Memorandum

To: Those Interested in Submitting an Application for an ABA Amicus Curiae Brief

From: ABA Standing Committee on Amicus Curiae Briefs

Subject: Memorandum Discussing ABA Policies and Procedures for Filing ABA Amicus Curiae Briefs

This memorandum discusses the ABA policies and procedures for filing an ABA amicus curiae brief. It also discusses the preparation of an ABA amicus brief, from submission of an application to the filing of the brief, and offers suggestions that should be considered when drafting the application and the proposed brief.1

The ABA policy on ABA amicus briefs can be found in Chapter 5 of the ABA Handbook on Policies and Procedures (the “Greenbook”). A link to Chapter 5 can also be found on the ABA Amicus homepage at www.abanet.org/amicus. A link to the application form can be found on the ABA Amicus Committee homepage.

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1 The ABA Standing Committee on Amicus Curiae Briefs is staffed by an attorney from the General Counsel’s Office. This GCO attorney should be contacted as soon as consideration of a potential brief has begun. Contact information is included in Section 10, below, and on the Standing Committee’s website, at www.abanet.org/amicus. The website also includes links to previously filed ABA amicus briefs.
1. **The ABA Standing Committee on Amicus Curiae Briefs.**

1.1. The ABA Standing Committee on Amicus Curiae Briefs ("Standing Committee") was established as a committee in 1973, and became a standing committee in 1991.

1.2. The Standing Committee is composed of five members, each of whom should have significant advocacy experience before the United States Supreme Court, and many of whom served as clerks for Justices of the Supreme Court. The ABA President appoints each Standing Committee member for a three year term and, from among those members, appoints the chair for a one year term.

2. **The Process for Board Approval of ABA Amicus Curiae Briefs.**

2.1. Section 25.2 of the ABA’s Bylaws requires that all proposed ABA amicus briefs must be reviewed and authorized by the Board of Governors ("Board") or its designee before they may be filed. If the Board cannot act in time, the Executive Committee of the Board may review and authorize the brief. (For convenience, references to the Board include the Executive Committee, when the Board cannot act in time).

2.2. The Board has delegated two important functions to the Standing Committee:

2.2.1. The Standing Committee reviews applications for amicus briefs and provides its recommendation to the Board on whether an application should be accepted. (See § 2.4, below). The Board considers, but is not bound by, the Standing Committee’s recommendation; and

2.2.2. If the application is accepted by the Board, the Standing Committee reviews the proposed brief, requests revisions, and determines whether the final version of the brief meets ABA standards. (See § 2.5, below). Before a brief may be considered by the Board, the Standing Committee must certify to the ABA President that the brief (a) constitutes a significant contribution to the Court’s consideration of the legal issues, (b) is a fair representation of ABA policy, and (c) is of high professional quality.

2.3. An application may only be submitted by an ABA entity or other organization that is authorized to make recommendations to the ABA House of Delegates. The application should be submitted to Standing Committee’s staff, who is an attorney in the ABA General Counsel’s Office.

2.4. The Standing Committee reviews and forwards the application to the staff, with its recommendation whether the application should be accepted. The staff sends copies of the application and any related material to the Board members and
to those sections, divisions, and standing and special committees (with the exception of the Judicial Division), that appear to have an interest in the subject matter but were not previously provided with a copy by the applying entity. The staff is assisted by the Policy Administration Office in the distribution of the application and any related materials, and with compiling any responses in support or against the application.

2.5. If the application is accepted, the Standing Committee coordinates the preparation of the proposed ABA amicus brief with the drafters; this may involve several drafts. After the proposed brief meets ABA criteria (see § 2(b)(2), above), the Standing Committee presents the proposed brief to the Board with its recommendation that the brief be approved for filing as an ABA amicus brief.

2.6. If the Board approves the brief for filing as an ABA amicus brief, the Standing Committee notifies the sponsoring entity that the brief may be printed and filed.

