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[www.harvardlawreview.org/forum/issues/119/aboutforum.shtml](http://www.harvardlawreview.org/forum/issues/119/aboutforum.shtml); [www.thepocketpart.org](http://www.thepocketpart.org); The Great Disappearing Act, 9 *GREEN BAG 2D* 3 (2005).

## Inamicable

**T**HE SUPREME COURT OF Illinois has revised its Rule 345 governing leave to file an amicus brief:

### **Rule 345. Briefs Amicus Curiae**

(a) Leave or Request of Court Necessary. A brief *amicus curiae* may be filed only by leave of the court or of a judge thereof, or at the request of the court. A motion for leave shall state ~~the reasons why a brief of an *amicus curiae* is desirable~~ the interest of the applicant and explain how an *amicus* brief will assist the court.

(b) Forms; Conditions; Time. A brief of an *amicus curiae* shall follow the form prescribed for the brief of an appellee, shall identify the *amicus* as such on the cover of the brief, and shall conform to any conditions imposed by the court. Unless the court or a judge thereof specifies otherwise, it shall be filed on or before the due date of the initial brief of the party whose position it supports. The color

of the cover shall be the same as that of the party's brief whose position it supports.

(c) Oral Argument. *Amicus curiae* will not be allowed to argue orally.

*Amended February 19, 1982, effective April 1, 1982; amended May 28, 1982, effective July 1, 1982; amended December 17, 1993, effective February 1, 1994, amended December 6, 2005, effective immediately.*

On the one hand, it is a sad comment on the state of amicus practice, at least before the Supreme Court of Illinois, that the court felt the need to promulgate a rule to explain that, to be “desirable” to a court, an amicus brief must explain (1) why the amicus is interested in the case and (2) what the amicus has to say that will assist the court.

On the other hand, it is a sad comment on the state of judicial posturing, at least in Illinois, that the state supreme court recently rejected an amicus brief by adopting a policy, as stated by an Illinois-based federal judge, that “[t]he fact that powerful public officials or business or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making, except in a few cases, of which this is not one, in which the position of a nonparty has legal significance.”

To suggest that courts, especially appellate courts and extra-especially supreme courts, do not care about the impact of their decisions on nonparties – or that judges on those courts are obliged to reject information about that sort of impact – is inconsistent with what judges write in many of the opinions in the state and federal reporters.

Without getting into all of the arguments for and against amicus briefs, we would ask the Illinois court the following questions:

- ◇ Do you apply the same standards to all amici, or is your hostility limited to “powerful public officials or business or labor organizations”?
- ◇ What is a sufficient “interest” in the case?

The rejected amicus brief, filed shortly after the amendment to Rule 345, stated that:

1. The Chamber [of Commerce] is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed amicus curiae briefs in numerous cases that have raised issues of vital concern to the nation's business community.
2. Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration. As a result, arbitration agreements, like the one at issue here, frequently preclude the parties from seeking to arbitrate their disputes on a classwide basis.
3. The court below purported to apply Illinois "unconscionability" principles to invalidate a class action waiver in an arbitration provision that is employed by thousands of businesses in a variety of fields. Intrusion into the private contracting process is of great concern to the Chamber; many of whose members have implemented or are planning to implement arbitration programs in reliance on the heretofore settled premise that arbitration agreements governed by the Federal Arbitration Act will be enforced as written. Because the decision below would wreak havoc with countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong

interest in having its views on the validity of these provisions considered by this Court.

It is hard to imagine an interest (at least of the commercial sort) that could be more substantial without being the interest of an actual party.

If the intention of the court is to exclude all amici who are not also parties – that is, if the purpose is to ban amicus briefs – then why not just say so? Perhaps because most reasonable lawyers and judges (albeit only the fallible, less-than-omniscient ones) recognize that it is rarely possible to predict whether a particular proposed amicus brief will add value. Sometimes an amicus brief is useful to a judge, whether he or she is speaking for a majority or a minority. Among recent cases, *Grutter v. Bollinger* and *Castle Rock v. Gonzales* in the Supreme Court of the United States come immediately to mind. So why preemptively reject them?

Perhaps the Illinois Supreme Court should consider one more amendment to Rule 345? Add a paragraph that reads as follows:

If an applicant's interest in a case is that the court's decision may affect it or its members, but the applicant has nothing substantial to add to the legal arguments of the parties, then the applicant must say so. Any brief filed by such an applicant must be limited to an explanation of its interest and a clear and detailed specification of the potential impact of the decision on it or its members. An amicus and its counsel who lard its brief with legal arguments duplicative of those made by the parties may be sanctioned and ordered to pay to the parties the reasonable costs incurred as a result of that brief.

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*Kinkel v. Cingular Wireless, L.L.C., No. 100925 (Ill. Jan. 11, 2005) (order denying leave to file amicus brief by the U.S. Chamber of Commerce); [www.state.il.us/court/SupremeCourt/Rules/Art\\_III/ArtIII.htm#345](http://www.state.il.us/court/SupremeCourt/Rules/Art_III/ArtIII.htm#345).*

