Amicus curiae:

Friend of the court … to befriend the Crown?

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For the late Keith M. Landy, an advocate for many, an *amicus* to me.

For all its strengths, our adversary system has its shortcomings. Since the parties control the presentation of their case, if a fact or law is not in a party's interest to bring up, the judge may never hear of it, however relevant it may be.

To overcome this shortcoming, the court can, in exceptional circumstances, summon the assistance of an *amicus curiae*. The purpose of an *amicus curiae*, Latin for "friend of the court," is to inform and advise the judge of factual or legal matters that might otherwise escape consideration, so as to minimize the risk of error in judgment. As Justice Kozak explained:

> An amicus curiae, properly so called, is a person or bystander, usually a lawyer, who has no interest in the proceedings and intervenes simply to call the attention of the Court to some point in law or fact which escaped its notice. Once a lawyer has been instructed by a client his appearance, on behalf of the latter, cannot be as amicus curiae …[1]

History of *amicus* appointments

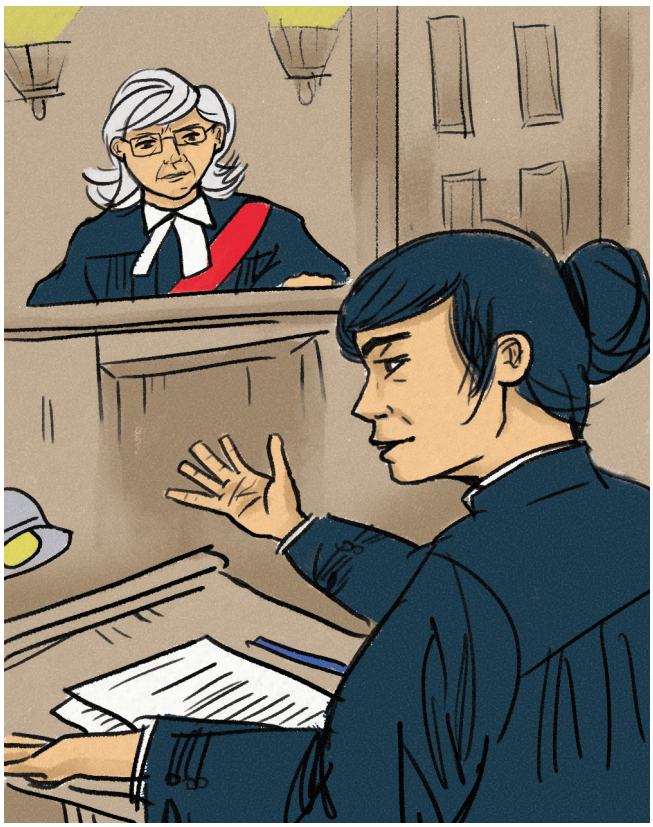
The practice of appointing *amicus curiae* goes back a long way. It has been reported in cases as early as 1353,[2] at a time when an accused had no right to counsel and bystanders intervened to assist the court since the accused might otherwise be helpless. By some accounts, the *amicus*'s origins trace back even earlier, to the Roman practice of appointing a consilium of independent advisors to advise judges, who were not legally trained and, thus, could benefit from the assistance.[3]

While modern-day judges are highly trained and versed in law, the institution of *amicus curiae* did not fade away. The need for *amicus* persisted because our system of justice remains as much of a process of partisan combat as ever. As far as the parties in a civil dispute are concerned, victory, not truth-finding, is the goal. They are expected to present only such evidence and arguments as necessary to win. Judges, for the most part, are at the parties' mercy in terms of what they get to see and hear. When one or both sides are lacking in means or skills to adequately pitch their case, the court may need to enlist a friend to help it reach a correct disposal. The power to do so is grounded in the inherent jurisdiction of superior courts, and for statutory courts, in their authority to control their own process.[4]

Morwald-Benevides v. Benevides breaks fresh ground

As with many judicial tools, *amicus* appointments have evolved over the years.[5] Most recent in the process is the Court of Appeal for Ontario's decision in *Morwald-Benevides v. Benevides* ("*Benevides*"),[6] released September 12, 2017, which ushered in two notable changes to *amicus* appointments.

