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Crafting helpful *amicus* filings in the Supreme Court of Illinois pursuant to Illinois Supreme Court Rule 345

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This article discusses the role of *amicus curiae* briefs in light of the Illinois Supreme Court's function in the development of Illinois' jurisprudence. It begins with a discussion of the function of the Supreme Court after the adoption of Article VI of Illinois' 1970 Constitution. Thereafter, the article discusses the guidance the Supreme Court has provided by rule and commentary regarding the filing of *amicus* briefs. Finally, suggestions are offered for filing effective *amicus* briefs in ways the Court may accept.

One of the Supreme Court's chief functions is to set legal precedent in the State of Illinois. Every year the Court receives thousands of petitions for leave to appeal complaining of still thousands more errors of every variety. However, granting a petition is a matter within the Court's sound discretion, and the cases that most greatly deserve its attention are not the cases that will have little to no future precedential effect. Those cases have already had the full attention of Illinois' trial and appellate courts.

What the Supreme Court intends to resolve are cases that will affect the state's jurisprudence and Illinois' citizens as a whole. The Supreme Court's role is to rule on the constitutionality of issues great and small, to resolve appellate district splits that have confounded litigants and attorneys, to decide the meaning of statutory language, and to help develop the common law in the state.[1] One former Chief Justice, Robert Underwood, commented that the Court's primary function should be to take cases "because of their significance to the state as a whole."[2]

Another former Justice, S. Louis Rathje, echoed the dictates of Rule 315 which governs petitions for leave to appeal, stating that the Court will allow such petitions only under certain circumstances: to resolve conflicts; where its supervisory authority is needed to maintain the integrity or operation of the judicial system; and where the question presented has general importance.[3] Justice Rathje stated that an attorney considering invoking the general importance of the question presented must ask whether anyone other than the parties to the case will care about its outcome.[4] If the answer is "no," the case has little chance of gaining the Court's attention. But, "if the answer is a resounding 'yes,' then the case likely represents the type of case the Illinois Supreme Court will review."[5]

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Amicus filings that keep the Court's role in mind and which focus on showing what effect the Court's decision will have on Illinois law as a whole, are useful. In some instances, the direct parties to a case do not have the time, space, or broader perspective necessary to speak to the long-term and wide-ranging impact a decision might have. Done correctly, *amicus* filings can fill that gap and provide helpful insight on the issues.

The remainder of this article will review the mechanics of the Supreme Court's Rule on *amicus* filings, offer suggestions on how best to craft an *amicus* filing in support of a client, and consider whether such a filing is appropriate at the petition for leave to appeal stage.

A. Rule 345 and *Kinkel v. Cingular Wireless*

Illinois Supreme Court Rule 345, titled "Briefs *Amicus Curiae*," provides that "[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," and notes that "[a] motion for leave must be accompanied by the proposed brief and shall state the interest of the applicant and explain how an *amicus* brief will assist the court."[6] The Rule sets out several more technical requirements including that an *amicus* brief should conform to the rules for an appellee's brief and any other conditions imposed by the Court, identify the *amicus* on the cover, and be filed on or before the due date of the brief (as well as have a cover that is colored the same) as that of the party whose position it supports.[7] Finally, the Rule states that "[*a*]*micus curiae* will not be allowed to argue orally."[8]

The above requirements are straightforward. The procedural mechanics of filing an *amicus* brief are roughly the same as those for filing a typical brief to the Court found in Rule 343. The key addition is the necessity of

a motion for leave to file which explains the *amicus'* interest as well as why its brief will assist the Court. The question, then, is what type of argument by *amici* the Court would find acceptable. Fortunately, the Court has provided some insight on this issue.

In *Kinkel v. Cingular Wireless, L.L.C.,*[9] the Supreme Court—prior to issuing its opinion in that matter—entered an Order denying a motion for leave to file an *amicus* brief, the third such motion from the same proposed *amicus*.[10] Notably, the motion was filed one day after amendments to Rule 345 became effective which made clear that a motion for leave to file an *amicus* brief *must* state the interest of the applicant and explain how its *amicus* brief will assist the Court.[11] While the Court ultimately denied the *amicus* leave to file its brief, in doing so, it provided guidance for future *amici* to follow.[12]

The Court noted that "[b]y definition, an *amicus curiae* is a friend of the Court, not of the parties."[13] The Court indicated that allowing an *amicus* filing is discretionary and a matter of "judicial grace," thereby requiring leave before such a brief may be filed.[14] Citing the Seventh Circuit, the Court stated that in deciding whether to accept an *amicus* filing, it "must consider whether the brief will provide it with ideas, arguments, or insights helpful to resolution of the case that were not addressed by the litigants themselves."[15]

