

Legal Analysis

Amicus Participation in Trial Courts: Navigating Uncharted Territory

by *Drew Dulberg and Amanda Baird*

Much has been written about amicus practice in appellate courts. It is an important aspect of appellate practice nationally and here in Massachusetts. Indeed, the Supreme Judicial Court actively [solicits amicus participation](#) in many of the cases on its docket.

Of course, amici can also add value to cases in trial courts, yet their participation in trial court proceedings is both relatively infrequent and often accompanied by questions for which clear answers cannot be found in the Commonwealth. Are amici permitted to file memoranda in trial court proceedings? Who grants permission? Are there page limits or word counts? Can they participate in argument? To be sure, not every trial court case is appropriate for amicus participation, but there are many in which amici can meaningfully contribute and make a difference. This article briefly discusses the benefits of amicus participation in trial courts and proposes that the courts provide written guidance—a rule, standing order, or other advice—that spells out the terms and conditions to govern amicus participation.

Value Added by Amici

Good amicus briefs contribute to the development of the law and the administration of justice.ⁱ They can benefit courts, parties, and, of course, the amici themselves. Courts benefit from having a more robust exposition of the issues and a broader array of perspectives; parties welcome the assistance a supportive amicus provides; and amici benefit from putting before the court information that will protect and advance their own interests. Good amicus briefs can offer a unique perspective on a legal issue or policy, insight and expertise not possessed by the parties in a specialized field, information not otherwise readily available to the parties or the court, or analysis of the broader implications of the court's decision beyond the parties.

In addition to filing helpful briefs, amici can offer benefits in other ways. Federal appellate courts and the Supreme Judicial Court (“SJC”) occasionally grant amici leave to present oral argument alongside the parties. While this is relatively rare in trial courts, it does happen. In one recent federal case we tried, amici were permitted to go even further. In addition to filing briefs and affidavits and arguing on certain dispositive pretrial motions, two sets of amici—a group of prospective and current students at Harvard College and a collection of more than two dozen student and alumni associations—were allowed to testify at trial, submit proposed findings and rulings, and present opening and closing arguments at trial.ⁱⁱ The judge's decision even relied in part on the evidence adduced by the amici. While this amount of amici involvement is unusual, it illustrates the potential of amicus participation in the trial courts. And there are many other instances where amici were permitted to do more in trial courts than simply file briefs.ⁱⁱⁱ

The Dearth of Guidance on Trial Court Amicus Practice

In appellate courts, where amicus participation is plentiful, the rules for filing and participating are clear. In general, there are rules that spell out in some detail the applicable procedures, such as the timing of amicus briefs, the required contents and disclosures, and the circumstances in which amici may participate in oral argument.^{iv} Not so in trial courts.

While our firm has filed amicus briefs in trial courts across the country, we have yet to encounter any uniform rules or standing orders for doing so. We are not alone. Others have written on this subject, noting the lack of uniform guidance from trial courts on amicus practice. For example, a *New York Law Journal* article cited only one such rule on point—Local Civil Rule 7(o) of the District of Columbia district court—and a few federal district court decisions that mentioned amicus submissions in their courts (with apparently differing attitudes toward their receptivity). The authors observed that individuals and organizations wanting to become amici “are generally left to consider a hodgepodge of local practices and guidance that vary by the district and even by the individual district judge.”^{v,vi} Our experience—both as authors of amicus briefs, solicitors of amicus briefs, and recipients of requests by third parties to participate in our cases as amici—is the same.

Specifically, we are not aware of any rules, orders, or other guidance that govern trial court amicus practice in Massachusetts. Whether an amicus will be permitted to file a brief in a trial court here—not to mention other forms of amicus participation—depends largely on the individual, unwritten preferences of each judge and the parameters they choose to set in their discretion. Attorneys must navigate their way through this uncharted territory on a case-by-case basis and keep their fingers crossed.

Advantages of Having Guidance from the Trial Courts

Having written rules for trial court amici would be helpful for the bar, parties, amici, and the courts.

