

METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Guidelines, Policies and Procedures for Amicus Briefs

(September 2014; updated December 2023)

General Principles, Goals, and Case Selection Criteria

MWELA petitions to appear as *amicus curiae* in employment and civil rights litigation that supports the organization's mission of promoting the interests of individual employees and assisting the lawyers who represent them. The primary goal is to develop case law in a way that promotes the interests of employees, as opposed to serving as an advocate for a particular employee. The cases most appropriate for MWELA's appearance as *amicus curiae* are those presenting emerging issues in employment and civil rights law, those seeking to extend current law to new situations involving clients of our members, or those challenging an existing body of law. MWELA also appears as *amicus curiae* in cases in which employees or their attorneys have been improperly subjected to sanctions. Although fact-intensive cases are not automatically inappropriate for an *amicus curiae* brief, MWELA does not participate as *amicus* in order to advocate for one party's version of the facts.

MWELA will generally decline to appear as *amicus curiae* in appeals of orders granting summary judgment where the sole or major issue on appeal is whether there are disputed material facts. MWELA will also decline to appear in cases that in the judgment of the Amicus Committee and the MWELA Board are contrary to the organization's mission, and/or present the potential for creating precedent adverse to the interests of employees and their attorneys.

As a matter of policy, MWELA generally will not appear as *amicus* in briefs to the U.S. Supreme Court (at either the certiorari or merits stage), but will refer the requesting attorney to NELA's Amicus Committee.

MWELA's Amicus Committee

MWELA's Amicus Committee, and the individuals who research and draft the *amicus* briefs, are independent from the parties to the litigation. The Amicus Committee and the brief writers shall exercise their discretion and their independent judgment in deciding what issues to address in an *amicus* brief and what arguments to make or not make.

MWELA's Amicus Committee shall be comprised of one or two Chairs and any number of MWELA members who volunteer to participate in the Committee's activities, whether by reviewing *amicus* proposals, drafting or reviewing briefs, or otherwise supporting the Committee.

The Amicus Committee Chair(s) will assist the Committee in fielding *amicus* brief requests, identifying new cases appropriate for MWELA's involvement as *amicus curiae*, coordinating communications with counsel for the parties, assisting with motions for leave, and otherwise assisting with MWELA's *amicus* work as necessary and appropriate. The Chair(s) shall be responsible for helping determine whether and the extent to which a proposed *amicus* project, brief, or argument within a brief would be inconsistent with MWELA's mission and/or would pose an unwarranted risk of producing negative precedent.

The Chair(s) and the Committee Members will also help identify new cases appropriate for MWELA's involvement as *amicus curiae*, keep apprised of key legal developments in employment law within their circuits, respond in a timely manner to requests for action or comment from the Committee, participate in discussions and deliberations regarding proposed *amicus* briefs, and otherwise assist with MWELA's *amicus* work as necessary and appropriate. Members who are consistently unable to fulfill these responsibilities will be asked to increase their commitment or to find other ways to participate in MWELA's efforts.

Conflicts of Interest

Any Committee member (or other MWELA member) with a direct interest in a case should recuse themselves from deliberations regarding MWELA's potential involvement as an *amicus* in that case. Any Committee member (or other MWELA member) with an indirect interest (*i.e.*, any substantial interest not requiring recusal) should disclose their interest in the case (or in related cases) to the Co-Chairs others in involved in deliberations regarding MWELA's potential involvement as an *amicus*.

Confidentiality

All conversations and communications among members of the Amicus Committee for the purpose of furthering MWELA's Amicus Program (including requests for *amicus* assistance, related materials, and emails sent via the listserv) are the confidential work product of MWELA. Such communications, including emails received via the MWELA listserv, should not be forwarded outside of the Amicus Committee.

Procedures for Submitting an *Amicus* Brief Request

Unless a request is initiated by the Chair(s), MWELA will ordinarily consider requests to appear as *amicus* only when the following conditions are met:

1. The request includes a copy of the decision being appealed (or challenged, in the rare case of requested *amicus* participation at the trial level);
2. The request includes a letter or memorandum outlining the case's procedural history, the facts the requester believes are important to the issues on appeal, and any relevant briefing already filed;
3. The request includes the briefing schedule, including the deadline for any *amicus* briefs; and
4. The request lists other organizations who have been or will be approached about, or who are considering filing, an *amicus* brief, and, if known, each organization's decision.

If an attorney or litigant believes that a particular case is one in which the court will benefit from the views of MWELA as *amicus curiae*, that attorney or litigant should contact MWELA's Amicus Committee as early in the appellate process as possible.

If MWELA is asked to draft a brief, a minimum of **40 days' notice** prior to the due date is required (absent exceptional circumstances).

