

COLORADO BAR ASSOCIATION

POLICIES AND PROCEDURES OF THE *AMICUS* BRIEFS COMMITTEE INCLUDING GUIDELINES FOR SUBMITTING AN *AMICUS* BRIEF ON BEHALF OF THE ASSOCIATION OR ONE OF ITS CONSTITUENTS

Effective November 6, 2010

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1. THE *AMICUS* BRIEFS COMMITTEE AND ITS FUNCTIONS

1.1. *Provision for Amicus Briefs Committee in CBA Bylaws.* Appendix C of the Bylaws (the "Bylaws") of The Colorado Bar Association (the "CBA") establishes the *Amicus* Briefs Committee (the "Committee") as a standing committee of the CBA, under this description:

Amicus Briefs Committee This Committee, with not more than five members, shall review applications for the CBA to participate as amicus in matters pending before federal and state courts in Colorado. The Committee shall make recommendations to the Executive Council if CBA participation is appropriate and then review and suggest modification to proposed briefs, if necessary.

1.2. *Appointment of Committee Members and Officers; Governance.*

(a) The President of the CBA (the "President") appoints the members of the Committee, pursuant to Section 9.3 of the Bylaws. Although the President is not limited in determining the qualifications of the appointees, expertise in appellate procedures and in the writing of appellate briefs and a thorough understanding of the core values and the stated policies and positions of the CBA are relevant considerations.

(b) The President appoints the Chair of the Committee, pursuant to Section 9.4 of the Bylaws. The Committee may select from its members a vice-Chair, a secretary, and such other officers as it deems appropriate.

(c) Pursuant to the authority granted by Section 9.4 of the Bylaws, the Committee has adopted these Policies and Procedures.

1.3. *Committee Functions, Reports.*

(a) Except as the Executive Council or the Board of Governors of the CBA may determine, the Committee shall review, in accordance with these Policies and Procedures, all internal and external requests (as those terms are defined in § 2.1) for *amicus* briefs by the CBA or by any Section, Committee, or other constituent of the CBA.

(b) The Executive Council or the Board of Governors may deal directly with any request for an *amicus* brief without prior consideration by the Committee and may, in any such case, request the Committee's participation in the Council's or the Board's consideration of the request.

(c) With respect to each request that it considers, the Committee shall determine to decline the request or to submit it to the Executive Council with such recommendation as the Committee may determine to provide to the Executive Council.

(d) No *amicus* brief shall be filed by or on behalf of the CBA or any Section, Committee, or other constituent of the CBA without the approval of the Executive Council or the Board of Governors.

(e) Pursuant to Section 9.4 of the Bylaws, the Committee, by its Chair, shall make a written annual report to the CBA. That report shall identify and describe the requests for *amicus* briefs that the Committee considered during the course of the fiscal year and the disposition of those requests; the report may include such other matters as the Chair determines. The Chair shall circulate the report to the members of the Committee, for comments, before submitting it to the Executive Director; but the Chair shall have the final determination of its contents. Any member of the Committee may at any time submit his or her own report to the Executive Director about any matter related to the Committee.

2. REQUESTS FOR *AMICUS* BRIEFS

2.1. *Terminology.* When used in these Policies and Procedures—

(a) The term "request" shall include a request, an application, and an invitation for the filing of an *amicus* brief.

(b) The term "internal request" shall include a request made by any Section, Committee, or other constituent of the CBA and a request made by any member of the CBA; and

(c) The term "external request" shall refer to a request made by a court or any other person other than a Section, Committee, other constituent of the CBA, or member of the CBA.

The terms "internal request" and "external request" are used in recognition of the fact that the Committee cannot impose the kinds of requirements on external requests that can be imposed on internal requests. These Policies and Procedures are structured to take into account the different natures of the two kinds of requests.

2.2. *Sources.* The Committee may consider *amicus* briefing—

(a) Upon an internal request made by one or more Sections, Committees, local bar associations, or other constituents of the CBA;

(b) Upon an internal request made by one or more members of the CBA;

(c) Upon an external request made by one or more other bar associations, trade organizations, or interest groups;

(d) Upon an external request made by any court, legislature, or administrative agency;

(e) Upon an external request made by any other person; or

- (f) Upon the Committee's own motion.

2.3. *Directing Requests to the Committee.*

- (a) Each internal request shall be made by delivery to the Executive Director.
- (b) Each external request that is received by any officer of the CBA or by any Section, Committee, or other constituent of the CBA shall be forwarded to the Executive Director.
- (c) Upon receipt of a request, the Executive Director shall forward the request to all of the members of the Committee. The Executive Director may include with the request information that the Executive Director may have obtained regarding the request or its context.