First, *Benevides* broke fresh ground in appointing *amici* to act for each of the parties in a civil proceeding. In the context of a complex



custody battle, the trial judge appointed an *amicus* for the mother after she had discharged five lawyers and collapsed in the courtroom on the first day of trial. She was emotionally distraught and, as the trial judge reasoned, "needed a buffer. *Amicus curiae* was the solution."[7] Then, when the father's lawyer sought to withdraw because of unpaid fees, the trial judge called on her to continue as *amicus* for the father in order to avoid a lopsided situation.[8]

Should an *amicus* be tasked to advocate?

The appointment of *amici* as counsel for parties jars with the traditional role of the *amicus* as an independent, non-partisan advisor to the court. The duties of the two inherently conflict.

The *amicus* serves to protect the court's honour. He is bound by a duty of loyalty to the court, not to the parties in the dispute. His "sole 'client' is the court."[9] He does not take instructions from anyone else, and there is no solicitor-client privilege.[10] Impartial to any side in the proceeding, an *amicus* will not urge a particular outcome. As with the judge, the *amicus*'s only interest lies in pursuing the truth and ensuring a fair trial and credible justice. To this end, he is obliged to bring all pertinent points of fact or law to the court's attention,

even if they are against a litigant's interest.

By contrast, an advocate must advance her client's position by all lawful means. It is not her responsibility to bring to light the whole truth, nor to vouch for victory going to the party in the right. Indeed, the advocate's responsibility to maximize her client's likelihood of prevailing may pull her in the opposite course: to not introduce relevant evidence that is adverse to her client, and to impeach truthful witnesses whose testimonies hurt her client's case. As Justice Rehnquist of the United States Supreme Court put it:

> Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional proprietary, causing delay and sowing confusion not only are his right but may be his duty.[11]

To require an *amicus* to step into the shoes of an advocate, as the court did in *Benevides*, may render the *amicus* neither very successful as an *amicus* nor effective as an advocate. The lack of client confidences between *amicus* and party illustrates the point. A lawyer's ability to effectively advocate on behalf of a party hinges on being fully informed about the facts of a case, the good and the bad. It is the rationale behind solicitor-client privilege.[12] The relationship between a litigant and her *amicus*-advocate, however, is not protected by privilege. Without an assurance of confidentiality, the litigant will be hesitant to make a clean breast of the facts to the *amicus*, hampering the *amicus*'s advocacy and usefulness to the court.

The duties of *amicus* and advocate collide head-on when an *amicus* assigned to function as advocate is aware of facts or legal arguments unfavourable to the party for whom she acts. Is she to bring up those facts and arguments, or keep silent because she has been instructed by the court to play advocate?

Imagine, for example, the *amicus* appointed to act for the mother in *Benevides* learns from the mother that she had neglected her children on one prior occasion unbeknownst to anyone else. This fact is relevant to the best-interest test for the children that the court must determine, but the court would not know about it unless the *amicus* discloses it. Arguably, an *amicus*'s overriding duty to the court compels disclosure. Yet such disclosure prejudices the mother and undermines the partisanship that turns the wheels of our adversary system. The adversary system is effective in teasing out the truth only if each side lives up to the task of presenting their own best cases, and slaying their opponents'.

Where an *amicus* had initially been counsel for a party, as was the case in *Benevides*, the lawyer's professional integrity may be compromised. Suppose, in the above scenario, that the *amicus* learned of the prior event of neglect while the mother was still her client. Since the duty to maintain confidentiality is "permanent"[13] and continues after the retainer ends, she would be breaching her duty to the mother if she divulges the fact for the benefit of the court – her current "client" – in deciding the case. What is more, unless her former client, the mother, consents, the rule prohibiting lawyers from acting against former clients may be contravened. Rule 3.4-10 of the *Rules of Professional Conduct* provides:

> Unless the former client consents, a lawyer shall not act against a former client in
> (a) the same matter,
> (b) any related matter, or
> (c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.[14]

Situations like this one leave the *amicus*-advocate in an extremely difficult position because the court's interest in pursuing the truth, and that of the mother in victory for herself, do not necessarily align. It begs the question: Should different rules of conduct apply for *amicus* acting as advocate? Unless and until professional conduct rules are clarified, lawyers should not be called upon to perform a function that leaves them wading in professionally murky waters.

