

# **METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION**

## **Guidelines, Policies & Procedures for Amicus Briefs**

**(September 2014)**

### **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 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. Fact-intensive cases raising factual issues on appeal are not appropriate for an *amicus curiae* brief.

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 making negative precedent that may harm the interests of individual employees and their attorneys.

As a matter of policy, MWELA will not appear as *amicus* in briefs to the U.S. Supreme Court (at either the cert or merits stage), but will refer such requests to NELA.

### **MWELA's Amicus Committee**

MWELA's Amicus Committee shall be comprised of two Co-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 Co-Chairs will assist the Committee in fielding *amicus* brief requests, identifying new cases appropriate for MWELA's involvement as *amicus curiae*, and otherwise assisting with MWELA's *amicus* work as necessary and appropriate. The Co-Chairs 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 Co-Chairs and the Committee Members will 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 replaced.

### **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**

Unless a request is initiated by the Co-Chairs, MWELA will consider requests to appear as amicus only when the following conditions are met:

1. The request includes a copy of the decision being appealed;
2. The request includes a letter outlining the case's procedural history, the facts of the case and the issues on appeal, and any relevant briefing regarding the issues on appeal;
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** (absent exceptional circumstances) prior to the due date is required.

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

### **Procedure to Review Requests for Amicus Assistance**

The Co-Chairs are responsible for making a preliminary determination on whether to pursue an amicus brief. If the Co-Chairs agree that an amicus brief may be worth pursuing, the Co-Chairs shall circulate a description of the potential issues and the materials referenced in the previous section to the Members of the Amicus Committee to solicit both their input and 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 Co-Chairs shall approve the proposal. The Co-Chairs 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, shall 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 Executive Committee or of 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 strategical inconsistency where it advances MWELA's interests to do so. 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 courting or other preparation for oral argument.

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 with the ability to honor that commitment fully. If an emergency prevents the volunteer attorney 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 briefs. Eleventh-hour brief preparation is highly discouraged, since last-minute work may affect 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 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 the case not fully developed by the parties. A "me-too" brief that merely re-argues the facts is not acceptable as an *amicus* brief.

The Co-Chairs will prepare MWELA's Statement of Interest to be incorporated into the brief.

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 Co-Chairs, so that appropriate arrangements to secure a 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 Chairs will make the final decision as to who will author the brief. MWELA attorneys participating on a brief-writing team are expected to honor their brief-writing commitments to each other, not expect one member to be responsible for the bulk of the work, and resolve any disputes professionally. Any disputes which cannot be resolved between brief writers 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 President, 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 co-chairs).

## **Review**

A final (or very nearly final) draft of every amicus brief should be sent to the MWELA Amicus Committee at least 10 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 throughout various amicus briefs. Draft briefs will always be reviewed by 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 generally have considerable discretion and latitude as to the legal issues they brief and the arguments they marshal in their briefs. However, the Amicus Committee may (after consultation with the MWELA President or Board, as appropriate) edit or override the volunteer attorney's 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 taken in prior *amicus curiae* briefs submitted by MWELA on the same or similar subjects.