2.4. *Content of Internal Requests.* Internal requests for *amicus* briefs shall conform to the requirements set forth in § 7.

2.5. *Content of External Requests.* It is recognized that the Committee cannot control the nature or content of external requests; but the Committee may determine, in its discretion, whether the nature and content of any external request is appropriate for its consideration; and the Committee may communicate with any person with respect to an external request with a view toward clarifying, reformulating, restating, or supplementing the external request as the Committee deems appropriate for its consideration.

3. SOLICITATION OF INPUT FROM SECTIONS, COMMITTEES, AND OTHER CONSTITUENTS

3.1. *Solicitation of Input from Constituents.* At any time in its consideration of an *amicus* brief, the Committee may solicit the input of any Section, Committee, or other constituent of the CBA. At some time prior to recommending to the Executive Council that an *amicus* brief be filed, the Committee, through the Executive Director, shall inform each Section and Committee of the CBA of the possibility of such filing, providing the Sections and Committees with appropriate information about the *amicus* brief to enable them to give consideration to it, and shall solicit their input on the propriety of such filing; provided, however, that, if a determination by the Executive Council of whether to file an *amicus* brief must be made quickly, the solicitation of input from Sections and Committees may be in parallel with submission of the Committee's recommendation to the Executive Council. The Committee need not solicit input with respect to requests for *amicus* briefs that it denies.

3.2. *Solicitation of Input from Other Persons.* At any time in its consideration of an *amicus* brief, the Committee may solicit input from any other bar association, trade organization, or interest group, or from any other person.

4. APPROPRIATE CASES FOR *AMICUS* BRIEFS

4.1. *In General.* It is the general policy of the CBA to file *amicus* briefs sparingly and only when the imprimatur of the CBA or of the Section, Committee, or other constituent of the CBA on behalf of which the *amicus* brief would be filed would be of value to the advancement of the position taken by the *amicus* brief and when the filing of the *amicus* brief would not be detrimental to the interests of the CBA.

4.2. *Particular Standards.* It is the general policy of the CBA to authorize an *amicus* brief only when the brief would constitute a significant contribution to the consideration of the issue or issues to be briefed and only when the position sought to be advanced is—

- (a) Consistent with the core values and the policies and positions known to have been previously adopted or promoted by the CBA;
- (b) A matter of public interest;
- (c) A matter of interest to lawyers or the legal profession; or
- (d) A matter of interest to the lawyers participating in, or represented by, the Section, Committee, or other constituent of the CBA on behalf of which the *amicus* brief is to be filed.

4.3. *Restatements of Party Arguments; Factual Issues.* An *amicus* brief should add perspective and depth to its subject and not merely restate arguments advanced by participating parties. Factual issues are not to be argued in an *amicus* brief, although the brief may take into account the existence of factual issues.

4.4. *Discussion of CBA Values, Policies, or Positions.* As appropriate, the *amicus* brief may cite and discuss prior adoption or promotion by the CBA of core values or policies or positions applicable to the subject of the *amicus* brief.

4.5. *Consideration of Appropriate Level for Briefing.*

(a) *Amicus* briefs may be filed in any court, including a trial court, but the Committee shall take care to direct each brief to the level of court at which it is likely to have maximum effect in establishing the position that is to be advanced by the *amicus* brief; ordinarily it is to be expected that such maximum effect would be attained at the highest level of court at which the issue is to be finally determined.

(b) *Amicus* briefs may be filed urging the court to grant certiorari or to note probable jurisdiction.

5. MATTERS INVOLVING CONFLICT AMONG SECTIONS, COMMITTEES, OR OTHER CONSTITUENTS

The Committee may recommend the filing of two or more opposing *amicus* briefs on behalf of Sections, Committees, or other constituents of the CBA when (a) the subject is not of general interest to the CBA but is of interest to those constituents; (b) those constituents have opposing positions about the subject; (c) the filing of opposing *amicus* briefs will enhance the development of the issues and will assist the court in which the briefs are to be filed in understanding and resolving the issues; and (d) the filing of opposing briefs will not be detrimental to the interests of the CBA. It is likely that such filings will rarely be recommended by the Committee or approved by the Executive Council.