3. **When ABA Amicus Briefs May Be Filed.**

3.1. The ABA files amicus briefs sparingly and only when a brief (a) constitutes a significant contribution to the Court’s consideration of the legal issues, (b) is a fair representation of ABA policy as adopted by the House of Delegates, and (c) is of high professional quality.

3.1.1. If a case involves a matter of compelling public interest or one that is of special significance to lawyers or the legal profession, and if there is not sufficient time between the brief’s filing date and the next meeting of the House of Delegates, the presenter may submit the position to be taken to the Board for adoption as ABA policy. Board adoption of policy, however, is extremely rare, and the burden is on the proponent of the brief to persuade the Board of the urgency and importance of filing a brief.

3.1.2. An example of a case that met the ABA’s criteria was *Swidler & Berlin and James Hamilton v. United States*, 524 U.S. 399 (1998), in which the issue was whether the attorney-client privilege survived the death of the client. The Board approved the brief for filing because the issue was fundamental to the legal profession and, further, the Standing Committee on Ethics and Professional Responsibility had published an ethics opinion that, based on the confidentiality provisions of the ABA Model Rules of Professional Conduct, had concluded that the privilege survived.

3.2. An ABA amicus brief will be authorized only at an appellate level and generally only in the highest court in which the issue is likely to be finally determined.
3.2.1. While ABA amicus briefs have on occasion been filed in state supreme courts or federal courts of appeals, most briefs authorized in recent years have been filed in the United States Supreme Court.

3.2.2. Special consideration is given to authorizing briefs in other courts that often are the courts of last resort for a particular matter, such as the Court of Appeals for the Federal Circuit in patent matters.

3.2.3. Consideration also will be given to authorizing a statement of intervention in the Court of Justice of the European Communities and in other international courts.

3.3. Although ABA amicus briefs are usually filed after a court has agreed to hear the case on the merits, filing at the petition or other appellate stage may be desirable if expression of the ABA's position may be an important factor in the court’s determination of whether the case warrants appellate review. Filing at such stage, however, does not commit the ABA to filing at the merits stage.

3.4. Generally, the ABA will not join in the amicus briefs of other organizations. This is because the content of any ABA brief must remain within the “four corners” of ABA policy.

4. How to Find Out Whether the ABA Has Policy or Resources Pertinent to the Issue before the Court.

4.1. For information on whether the ABA has policy on a particular issue, the Policy Administration Office or the General Counsel’s Office should be contacted. The contact information for these offices is listed in Section 10, below.

4.2. These offices should also be contacted for resources, such as copies of out-of-print versions of the ABA’s Standards or Model Codes, which may be helpful in showing the ABA’s long involvement in an issue.

5. Timeline: Application through Filing of the Brief.

5.1. ABA amicus briefs are public communications to the courts, the press, the public and the ABA’s members. Every effort should be made, therefore, to ensure that there is sufficient time for thorough consideration of an application and proposed brief by the Board, the Standing Committee and the ABA entities that have an interest in the issues presented. Accordingly, as soon as an entity begins to consider whether an amicus brief should be filed in a matter, the General Counsel’s Office should be contacted.

5.2. Six weeks is the standard time needed from submission of an application through filing an ABA amicus brief.
5.2.1. Although ABA amicus briefs have been filed within shorter time constraints, this has required extraordinary effort and time commitment by volunteer members, including the drafters, the Standing Committee and the Board, and should be avoided unless absolutely necessary.

