

HOW TO GET THE ABA TO SUBMIT AN AMICUS BRIEF IN SUPPORT OF YOUR APPEAL

The Fall 2016 issue of Appellate Practice contained an article on the Judicial Division's newly created Amicus Committee. The Section of Litigation has its own Amicus Curiae Briefs Committee, which stands ready to help you through the process to obtain ABA amicus support of your appeal.

The ABA has a long history of filing amicus briefs. Over the past 70 years, the ABA has filed amicus briefs in nearly 300 cases. Although the ABA's amicus practice before the U.S. Supreme Court receives the most publicity, the ABA also files in the Federal Circuit Courts of Appeals and State Supreme Courts. Last year, the ABA filed 18 amicus briefs in various courts. So far, this term, the ABA has approved filing briefs at the request of the Section of Litigation in the U.S. Supreme Court, the Ninth Circuit and the California Supreme Court.

The Explosive Growth of Amicus Practice

Over the past 50 years, the frequency and number of amicus briefs in U.S. courts has grown at an astounding rate. The U.S. Supreme Court statistics provide striking evidence of this. In the mid-1960s, amicus briefs were filed in only 35 percent of the cases before the U.S. Supreme Court. By the mid-1990s, that had grown to more than 90 percent of cases. In the 2014 – 2015 term, only one case did not have an amicus brief filed — and that case received a summary disposition.

Not only has the number of cases with amicus increased dramatically, but so has the total number of amicus briefs. In the 2014 – 2015 term, more than 1,000 amicus briefs were filed with the U.S. Supreme Court. That represents an almost 20 percent increase over the prior two terms. While the number of amicus briefs has increased, the number of cases the U.S. Supreme Court hears has dramatically declined, from an average of 150 in the 1980s to between 70 and 75 the last few years. As a result, the number of amicus briefs in each case has gone up substantially. In the 2015 – 2016 term,

nine cases drew more than 30 briefs, a number that pales in comparison to the record 153 amicus filings in *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015) (the same-sex marriage case).

The growth in amicus filings has not been limited to the U.S. Supreme Court. Federal Courts of Appeal and State Supreme Courts have seen an ever-increasing number of amicus briefs. In one circuit court case, *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) (the transgender bathroom case now before the U.S. Supreme Court), the decision lists 44 amici for the appellant and 32 for the appellee (although several amici combined on each side to submit joint briefs). In another more mundane example, four amici, including the U.S. Chamber of Commerce, filed briefs in the Third Circuit on the exclusion of an expert under the *Daubert* test. *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendants-Appellees, No. 16-2247 (3d Cir. October 18, 2016).

The large number of cases in all courts receiving amicus briefs increases the likelihood that your opponent will have such “friends” file against you. This highlights the benefit of getting the ABA to weigh in on your side. The ABA limits its practice, however, usually filing only when the case is before the highest tribunal. Thus, the ABA does not file in intermediate state appellate courts, nor in a federal circuit court if it appears the case will ultimately reach the U.S. Supreme Court. Nonetheless, you may have a case in which you think the ABA would, or should, file an amicus; if so, you should pursue that option.

How The ABA Process Works

The first step is to contact one of the co-chairs of the Amicus Curiae Briefs Committee, currently, M.C. Sungaila and Tom Donlon. The Committee Co-Chairs have the responsibility to review and screen requests for the Section. They will be glad to explain the system and answer any questions.

One important point to remember is that the ABA will *not* submit an amicus brief on an issue, unless there is already a relevant policy adopted by the ABA. The ABA has

adopted hundreds of policies over the years. To find if there is a policy to support your position, go to the ABA Policy Document Library, www.americanbar.org/directories/policy, and search for your topic. If there is not a specific policy, in some cases, a more general policy document, such as the ABA Model Rules of Professional Conduct on ethical issues, may suffice.

Having identified the policy, the requesting attorney should fill out the ABA “Application Form for ABA Amicus Curiae Briefs,” which can be found on the Amicus Curiae Briefs Committee’s website at www.americanbar.org/groups/committees/amicus.html. Completing the Application helps crystalize the issues, such as what policy is relevant or what outside attorney may be interested in preparing the brief. (The requesting attorney does not have to identify an author but it is helpful, especially if the proposed author is a recognized appellate practitioner.) As the Application must be completed in order for the request to be reviewed further up the chain, the Amicus Curiae Briefs Committee Co-Chairs will be happy to help work you through it. They can also talk to you about an Application’s potential for success, but the Co-Chair do not make the final decision.

Once the Application is complete, the Co-Chair forward the Application, with either a positive or negative recommendation, to the Chair of the Section of Litigation. The Chair distributes the Application to the members of the Section of Litigation Council, who decide whether to recommend supporting the Application. If the Council chooses not to support an Application, the process is over and you will be informed.

If the Council approves, the Application is forwarded by the Section to the ABA Standing Committee on Amicus Curiae Briefs. This committee is appointed by the ABA President from members of many different ABA Sections. Working with the Assistant General Counsel of the ABA, the Standing Committee reviews the Application and makes a final recommendation to grant the request. Denial by the Standing Committee also would end the process.

Where approval is recommended, the Standing Committee remains directly involved during the brief writing process. They review drafts and must vote to approve

the final version. After that vote, the amicus brief is forwarded to the ABA Board of Governors who must grant final approval before any ABA amicus brief is filed. The final amicus brief is filed in the name of the President of the ABA.

This approval system may appear bureaucratic and time-consuming. However, the levels of review are important. When the ABA files an amicus brief, it speaks for the entire organization — lawyers across America. Courts, including the U.S. Supreme Court, rely on ABA amicus briefs to provide the definitive lawyers' view on issues critical to the profession. For this reason, it is vital that any amicus brief filed clearly expresses the agreed position of the ABA.

Although this process may seem daunting, it is worth going through to help win an important case. The people involved are experienced and dedicated to helping members navigate the requirements. If you have a significant appeal, consider asking for the ABA's support — and give the Amicus Curiae Briefs Committee a call.

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