The Court noted that *amicus* briefs which merely restate the arguments of the principal parties are of no benefit to the adversarial process and only add an unnecessary burden to the time and resources of both the Court and the parties.[16] The Court explained that such briefs may represent an "improper attempt" to inject interest group politics in the appellate process or to circumvent the Court's rules on page limitations.[17]

With these concerns in mind, the Court described several instances when an *amicus* brief would be appropriate including: "(1) when a party is not competently represented or not represented at all; or (2) when the would-be *amicus* has a direct interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata,* materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court beyond the help that the lawyers for parties are able to provide."[18] The Court stated that while these criteria were non-binding, "we consider them a useful guide in assessing the propriety of *amicus* briefs submitted to us under Rule 345, as amended."[19]

Putting these principles into practice, the *Kinkel* Court denied the proposed *amicus* leave to file its brief. While it had no doubt of the sincerity of the *amicus*' concerns regarding the case or its description of the potential ramifications for its members, the Court determined that the *amicus* brief "provide[d] no significant insights into the merits of the case beyond those offered by able counsel" for the party it sought to support.[20] The Court stated that the proposed brief filled "no analytical gaps" and provided no "tangible examples of how the appellate court's decision" actually affected the interests the *amicus* represented.[21] In the Court's view, the proposed brief offered "nothing more about the case except how the [*amicus]* believes it should be resolved," an insufficient basis to warrant participation.[22]

One important aspect of the *Kinkel* Order is its discussion of the propriety of filing an *amicus* brief in support of a petition for leave to appeal. The Court noted that the *amicus* in *Kinkel* originally filed its motion for leave to file its brief in connection with a petition for leave to appeal.[23] The Court stated that this original motion was denied because "our rules do not authorize *amicus* filings in support of petitions for leave to appeal."[24] It also pointed out that "in accordance with [ ] established policy," its denial was without prejudice to the *amicus'* ability to file a renewed motion for leave to file should the petition for leave to appeal be granted.

B. Crafting a helpful amicus filing

As noted in the *Kinkel* Order, at least three situations are appropriate for *amicus* filings: where competent counsel is not already involved in an appeal; where *stare decisis* or *res judicata* is at play; or where the *amicus* has a unique ability to assist the Court in a way that the parties cannot. The first two situations are relatively clear. That said, they provide only a limited avenue for potential involvement. It is rare, for example, for a case to reach the Illinois Supreme Court involving incompetent counsel, let alone an unrepresented party. Likewise, it is relatively rare for a party to have a direct interest in a case which would be affected by *stare decisis* or *res judicata*. If those situations arise, any potential *amici* will have a strong case for involvement. The majority of filers, though, will have to look to the third category in order to make their case—they must provide a unique perspective or information that can assist the Court in ways the parties may not.

As an initial step, a potential *amicus* should consider how its brief can assist the Court rather than simply support a particular party. Because *amicus* opportunities tend to arise in situations where a party actively seeks additional helpful involvement or a particular interest group is carefully watching for cases that might affect its interests, potential *amici* are almost always heavily invested and interested in supporting one outcome or another. When these *amici* hire counsel to craft an *amicus* brief, they rightly expect their brief to reflect their interests. The goal, then, is to accomplish this task in a way that avoids partisanship.

A successful *amicus* brief will not simply explain and reiterate that a particular outcome is warranted for all the reasons already described in the brief filed by the party it seeks to support *and* because the *amicus* agrees with that position as well. Instead, it has to provide something more to aid the Court in its analysis. While there is no one way to provide this additional help, several approaches are possible.

In a case causing a detrimental effect on a particular business or type of business, potential *amici* may be able to show that a similar detrimental effect will ultimately be felt in other types of businesses or by the Illinois business community as a whole. In such situations, as *Kinkel* suggested, the potential *amicus* should carefully set out tangible examples of how a particular decision will affect its interests. Potential *amicus* might accomplish this through citations to past examples, scholarly articles and studies, decisions in other jurisdictions, or even newspaper articles.

Oftentimes, potential *amicus* can assist the Court through a detailed and in-depth knowledge of how particular outcomes or decisions have played out in the past. *Amicus* briefs are commonly filed by state or nationwide associations or organizations representing relatively well-defined interests. By virtue of their long-term involvement in support of their interests and memberships, these groups often have the historical or broader based knowledge to file a brief that can explain historical or extra-jurisdictional examples. The parties to a case, by contrast, simply may not have the background or broad knowledge and historical perspective

necessary to make such points.

A third more general path to helpful *amicus* involvement is to attempt to show how the outcome of a case may affect Illinois, its citizens, or its jurisprudence. If an *amicus* is able to show how the Court's decision has the potential to affect the law in Illinois in ways that have not previously been anticipated or described by the parties to a case in filings before the trial or appellate courts, such a situation calls out for *amicus* involvement. As described above, the Supreme Court specifically intends, among other things, to decide and resolve cases that will have an impact in the future and on parties other than those directly involved. The parties to a case, and the Court itself, cannot anticipate all of the potential ramifications of a particular decision. If a potential *amicus* can help in that regard, the Court is likely to look favorably on its involvement.

