collaboration between parties and amici is inevitable and might even be desirable. For example, Judge Richard Posner — a notorious amicus curiae antagonist — once lamented that "it is very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting."8 If parties are allowed to collaborate with amicus curiae, it would be less likely — at least, in theory — that courts would receive needlessly redundant amicus briefs. In fact, the federal appellate rule was amended specifically with collaboration in mind, granting amicus authors enough time "to review the completed brief of the party being supported and avoid repetitious argument."9

Thus, rather than prohibit collaboration altogether, other jurisdictions have adopted rules that require amicus briefs to disclose whoever contributed to writing or funding them. For example, the federal rule requires all amicus briefs to disclose whether "a party's counsel authored the brief in whole or in part," and to identify any person "other than the amicus curiae, its members or its counsel," who "contributed money that was intended to fund the preparing or submitting of the brief," including "a party or a party's counsel."10

Thirteen states have adopted similar rules requiring amicus briefs to disclose authors and financial contributors, though Washington is not among them.11 Some states require these disclosures in the application to submit an amicus brief,12 while others require the disclosure to be in the brief itself, usually in a footnote on the first page.13

These disclosure rules strike an appropriate balance by permitting collaboration between parties and amicus curiae while also requiring that any contribution — financial or otherwise — be transparent, ensuring that neither the courts nor other parties will be misled as to any amicus briefs' origin. Disclosing financial contributions is especially important as amicus briefs have proliferated and evolved to resemble political advocacy akin to "lobbying on behalf of the membership" of amici's constituent organizations.14

Washington practitioners should urge our courts to amend the appellate rules so that amicus briefs must disclose any contributing authors and outside financial contributions. Doing so will unmask potential "sock puppet" amicus briefs lurking in Washington courts and provide valuable transparency for other litigants and the public.

In the meantime, should you require any amicus curiae support, please consult my colleague and long-time collaborator, "Don Rollins,"15 or contact me via any of my many, many Twitter accounts.16

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1 See Allyson Chiu, 'C'est moi': Mitt Romney Admits to Running Secret Twitter Account Under the Alias 'Pierre Delecto,' Wash. Post, Oct. 21, 2019.

2 Helen A. Anderson, Frenemies of the Court: The Many Faces of Amicus Curiae, 49 U. Rich. L. Rev. 361, 401 (2015).

3 Voices for Choices v. Ill. Bell. Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003).

4 See, e.g., Glassroth v. Moore, 347 F.3d 916 (11th Cir. 2003).

5 Id. at 919. Some fees incurred due to collaboration with amicus curiae may be compensable, however. See Bishop v. Smith, 112 F.Supp.3d 1231, 1244-47 (N.D. Okla. 2015).

6 Anderson, supra at 401 (internal quotation omitted).

7 Ariz. R. Civ. App. P. 16(a).

8 Voices, 339 F.3d at 545.

9 FRAP 29, Advisory Committee Notes, 1998 Amendments, subdivision (e).

10 FRAP 29(a)(4)(E).

11 Arkansas, California, Connecticut, Iowa, Maryland, Massachusetts, Michigan, North Carolina, North Dakota, New Mexico, Pennsylvania, Texas, and West Virginia.

12 See, e.g., California Rule of Court 8.200(c).

13 See, e.g., Michigan Court Rule 7.212(H).

14 Anderson, supra at 379.

15 This is a joke.

16 See id.