Tasking an *amicus* with an advocacy role also compromises the court's impartiality. An essential element of our adversary system is an impartial decision-maker. Without it, our system would not be regarded as "fair." Impartiality requires that judges apply the rules of the contest even-handedly and not become advocates for the parties, even when one side is represented and the other is not. Yet when a judge assigns an *amicus* for a party, she is indirectly – through the court's counsel – providing legal and strategic advice to litigants, something she is not to do directly.[15]

Friend of the court to befriend the Crown?

The second change that *Benevides* spurred is to vest the Crown with greater control over who judges can call upon as *amici curiae* to inform and advise them.

In *Benevides*, the two *amici* appointed by the trial judge were not prepared to accept legal aid rates. Rather than negotiate remuneration, the Attorney General moved to set aside their appointments. Siding with the Attorney General, the Court of Appeal remitted the matter back to the judge below to select an *amicus* from the three candidates proposed by the Attorney General.

If there is truth in the maxim "you get what you pay for," then the judiciary's ability to appoint qualified counsel as *amicus* is significantly hamstrung when the Attorney General has unilateral control over *amicus* remuneration and can cap it at legal aid rates, or less. The difference between legal aid rates and private rates is almost threefold. Pursuant to Ontario's legal aid tariff, a lawyer with 10 or more years of experience is paid $136.43 an hour. By comparison, the average hourly rate for 10-year calls in the private sector is $383.00, and it trends up with additional years of experience.[16] Lawyers are financially discouraged from acting as *amicus*, and many may decline.

Where a judge's counsel of choice is not willing to work at the legal aid rate, the judge is left to make a Hobson's choice: either she accepts a candidate put forward by the Attorney General or she forgoes having the services of an *amicus* altogether. While it is not the case at present, *Benevides* leaves the door open for the Attorney General to fix the rate of compensation exceedingly low – even lower than legal aid rates – thereby winnowing the judge's selection to a few whose quality or independence from the Crown is questionable.

Such a result would jeopardize both the separation of powers between the executive and judicial branches and the institutional independence of the judiciary. Requiring a judge to choose an advisor from candidates shortlisted by the Attorney General is to introduce executive influence, tipping the balance of powers. An advisor to the judge who is inadequately paid may be prone to temptation. All of which mars public confidence in the administration of justice. As Justice Fish portended in *Ontario v. Criminal Lawyers' Association of Ontario*, "[I]f the Crown were permitted to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the 'expectation … of give and take' might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General."[17]

With the shifts in the tides that *Benevides* swept in, the *amicus curiae* may sooner turn a friend of the Crown.

Notes

1. *Nakonagos v Humphrey*, [1996] OJ No 2002 (Gen Div) at para 24. See also *Grice v The Queen* (1957), 11 DLR (2d) 699 at 702.
2. Ernest Angell, "The Amicus Curiae American Development of English Institutions" (1967) 16 Int'l & Comp LQ 1017.
3. S Chandra Mohan, "The *Amicus Curiae*: Friends No More?" 2010 Sing J Legal Stud 352 at 362–64; Frank M Covey, Jr, "*Amicus Curiae*: Friend of the Court" (1959) 9 DePaul L Rev 30 at 33; Samuel Krislov, "The *Amicus Curiae* Brief: From Friendship to Advocacy" (1963) 72 Yale LJ 694.
4. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 12.
5. The development of the law related to *amicus curiae* by and large happened in criminal cases.
6. 2017 ONCA 699.
7. *Morwald-Benevides v Benevides*, 2015 ONCJ 532 at para 68.
8. *Ibid* at paras 85–87. A potential alternative solution to appointing an *amicus curiae* for each party in the custody proceedings was for the court to exercise its *parens patriae* jurisdiction and appoint a lawyer for the children.
9. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 118.
10. *R v Samra*, [1998] OJ No 3755 (CA).
11. *Walters v National Association of Radiation Survivors*, 473 US 305 (1985).
12. *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 13,
13. *Lizotte v Aviva Insurance Company of Canada*, [2016] 2 SCR 521 at para 22.
14. The commentary to s 3.4 of the *Rules of Professional Conduct* further cautions, "Lawyers also have a duty not to act against a former client in the same or a related matter *even where the former client's confidential information is not at risk*." [Emphasis added.]
15. *Supra* note 9 at para 54.
16. Michael McKiernan, "The Going Rate," *Canadian Lawyer Magazine* (June 2016); online: <http://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_June_16-Going%20Rate.pdf>.
17. *Supra* note 9 at para 125.