6. RECOMMENDATION FOR, OR DENIAL OF, BRIEFING

6.1. *Committee Recommendation for Briefing.* If the Committee determines that an *amicus* brief should be filed on behalf of the CBA or any of its Sections, Committees, or other constituents, the Committee shall prepare a writing making such recommendation and shall deliver the writing to the Executive Director. The Executive Director shall put the recommendation before the

Executive Council in the appropriate manner for its timely approval or disapproval. The Committee may request the opportunity to make a presentation to the Executive Council regarding its recommendation, and the Committee shall participate in the Executive Council's consideration of the recommendation as the Executive Council may direct.

6.2. *Consideration by the Board of Governors.* Pursuant to the Bylaws, consideration of whether the CBA or any of its Sections, Committees, or other Constituents should file an *amicus* brief may be referred to the Board of Governors. In the event of such a referral, the Committee may request the opportunity to make a presentation to the Board of Governors regarding its recommendation, and the Committee shall participate in the consideration of the request by the Board of Governors as the Executive Council or the Board of Governors may direct.

6.3. *Committee Denial of Briefing.* If the Committee determines that a request for an *amicus* brief should not be filed on behalf of the CBA or any of its Sections, Committees, or other constituents, that denial need not be submitted to the Executive Council for approval or disapproval. If the Chair deems it appropriate, the Chair may communicate the fact of the denial, with such explanation as the Chair may choose to provide, to any person or persons associated with the request.

6.4. *Reports of Denials of Briefing.* The Committee shall report upon its denial of requests for *amicus* briefs in its annual reports to the Executive Director made pursuant to § 1.3(e).

7. CONTENT OF INTERNAL REQUESTS FOR *AMICUS* BRIEFS

7.1. *Requests in Writing, Including by Electronic Means.* Each internal request shall be in writing, which may be in hardcopy or electronic form. Each internal request that is made in electronic form shall be delivered to the Executive Director by email or by such other means as the Executive Director may permit. Internal requests that are in electronic form shall be in files that are in "portable document format." To the extent feasible, the content of such files shall be text-searchable.

7.2. *Content of Internal Request.* Each internal request for an *amicus* brief shall contain the following items, as appropriate:

- (a) The identities of all of the parties to the controversy;
- (b) A full statement of the relevant facts of the controversy or instruction directing the Committee to the places within the submitted materials where a statement or statements of those facts can be found;
- (c) A statement of the position or positions the *amicus* brief will support;
- (d) An outline of the argument or arguments to be made in the *amicus* brief, or a draft of the brief;
- (e) If the *amicus* brief would further one or more core values or policies or positions known to have been previously adopted or promoted by the CBA, a statement identifying those values, policies, or positions, citing to known, prior expressions thereof by or on behalf of the CBA, and indicating how the brief would further them;
- (f) If the *amicus* brief would further a value, policy, or principle of law which is not known to have been previously adopted or promoted by the CBA, a statement of that value, policy, or principle of law and of reasons why it should be adopted or promoted by the CBA;

(g) An explanation of the reasons why the subject of the *amicus* brief is an important one for CBA participation;

(h) A complete copy of the decision or order from which appeal is taken, with instruction directing the Committee to the portions thereof that are relevant to the subject of the *amicus* brief;

(i) A statement of the filing deadline for the *amicus* brief and a statement regarding extension of that deadline, if extension may be available;

(j) The style or caption of the case in which the *amicus* brief would be filed;

(k) The identification of the last court to render a decision in the case and of the court in which the *amicus* brief would be filed;

(l) A copy of each extant brief, or of the portions thereof that are relevant to the subject of the *amicus* brief; and, where entire copies of briefs are provided, instruction directing the Committee to the portions thereof that are relevant to the subject of the *amicus* brief;

(m) If the request is made by a Section, Committee, or other constituent of the CBA, a statement of the occasion on, and the method by, which the determination to make the request was made; a description of any dissenting views expressed in the determination process; and, if a vote or other measurement of the strength of approval and dissent to the determination to make the request was taken or made, a statement of that vote or other measurement.

(n) If the request is made by a CBA member, disclosure of all personal and professional interests of the member in the controversy or in the subject of the *amicus* brief, including because of engagement to provide legal services to a party to the controversy;

(o) If one or more lawyers have been identified as willing and able to write the *amicus* brief, their names and the identities of the law firms, law schools, or other entities at which they are employed; and their qualifications relevant to the writing of the brief; and, if no such writers have been identified, the steps that the requester expects to take to secure such writers;

(p) A list of the Sections, Committees, and other constituents of the CBA which are likely to be interested in the *amicus* brief; and, if it is known that the filing of the *amicus* brief, or the position to be taken in the *amicus* brief, is likely to be opposed by any other such Section, Committee, or constituent, a brief statement of the perceived reasons for such opposition.