5.3. The typical timeline from submission of an application through filing of an ABA amicus brief is:

- **week one:**
  - Application is submitted to and reviewed by the Standing Committee.
  - The Standing Committee recommends whether Board should accept or decline the application. (Please note: neither the Standing Committee’s recommendation nor the Board’s acceptance of an application guarantees that the final brief will be accepted for filing as an ABA brief).
  - The Standing Committee informs the drafters whether the application is accepted or declined, and if accepted, of any recommendations on drafting the brief.
- **week two:**
  - Drafters submit first draft of proposed brief.
- **week three:**
  - Standing Committee reviews first draft and sends requests for revisions to drafters.
- **week four:**
  - Drafters submit second draft of proposed brief.
- **week five:**
  - Standing Committee reviews second draft and, if necessary, sends requests for further revisions to drafters.
- **week six:**
  - Drafters submit third draft, if necessary, of proposed brief.
  - Standing Committee presents final draft to Board, certifying whether the brief (a) constitutes a significant contribution to the Court’s consideration of the legal issues, (b) is a fair representation of ABA policy, and (c) is of high professional quality, and whether acceptance for filing is recommended.
  - If accepted by the Board, the Standing Committee asks the drafters to have the brief printed and filed with the court.

5.4. As shown in the timeline:

5.4.1. Sufficient time must be allotted for the Standing Committee to review each draft, schedule conference calls to discuss the drafts and send its comments to the drafters, and for the drafters to revise the drafts.
5.4.2. Sufficient time must be allotted for the Board to review the final version and to schedule a conference call to determine whether the brief should be approved for filing.

5.5. Because the ABA brief is very specialized (see Section 9, “Tips for Drafting the ABA Amicus Brief,” below, for discussion), the Standing Committee reviews an average of three drafts of a proposed brief before the brief is presented to the Executive Committee. It is therefore essential that drafters be available to prepare revisions within tight time frames.

5.6. The Standing Committee itself may make revisions to the draft brief, especially when the time frame is tight.

6. Submitting the Application.

6.1. A link to the application form is available on the Standing Committee’s homepage at www.americanbar.org/groups/committees/amicus.

6.2. Because of the time needed for review and approval of an ABA amicus brief, the application should be submitted as soon as possible. It should not be delayed until after the first draft of the proposed brief is completed; however, an outline of the proposed brief should be included with the application.

6.3. The application should contain all of the information requested on the form. For questions on completing and submitting the application, please contact the GCO attorney serving as staff for the Standing Committee (see Section 10, “Contact Information,” below).

6.4. The application should be submitted by e-mail to the GCO attorney serving as staff for the Standing Committee (see Section 10, “Contact Information,” below). The application should be submitted as a word document.

6.5. If the filing date mandates expedited review, this should be clearly stated in the cover e-mail.

7. Required Contents of an ABA Amicus Brief.

7.1. The ABA President is named as counsel of record, with ABA headquarters as the address. The names of the drafters are customarily added as of counsel, but without their firm attribution(s) or address(es).

7.2. Each ABA amicus brief must contain the following disclaimer as a footnote, usually on the first page of the body of the brief:
Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

7.3. The relevant ABA policy must be quoted, although sometimes only in pertinent part, together with a brief discussion of the expertise the ABA brings to the issues that others cannot.

7.3.1. The fact that ABA has policy will not be persuasive to the Court unless the Court understands that the basis for the policy is directly relevant to the issue(s) presented. (See Section 9, “Tips for Drafting the ABA Amicus Brief,” below, for discussion).

7.3.2. For ABA amicus briefs filed in the United States Supreme Court, the pertinent ABA policy is typically quoted in the “Interest of the Amicus” section and discussion of the policy is sometimes the focus of the “Argument” section. The ABA amicus brief filed in Caperton, et al. v. Massey Coal Company, et al., which is available on the Standing Committee’s website, is an example of how the history of the ABA Model Code of Judicial Conduct was used in both sections.

7.4. The first reference to ABA policy must include a footnote that states, substantially, the following:

The ABA’s House of Delegates (“HOD”), with more than 500 delegates, is the ABA’s policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. See ABA General Information, available at http://www.abanet.org/leadership/delegates.html.