Importantly, *amicus* should also remain mindful that "an *amicus* takes the case as he finds it, with the issues framed by the parties."[25] In other words, while a helpful *amicus* brief needs to add something to aid the court rather than merely reiterate the position of the party which it supports, such a brief also must carefully avoid raising new issues. In situations where the Supreme Court feels that an *amicus* has gone too far by attempting to add new issues to a case, it will decline to address the issue or strike it from the *amicus* brief altogether.[26]

C. Should an *amicus* file at the petition for leave to appeal stage?

In some cases, a potential *amicus* is interested in filing a brief at the petition for leave to appeal stage, before the Supreme Court has decided to take the case in the first place. While this is commonly done before the United States Supreme Court, the Illinois Supreme Court has taken a different approach. Here again, *Kinkel* provides insight and guidance.

The Supreme Court Rules do not provide specific procedures for an *amicus* brief in support of a petition for leave to appeal. Nothing in the rules explicitly permits or prohibits such a filing. Rule 345 represents the only discussion of *amicus* briefs in the rules and it is focused, by its language, on briefs in support of pending appeals. For example, the Rule provides that an *amicus* brief should follow the format of an appellee's brief.[27] Likewise, the Rule states that *amicus* briefs shall be filed "on or before the due date of the initial brief of the party whose position it supports."[28] A petition for leave to appeal, though, is not a "brief" and the Court's Order in *Kinkel* makes clear that its omission of any guidelines for *amicus* participation in the petition for leave to appeal process is no accident. As noted, *Kinkel* specifically states that the Supreme Court Rules "do *not* authorize *amicus* filings in support of petitions for leave to appeal."[29]

Kinkel's pronouncement on this issue suggests that filing an *amicus* brief in support of a petition for leave to appeal will have no affect on the petition's potential for success. The Rules simply do not allow for such a filing. *Kinkel* also provides, however, that while a motion for leave to file an *amicus* brief in support of a petition for leave to appeal will be denied, the Court's current practice is to deny such motions without prejudice to a renewed request should the petition for leave to appeal be granted. This caveat is important and might have strategic import.

In some instances, a potential *amicus* may want to file for leave to submit a brief in support of a petition for leave to appeal as a means to focus the attention of its constituents or members on a particular case of great importance, better prepare itself for a potential *amicus* filing if the petition for leave to appeal is granted, and have a draft of such filing written and prepared should it become necessary. It could be, for example, that the filing and publication of a motion for leave to file an *amicus* brief in support of a petition for leave to appeal, even if certain to be denied, may allow a proposed *amicus* to better marshal its arguments and resources on the chance that the petition for leave to appeal is later granted.

Further, even the very publication of a proposed *amicus* brief itself may have a benefit the potential *amicus* is interested in, regardless of whether the Court ever even reads the brief. Indeed, Justice Antonin Scalia and Professor Bryan Garner, after noting that most judges rarely read all the *amicus* briefs that come across their desks, noted that:

> [p]erhaps the most common purpose [of *amicus* briefs], is to enable the officers of trade associations to show their members that they are on the ball. To achieve this end, it really does not matter what the *amicus* brief says. It can track the party's brief; the filing of it is what counts. The same can be said of the *amicus* brief filed by 35 states, or by the chief law-enforcement officers of 50 metropolitan jurisdictions. The very cover of the brief makes its principal point—a very telling point in support of a petition for discretionary review: this case involves an issue of grave national importance.[30]

The lesson from *Kinkel* is that amicus filings in support of a petition for leave to appeal to the Supreme Court of Illinois *will* be denied because they are not "authorized." As such, any motion for leave to make such a filing should keep this point in mind, make clear that it has not been ignored, and explain why the attempt to file an *amicus* brief at the petition for leave to appeal stage could result in a greater ability to assist the Court should leave to appeal be granted. In other words, the motion for leave to file should make clear that the proposed *amicus* does not intend to violate the Supreme Court Rules, believes that moving for leave to file is not a violation of any rule, recognizes that its motion will likely be denied and its brief not accepted, but still believes there is value in filing the motion for leave to file.

Any client intent on attempting to involve itself as an *amicus* at the petition for leave to appeal stage should be advised and apprised of *Kinkel* and especially the fact that it will be denied leave to file its proposed *amicus* brief. Most clients—in an effort to avoid an unnecessary expense—will likely decide not to file when informed of that reality. For the reasons discussed above, however, some may decide to file for leave anyway. That decision is only appropriate, however, when made in a fully informed way.