If MWELA is being asked to sign on to the brief of another organization, a minimum of **14 days' notice** prior to the due date is required (absent exceptional circumstances).

Procedure to Review Requests for *Amicus* Assistance

The Chair(s) are responsible for making a preliminary determination on whether to undertake *amicus* participation. If the Chair(s) agree that an *amicus* brief may be worth submitting, the Chair(s) will circulate a description of the potential issues and the materials referenced in the previous section to the Members of the Amicus Committee for their input and to solicit potential brief writers. If the consensus of the Amicus Committee is that a brief should be written, and there are sufficient volunteer(s) to write and review the brief, then the Chair(s) will approve the proposal. The Chair(s) may also consult with MWELA's Board members, either at a regular Board meeting, or through the Board's listserv, to obtain the Board's input.

It is the goal and intent of the MWELA Amicus Committee that a decision whether to file an

amicus brief and, if so, the argument(s) to be advanced in that brief, will be based, to the extent possible, on a consensus of the participants in the *amicus* request review process. Absent approval of the Executive Committee, MWELA will not take a position within an *amicus* brief about which there is substantial substantive objection by the participants in the decision-making process. It is anticipated that action by the Executive Committee, or by the Board itself, will be required only in rare cases.

Cooperation with the Parties and Other *Amicus* Authors

The position MWELA takes in its capacity as *amicus curiae* may not be drafted, approved, or financed by the party MWELA supports on appeal. This policy is not intended to preclude substantive discussions and coordination with either the party's counsel or other *amicus* brief writers to prevent oversight, duplication, and philosophical or strategic inconsistency where it advances MWELA's interests to do so, and is permitted under Fed. R. App. P. 29 and its state and local counterparts. This also does not preclude other forms of assistance to the party's counsel, especially when such counsel is a MWELA member, such as finding co-counsel to assist with preparation of the party's brief, or assisting with moot courts or other preparation for oral argument.

Since an *amicus* brief should not argue the facts, the brief writers can consider (1) adopting or stating an assumption as to the accuracy of the factual presentation in the party's brief or in the decision below; or (2) doing a very short summary of the factual issues to provide context for the legal argument; or (3) not mentioning the facts at all.

In appropriate circumstances, the *amicus* brief writers may share portions of a draft brief, or a preliminary draft, with counsel for the party being supported. This can be particularly useful when it will help ensure accuracy in factual presentations or procedural background, especially when the factual or procedural issues are part of the issues on appeal. That party should understand that time constraints may limit the time afforded to the supported party to provide comment before the brief is filed. In such instances, counsel for the party supported may provide feedback, but is not permitted to edit, revise or rewrite the brief, or to require that the brief writers defer to the party's views. The brief writers, any reviewers, and the Chair(s) shall have discretion to decide whether and how to address any such feedback.

Where consistent with MWELA's mission, MWELA may join another organization in filing a joint *amicus curiae* brief, or may invite another organization to join MWELA's brief. Requests to sign onto a joint brief must be submitted at least 14 days before the deadline for filing the brief. When numerous groups are working in coalition to determine an overall *amicus* strategy, MWELA will participate in such strategic discussions and will work to coordinate with other *amicus* writers.

Guidelines for Volunteer Brief Writers

Attorneys who agree to author MWELA's *amicus* briefs should do so only when they have the ability to honor that commitment fully. If an emergency prevents the volunteer from honoring his or her commitment to prepare a brief, he or she should contact the Amicus Committee as soon as possible so that alternate brief writers may be identified. The commitment to write a brief includes a commitment to honor all deadlines imposed by the court and the Amicus Committee for review of *amicus* briefs. Eleventh-hour brief preparation is highly discouraged, since last-minute work may hinder MWELA's ability to produce a timely brief of the highest quality.

When MWELA is granted leave to appear as *amicus curiae*, it usually addresses one or two issues at most, in a brief that can be characterized as well-written, short, and to the point. Short briefs of *amicus curiae* stand a better chance of being read, while long briefs are skimmed, if not ignored altogether. MWELA's *amicus curiae* brief should bring to the attention of the court only relevant matter(s) or legal authorities not already fully argued by the parties. Whereas the parties' attorneys typically will focus on the facts and arguments most favorable to their clients, MWELA's *amicus curiae* brief usually should address broader implications in the case that are not fully developed by the parties. A "me-too" brief that merely re-argues the facts is not acceptable as an *amicus* brief.

The Chair(s) will help prepare MWELA's Statement of Interest to be incorporated into the brief, and will also prepare any motion for leave to file that may be required, along with contacting opposing counsel to ascertain their position on the motion for leave. The Chair(s) will, if needed, also coordinate the printing and delivery of hard copies to the clerk's office.