7.5. The brief is filed in the name of the ABA and not in the name of an ABA entity. The ABA entity’s work and research on the issue, however, should be discussed where relevant. The ABA amicus brief filed in Mohawk Industries v. Carpenter, which concerned an alleged waiver of the attorney-client privilege, is an example of how the work of the Task Force on Attorney-Client Privilege was used in the brief. (See also, Section 9, “Tips for Drafting the ABA Amicus Brief,” below, for discussion).
7.6. Except in exceptional circumstances, the conclusion section of an ABA amicus brief is as follows:

CONCLUSION

For the foregoing reasons, amicus curiae American Bar Association requests that the judgment of the [name of lower court] be [affirmed/reversed].

8. Printing and Filing the ABA Amicus Brief.

8.1. After the brief is approved by the Board for filing, the Standing Committee will notify the drafters that the brief may be printed and filed.

8.2. The drafters are responsible for compliance with all court rules, including, where required, obtaining consent of the court or the parties, or submission of a motion for leave of the court to file an amicus brief.

8.3. The drafters are responsible for preparing the brief for filing, including proof-reading and cite-checking and print-ready formatting.

8.4. The drafters are responsible for contracting with a printer, and for having the brief printed, filed and served as required under the relevant court’s rules.

8.5. After the brief is printed, the drafters must send a scanned version to the ABA General Counsel’s Office, so that the brief can be posted on the Standing Committee’s web site. In addition, the drafters must send five copies of the printed brief to the General Counsel’s Office for the Standing Committee’s files.

8.6. The ABA pays no fees for the preparation or review of an ABA amicus brief, but in extraordinary circumstances will reimburse the drafters for the necessary costs of printing and filing the brief. While the General Counsel’s Office maintains a small budget for reimbursement, payment by the drafters is appreciated, as it assists the ABA in its ability to file additional briefs.

9. Tips for Drafting the ABA Amicus Brief.

9.1. An ABA amicus brief is very specialized in that (1) it is not an advocate’s or merits brief; (2) it must be focused on ABA expertise; and (3) it must remain within the “four corners” of ABA policy. Each of these is discussed below.

9.1.1. An ABA amicus brief is very specialized. Because of these requirements, an ABA amicus brief is very different from the typical appellate brief in both content and tone. It is essential, therefore, that time be allocated for the Standing Committee’s review of a minimum of three drafts, and that the drafters be available to prepare revisions within tight
time frames. (See Section 5, “Timeline: Application through Filing of the Brief,” above).

9.1.2. **An ABA amicus brief is not an advocate’s or merits brief.** An ABA amicus brief strives to be, truly, a “friend of the court” brief and to be seen by the court as a resource in its consideration of the issues presented. It is generally not appropriate to include discussion of party positions, legal argument that a party/advocate should be expected to present, or case-specific factual issues unless they are directly relevant to the discussion of ABA policy.

9.1.2.1. The ABA amicus brief should be drafted in a neutral and respectful tone. The tone should not imply that the ABA is attempting to give direction to the court.

9.1.2.2. Frequently, an ABA amicus brief is structured as a request that a court provide needed guidance on what is constitutionally required. Where possible, the ABA amicus brief should speak from a unified perspective of attorneys on both sides of the issue – both prosecuting and defending claims – with an emphasis on the mutual desire for predictability.

9.1.3. **An ABA amicus brief must focus on ABA expertise.** ABA expertise is rooted in the experiences of attorneys and the judiciary working in the relevant field. An ABA amicus brief must focus on the expertise that the ABA brings and that others cannot, which may be the results of years of conducting or collecting others’ research and producing reports on the ABA’s conclusions.

9.1.3.1. Although scientific evidence might be relevant to an issue, such information should not be included in an ABA amicus brief unless it is within the ABA’s expertise.

9.1.3.2. The fact that ABA has policy will not be persuasive to a court unless the court understands that the policy is based on the ABA’s expertise, that is, is based on the experiences of attorneys working in the pertinent field or on the pertinent issue.