D. Conclusion

Briefs *amicus curiae* can play an important role in cases before the Illinois Supreme Court. To do so, such filings should carefully follow the guidelines the Court has provided in its rules and decisions and keep in mind that the Court's function, as former Chief Justice Underwood stated, is to take and decide cases that affect Illinois as a whole. Apart from this, as *Kinkel* states, potential *amici* and their attorneys must remember that an *amicus* brief needs to focus on assisting the Court, not just a particular party. There are several ways to accomplish that task and, as long as it remains at the forefront of any *amicus* filing, there is a chance to capture the Court's attention while at the same time advancing the interests an *amicus* represents.

Furthermore, potential *amici* should understand that, according to *Kinkel*, amicus briefs in support of petitions for leave to appeal are not "authorized" by the Supreme Court Rules. As such, their value at that stage, if any, lies not in the their ability to increase the odds of convincing the Supreme Court to allow a petition for leave to appeal but instead, through a motion for leave to file, as a strategic means to develop a better *amicus* brief if the appeal is accepted on its own merits. Potential *amici* and their attorneys should also be careful to follow any new developments surrounding this practice. ■

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1. *See* Article XI, §§ 4, 16; Ill. S. Ct. R. 315(a); *see also, Petitions for Leave to Appeal: A Primer*, Hon. S. Louis Rathje, 11 DCBA Brief 12 (1999).

2. *See The Illinois Supreme Court: What Role Does it Play?*, Illinois Issues, Daniels, Stephen, Melton, Ada, and Wilkin, Rebecca (April 1984) (reprinted at http://www.lib.niu.edu/1984/ii840411.html) ("Today, the ISC [Illinois Supreme Court] is what an ISC justice called a 'discretionary court.' The 1970 Constitution gives the ISC almost complete discretion in choosing the cases it will hear with only a few specifically mandated exceptions (perhaps the most important being death penalty cases). As a result, the ISC can virtually control the size and nature of its caseload. In a 1974 address to the Illinois State Bar Association, then Chief Justice Robert Underwood remarked that, in his estimation, the ISC '. . . was for the first time in the history of the state, performing the function ... a state court of last resort should perform.' It was, he thought, taking cases '... because of their significance to the state as a whole. ...' And this is precisely what reformers since the turn of the century have wanted."); *See also Price v. Philip Morris, Inc.*, 2011 IL 112067 (Garman, J. dissenting on denial of a petition for leave to appeal in a long-pending case and noting that while the issue presented "appear[ed] to involve only a routine question of the timeliness of a motion" it was important and worth taking "because the people of the State of Illinois and other litigants, whose access to the courts is affected by litigation that endures for a decade or more, also deserve to have us address" it); *People v. Edwards*, 96 Ill. 2d 543 (1983) (Simon, J. dissenting on denial of a petition for leave to appeal in a question which implicated prison overcrowding which Justice Simon described as a potential concern of the judiciary but "certainly . . . the concern of society.").

3. *Petitions for Leave to Appeal: A Primer*, Hon. S. Louis Rathje, 11 DCBA Brief 12 (1999).

4. *Id*.

5. *Id*.

6. Illinois S. Ct. Rule 345.

7. *Id*.

8. *Id*.

9. No. 100925, 2006 Ill. Lexis 1 (January 11, 2006). The author would like to acknowledge that his friend, attorney Michael T. Reagan, pointed him in the direction of this Order which was entered in *Kinkel*.

10. *Id* at *1.

11. *Id*. at *2.

12. *Id*. at *6.

13. *Id*. at *2; *Burger v. Lutheran General Hosp.*, 198 Ill. 2d 21, 62 (2001) ("It is well settled that an *amicus curiae* is not a party to the action but is, instead, a 'friend' of the court. As such, the sole function of an *amicus* is to advise or to make suggestions to the court." (internal quotations omitted)).

14. *Id*.

15. *Id*. citing *Voices for Choices v. Illinois Bell Telephone Co*., 339 F.3d 542. 545 (7th Cir. 2003) (chambers opinion by Posner, J.).

16. *Id*. at *3.

17. *Id*.

18. *Id*. at *4 citing *National Organization for Women v. Scheidler*, 223 F. 3d 615, 617 (7th Cir. 2000).

19. *Id*. at *4 (emphasis in original).

20. *Id*. at *5-6.

21. *Id*. at *6.

22. *Id*.

23. *Id*. at *1.

24. *Id*.

25. *Burger*, 198 Ill. 2d at 62

26. *Id*. (expressly declining to address an issue that was not raised by the parties); *see also Karas v. Strevell*, 227 Ill. 2d 440, 450-51 (2008) (striking portion of *amicus* brief which raised an issue not raised by the parties to the action).

27. Illinois S. Ct. Rule 345.

28. *Id*.

29. *Kinkel*, 2006 Ill. Lexis at *1 (emphasis added).

30. "Making Your Case: The Art of Persuading Judges," Scalia, Antonin and Garner, Bryan A. (2008).