8. THE BRIEFING PROCESS

8.1. *Committee Does Not Write.* It is not a function of the Committee to write *amicus* briefs or to engage authors of *amicus* briefs.

8.2. *Drafting; Quality.* If the Executive Council has approved of the filing of an *amicus* brief, the Committee shall oversee the process of drafting the brief, with a view toward timeliness in

light of applicable deadlines, and shall read and review the brief, suggesting or making desired modifications with a view toward achieving the best possible expression of the positions to be supported by the *amicus* brief and toward attaining the highest quality of scholarship, advocacy, and professionalism. In its activities, the Committee shall take into account the fact that the organizational reputation of the CBA will be at stake with every *amicus* brief filed under these Policies and Procedures, including *amicus* briefs filed on behalf of Sections, Committees or other CBA constituents and *amicus* briefs filed by opposing constituents.

8.3. *Constituent Participation.* If the Executive Council has approved of the filing of one or more *amicus* briefs (including opposing briefs) on behalf of one or more Sections, Committees, or other CBA constituents, the Committee shall cooperate with those constituents in the drafting process, and no such brief shall be filed on behalf of any constituent unless both the Committee and the respective constituent are in agreement that, as drafted and revised, it should be filed; provided, however, that the inability of the Committee and any one constituent to reach such agreement shall not preclude the filing of any brief or briefs on behalf of any other constituents.

8.4. *Timeliness and Compliance with Rules.* The Committee shall assure that each *amicus* brief that is submitted under these Policies and Procedures is timely under, and otherwise complies with all aspects of, the applicable rules and deadlines for such briefs.

8.5. *No Submittal without Final Approval.* No *amicus* brief shall be submitted in the name of the CBA or in the name of any Section, Committee, or other constituent of the CBA without final approval of the *amicus* brief by the Chair of the Committee or the Chair's designee for that purpose.

8.6. *Signatures; Identification of Participants.* *Amicus* briefs that are filed on behalf of the CBA shall be signed on behalf of the CBA by the President or by the President's designee for that purpose. *Amicus* briefs that are filed on behalf of a Section, Committee, or other constituent of the CBA shall be signed on behalf of the constituent by an appropriate representative of the constituent. Where appropriate, an *amicus* brief may also identify any or all of those persons who served significantly in the drafting process.

8.7. *Costs.* The CBA shall pay no fee for the drafting or review of an *amicus* brief. The costs of printing and filing an approved brief shall be borne by the CBA, except that those costs shall be allocated to the Sections, Committees, or other Constituents on behalf of which *amicus* briefs are filed.

8.8. *Executive Director.* The Executive Director shall participate appropriately in the briefing process, and the Committee shall keep the Executive Director informed throughout the course of the drafting process and shall consider the comments and recommendations that the Executive Director may have about the brief or the briefing process.

9. ORAL ARGUMENT.

Leave of the court to participate in oral argument in connection with any *amicus* brief filed on behalf of the CBA or of any Section, Committee, or other CBA constituent shall be sought only with the prior approval of the Executive Committee on the recommendation of the Committee. If such approval is granted, and unless the Executive Committee determines otherwise, the Committee shall select the person or persons who are to participate in the oral argument. If the argument is to be on behalf of any Section, Committee, or other CBA constituent, the Committee shall consider the recommendations of participants, if any, provided to it by that Section, Committee, or other CBA constituent. It is likely that oral argument will rarely be recommended by the Committee or approved by the Executive Council.

10. RELATIONSHIP WITH REQUESTING PARTIES.

10.1. *Confidentiality.* Neither the CBA nor any Section, Committee, or other CBA constituent (including the Committee) shall make any undertaking of confidentiality to any person outside of the CBA regarding any aspect of an *amicus* brief or of the processing of an *amicus* brief under these Policies and Procedures — including, without limitation, regarding the fact that a request has been made, the facts of the controversy, or the position of any person with respect to the controversy. The Executive Council may impose confidentiality upon the briefing process within the CBA and its Sections, Committees, and other constituents as the Executive Council determines from time to time.

10.2. *Joint Briefs.* Ordinarily, the CBA will not join with other persons in *amicus* briefs, but the Committee may recommend joint briefing to the Executive Council in appropriate cases, and the Executive Council may approve of such briefing. No such approval shall be deemed to reduce the standards of quality that are to be attained by briefs filed on behalf of the CBA.