

**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA**

PASCUAL HERRERA, JR., M.D.)	
)	
Petitioner,)	
)	Civil Action No.
<i>vs.</i>)	
)	CV-01-2232-H
JERRY N. GURLEY, M.D., etc., et al.,)	
)	
Respondents.)	

**REPLY TO RESPONDENT’S OBJECTION TO MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS (AAPS) IN FAVOR OF PETITIONER**

The Association of American Physicians & Surgeons, Inc. (“AAPS”) hereby replies to the Objection by the Respondent, Medical Licensure Commission of Alabama, to AAPS’s Motion for Leave to File an *Amicus Curiae* Brief.

Respondent does not, and cannot, cite any prejudice that would result from allowing AAPS’s brief. Nor can the Respondent cite any ruling requiring rejection of AAPS’s motion and brief. The AAPS brief provides additional information to this Court that can aid its consideration of this matter. There is no reason to exclude this information.

Rule 29 of the Alabama Rules of Appellate Procedure is based on its federal counterpart (Federal Rule of Appellate Procedure 29), and both authorize courts to accept *amicus curiae* briefs at any time. Where, as here, there is cause for the delay, timing does not preclude the filing. The AAPS Board of Directors was not able to meet with Petitioner Dr. Herrera until earlier this year, and AAPS’s brief is a product of that investigation. There

is no prejudice to allowing AAPS's *amicus curiae* brief, and in the absence of prejudice *amicus* briefs are routinely accepted in order to assist in the decisionmaking. For example, AAPS's successful brief in favor of Dr. Rutgard before the Court of Appeals for the Ninth Circuit was accepted by that court over the objections of the government and after the deadline for briefing by the parties. *See United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversing, on the strength of AAPS' *amicus curiae* brief, many of the convictions related to Medicare fraud) (cited by AAPS's brief here, p. 2).

This Court clearly has the power to accept AAPS's brief, and Respondent cannot cite any resulting prejudice. Accordingly, Respondent's objection should be rejected and AAPS's motion should be granted.

Respectfully submitted this _____ day of _____, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing upon:

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by placing a copy of the same in the U.S. Mail, properly addressed with postage prepaid this

_____ day of _____, 2003.

Of Counsel