First, written guidance would inevitably increase awareness among attorneys, parties, and potential amici of the possibilities for amicus participation in the trial courts, and increased awareness of those opportunities could in turn encourage amici to become involved. Without some sort of rule or order, however, parties and potential amici may be left with the mistaken belief that amicus involvement is not permitted or, at least, not welcome. Simply knowing that a judge might, in their discretion, theoretically grant leave for amici to participate is not enough. Without the certainty of a rule or order, amici understandably may be reluctant to invest time and resources preparing a brief.

Second, an individual or organization wishing to participate as an amicus would have a roadmap to follow. Currently, potential amici are essentially left to guess whether a particular judge would be receptive to their participation. A standardized rule or order, or other written guidance, would provide direction, set expectations, and assure the amicus that, if they do commit their time and resources to preparing a conforming brief, they are unlikely to be rejected.

Third, with written guidance, trial courts can impose some uniform control over the terms and conditions for amicus participation. In the appellate courts, for example, rules require that an amicus disclose if their brief has been written or paid for, in whole or in part, by one of the parties or their counsel, or if the amicus or their counsel has other close connections to the parties or the case.^{vii} This helps to ensure that the amici are sufficiently independent of the parties. Appellate rules also impose timing requirements, page limits, and other criteria for amicus briefs. All of this is helpful and would foster efficiency and certainty in the trial courts.

Finally, having a trial court rule or order on amicus participation might also benefit the appellate courts. When amici become involved in a case for the first time on appeal, there often is concern about whether the information and arguments they present impermissibly exceed the trial court record. The introduction of new arguments or factual information on appeal—e.g., in the form of studies, data, or affidavits attached to an amicus brief—can be especially difficult for an appellate court to assess.^{viii} Having greater amicus involvement in the trial court, particularly in cases that are novel, complex, or have important public policy ramifications, could help avoid this issue. A more fully developed trial record, where amici arguments and information are vetted alongside the parties' arguments in the first instance, may lead not only to more informed trial court decisions but also better records on appeal.

Proposed Guidance

The guidance we propose is something we invite the Massachusetts trial courts and the District of Massachusetts to consider on an experimental basis. At the state-court level, we believe it could be especially helpful in the Superior Court's Business Litigation Session, given the novelty, complexity, and public importance of many of the cases that arise there, and the resources available to amici organizations that may be drawn to those cases. Guidance for amici could also be helpful in courts of specialized jurisdiction, such as the Land Court, Housing Court, Probate and Family Court, or Juvenile Court, where specialized bar associations and industry and advocacy organizations have considerable expertise to offer in their respective areas.

The guidance could take the form of a court rule or standing order. A standing order might be preferable because it could be tailored to each court and adopted (and, if necessary, amended) more quickly and easily than a rule, perhaps as a temporary pilot project to give the court an opportunity to assess its worth and fine-tune the guidance before adopting it permanently. The Business Litigation Session has previously used pilot projects to experiment with changes to the discovery process,^{ix} and has occasionally issued formal guidance and procedural orders,^x in addition to sharing individual judges' preferences in the BLS Bench Notes.

Whatever form it takes, in addition to other considerations and requirements the court considers necessary or desirable, the guidance could include:

- an acknowledgment of the potential benefits of amicus involvement and an indication that the court is willing to permit amicus participation in appropriate circumstances;
- the stages of a case when the court might be willing to entertain amicus participation (e.g., pretrial, dispositive motions, trial, all stages);
- the extent to which amici can participate (e.g., briefs only, oral argument, other);
- the process by which prospective amici can obtain the court's approval to participate (e.g., motion for leave), the showing the amicus must make, and the general considerations the court will take into account in deciding whether to permit amicus involvement (including whether the parties have an opportunity to assent or object);
- whether, [as in appellate courts](#), the Commonwealth and its officers and agencies may participate as amici as a matter of right, or instead must seek leave;
- for amicus briefs, the time for filing the briefs and the page or word-count limits (e.g., full length or a fraction of what parties are permitted to file);
- the requirement, [as in appellate courts](#), for making a corporate disclosure and identifying the amicus and its interest in the case;
- the requirement, [as in appellate courts](#), for disclosing any party's involvement in writing or funding the amicus brief or the amicus's other connections to the parties or to the case;
- whether the court permits an amicus letter or memorandum in lieu of a complete brief, as is the unofficial practice in the SJC;
- other requirements for content and format of the brief; and
- filing and service requirements.