The volunteer attorney primarily responsible for a particular brief will serve as counsel of record, unless he or she is unable to serve of counsel of record before a particular court. The volunteer attorney should take care to ensure that he or she already meets or is able to meet the requirements for admission before the particular court in which the brief is being submitted, and that the brief submitted is in compliance with all local court rules. If the volunteer attorney does not meet those requirements, and cannot therefore serve as counsel of record, he or she must immediately inform the Chair(s), so that appropriate arrangements to secure counsel of record can be made.

Often a MWELA *amicus* brief will be prepared by two or more attorneys on MWELA's behalf. Such collaboration and cooperation are strongly encouraged, as it generally results in a stronger brief. In the event of a dispute over which MWELA attorney(s) will author MWELA's *amicus* brief, the Amicus Committee Chair(s) will make the final decision as to who will be listed as

author(s) of the brief. MWELA attorneys participating on a brief-writing team are expected to honor their brief-writing commitments to each other, not to expect one member to be responsible for the bulk of the work, and to resolve any disputes professionally. Any disputes that cannot be resolved between brief writers, and which may affect the quality, philosophical consistency, or timeliness of the brief, should be immediately brought to the attention of the Amicus Committee, which shall resolve any major disputes in conjunction with the MWELA Executive Committee, and the Board where appropriate.

The following “Role of Amicus” prepared by Richard Johnson (Amicus Coordinator for Florida NELA), bears consideration:

This is the formula for getting an *amicus* accepted in the 11th Circuit and for making one effective in any other appellate court:

- Be careful not to duplicate or even much overlap the supported party’s brief. If the *amicus* looks like a condensed version of the principal brief, they don’t want to read it. They say you’re a friend of the appellant, not a friend of the court. They are concerned you are, in effect, exceeding the supported party’s page limits.
- Cast your argument at a higher level of abstraction with no more dependency on the particulars than is necessary to show how this case fairly presents the points you wish to make. Never argue the facts.
- Explain how your contribution assists the court rather than supported party. This needs to be the centerpiece. Even if the judges don’t think it helps them much, it creates a kindly disposition.
- Address the consequences of the bad decision below becoming circuit law (or the consequences of the good decision below being reversed). Bad law will hurt the courts and the rest of the system in some way. Find that and focus there. Look for big picture effects – injuries to constitutional separation of powers, circumvention of Congressional or legislative mandates, effects on judicial legitimacy, etc., or at least medium picture concerns – affirmance will encourage bad employer behavior and more suits, stimulate frivolous defense motions, make more work for judges, etc.
- Keep it short. The federal rules allow half the length of a principal brief But one should struggle to stay well under 20 pages (in the Arabic numeral sections) in both state and federal appeals courts. The ideal is probably to get the page count down to about 12, but that is not always possible. This is a bitter pill for some authors to swallow. It forces a reconceptualization of what many think the role of an *amicus* brief to be.

Expenses

MWELA will reimburse volunteer attorneys for all reasonable expenses related to the cost of preparing *amicus* briefs, including any filing fees, copying costs, messengers, and postage. However, MWELA is unable to reimburse volunteer attorneys for (1) the cost of their time; (2) travel expenses unrelated to the filing of a brief, such as to attend oral argument; (3) the cost of on-line research using Lexis or Westlaw or other paid services; or (4) the cost of commercial printing services that charge extra for formatting and proofreading a brief, except with the prior approval of the Amicus Committee Chair(s).

Review

The *amicus* brief writers should prepare an outline or summary of the *amicus* brief as far in advance of the filing deadline as reasonably feasible, ideally several weeks in advance, and provide that to the Chair(s) for review. The Chair(s) may share the outline or summary with the full Committee or with those members who have expressed a specific interest in the brief. The outline may also be shared with counsel for the party requesting the brief. A final (or very nearly final) draft of every *amicus* brief should be sent to the Chair(s) at least five days prior to the filing deadline to allow sufficient time for review and editing. Because cases in which MWELA is involved as *amicus* may have a broad effect on policy as it relates to MWELA's mission, MWELA must be consulted about strategic or philosophical decisions being made while briefs are being drafted. These guidelines enable MWELA to provide editorial and substantive assistance where appropriate, and to ensure that MWELA's policy remains consistent across its *amicus* briefs. Draft briefs will always be reviewed by the Chair(s), and, when appropriate, by some or all members of the Amicus Committee and other active MWELA members and board members with expertise in the subject area as appropriate.

The authors of MWELA's *amicus* briefs have wide discretion and latitude as to the legal issues they brief and the arguments they marshal in their briefs. However, the Amicus Committee (after consultation with the MWELA President or Board, as appropriate) may edit or override the draft brief in order to assure the filing of a high-quality brief which is consistent with MWELA's mission, policy, and/or the position it has taken in prior *amicus curiae* briefs submitted by MWELA on the same or similar subjects.