Conclusion

Our SJC leads the way among state appellate courts in welcoming amicus briefs. So, too, should Massachusetts trial courts and the District of Massachusetts consider leading by welcoming amicus participation at the trial-court level. To accomplish that, we urge our trial courts to provide much-needed guidance to the bar, parties, and potential amici, about the terms, conditions, and processes by which amici can participate. We are ready, willing, and able to work with our colleagues in the bar and with the courts to draft appropriate guidance for any court that wishes to formalize involvement of amici in our trial courts.

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I. For an excellent discussion of the many ways in which amici can add value to cases, both in appellate courts and in trial courts, see Joanne D'Alcomi, "*Role of the Amicus*," in *Appellate Practice in Massachusetts* (Neal Quenzer & Hon. Peter Sacks eds., MCLE, 5th ed. 2024).

II. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 1:14cv14176 (D. Mass.).

III. See § 17.5.1 of *Appellate Practice in Massachusetts*, *supra* note 1, for a comprehensive collection of examples of trial court cases in state and federal courts in Massachusetts where amici were given "enhanced amicus" or "amicus-plus" status and thus permitted to transcend the more typical role of filing briefs only.

IV. See [Sup. Ct. R. 37](#), [Fed. R. App. P. 29](#), and, in Massachusetts, [Mass. R. App. P. 17](#). See also the Supreme Court's "[Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States](#)" (Jan. 1, 2023).

V. Akiva Shapiro, et al., [Tips for District Court Amicus Brief Success](#), N.Y.L.J. (Dec. 24, 2020). In March 2021, the authors submitted a proposed rule to the Federal Advisory Committee on Civil Rules that would have standardized amicus practice in all federal district courts. The proposal has not been adopted.

VI. One judge's order in particular caught our eye. On March 21, 2023, a federal district judge in Arkansas, Hon. Lee P. Rudofsky, issued an "[Order on Amicus Briefs](#)" to be entered on the docket of every pending and future case to which he was and will be assigned. The order identifies the advantages of good amicus involvement, sets out terms and conditions on which amici can participate in his court, and notes the opportunity that amicus representation provides for young attorneys to gain valuable experience. His order also creates an unusual opportunity for young lawyers who file amicus briefs: "Anyone who is the principal drafter of an amicus brief on either a dispositive motion or a motion for preliminary relief in one of my cases will be guaranteed at least ten (10) minutes of oral argument time so long as the person has been a lawyer for fewer than seven (7) years."

VII. See [Mass. R. App. P. 17\(c\)\(5\)\(A\)-\(C\)](#); see also [Sup. Ct. R. 37.6](#) & [Fed. R. App. P. 29\(a\)\(4\)\(E\)](#).

VIII. The SJC, for example, generally declines to consider an argument raised by an amicus that is not made by the parties. E.g., *Commonwealth v. Dustin*, 476 Mass. 1003, 1003 n.2 (2016). But whether an amicus's argument is "sufficiently related" to arguments made by the parties, and whether other circumstances warrant consideration of an amicus's position, see *Bongaards v.*

Millen, 440 Mass. 10, 19 n.6 (2003), are questions that can create uncertainty at the appellate level. In contrast, the Supreme Court appears to have no trouble considering, and relying upon, arguments and factual material raised solely by amici. *See, e.g., Garland v. Cargill*, 602 U.S. 406, 416-21 & n.3 (2024) (relying upon amicus’s diagrams of the trigger assembly of an AR-15 rifle in concluding that a “bump stock” does not convert a semiautomatic rifle into a “machine gun,” and thus a federal agency may not ban the device).

IX. *See, e.g.,* [BLS Pilot Program](#).

X. *See* [Superior Court Business Litigation Session Procedural Orders and Formal Guidance](#).