9.1.4. **An ABA amicus brief must remain within the “four corners” of ABA policy.**

9.1.4.1. An ABA amicus brief cannot take a position on a national or state constitutional or statutory law issue unless there is ABA policy reasonably supporting the position asserted. An ABA amicus brief cannot take the position that a state law is unconstitutional unless that position is specifically stated in, or is a reasonable conclusion from, ABA policy.
9.1.4.2. An ABA amicus brief can discuss materials, including case law and law review articles that may be helpful to a court in considering the constitutional issues involved, but the brief cannot offer any explicit conclusions as to how the court should rule on those issues unless there is ABA policy reasonably supporting those conclusions.

9.2. Care must be taken to not overstate the reach of an ABA policy. Only the language approved by the House of Delegates is ABA policy.

9.2.1. ABA policies are often “inspirational,” and are based on the ABA’s conclusions as to how the law should develop. When a policy states that an action “should” be taken or, by its plain language, it is a request that the legislative branch take a specified action, it cannot be used to assert that an action must occur.

9.3. Use of Reports with Recommendations presented to the House of Delegates.

9.3.1. A Report that accompanied a Resolution presented to the House is not ABA policy; only a Resolution passed by the House is ABA policy. However, the contents of a Report may be included in a brief as illustration of matters that were considered by the House when it adopted the Resolution as ABA policy.

9.4. Use of ABA Model Codes and Standards.

9.4.1. ABA Model Codes and Standards that have been adopted by the House of Delegates are considered ABA policy.

9.4.2. In order to offer a Code or Standard as an effective guideline that may be helpful in a court’s consideration of the issue presented, the discussion should include details as to how it was formulated based on a consensus of a broad range of thinkers and has been tested in the field over a long period.

9.4.3. A state legislature’s adoption of a Code or Standard may be offered as an example of a considered legislative policy decision.

9.4.4. Case law that cites a Code or Standard and/or that supports the position taken in the Code or Standard can be persuasive.

9.4.5. While the Commentary is typically not ABA policy, it may be used to illustrate a Code or Standard.

9.4.5.1. However, care must be taken that the brief does not summarize Commentary in a way that is not supported by the plain language of the Commentary. It is especially important that, if the
court looks for a statement attributed to a Commentary, the court
will find it.

9.5. Use of letters from ABA Presidents and from others authorized to speak
on behalf of the ABA.

9.5.1. Such letters, especially where they have been presented to Congress
during its deliberations of a bill, are often helpful supporting materials and
may be quoted in ABA amicus briefs.

9.6. Use of research by an ABA entity.

9.6.1. A brief may discuss research conducted or collected by an ABA
entity on an issue, but cannot assert conclusions based on that research
unless the conclusions have been adopted as ABA policy. That is, unless
the results have been adopted as policy, the brief may only state that the
collected research “indicates” a result.

9.7. Use of older ABA policies.

9.7.1. Before using an ABA policy in an ABA amicus brief, current
circumstances should always be examined to ensure that they do not call
into question the policy’s continued, current vitality.

9.8. Accuracy. Accuracy is critical in every aspect of an ABA amicus brief.

9.8.1. It is essential that an opinion be cited for no more than what can be
found in the plain language of the opinion. For example, if a court
discussed a case in a footnote, the brief should not say that the court
“relied on” the case; rather it should state that the court “noted” the case.

9.8.2. For any case cited in an ABA amicus brief, the court must be able
to check the cited case, have no disagreement as to the ABA’s description
of the case and, perhaps, have no hesitation in using the ABA’s
description in the court’s opinion.

9.8.3. In quoting from an opinion, pieces of the opinion should not be
rearranged to make a statement that is not in the opinion.

9.8.4. If a commentary says that research “indicates,” that is the word that
must be used.

9.8.5. Bottom line: ABA amicus briefs will be posted on the ABA
Amicus website and on the legal search engines, and may be quoted in the
press. Accordingly, its accuracy must be beyond dispute.
9.9. What the Justices of the United States Supreme Court have said about ABA amicus briefs. Over the years, in meetings with individual Justices of the United States Supreme Court, the Standing Committee has been informed that ABA briefs are helpful to the Court when they:

9.9.1. Speak on behalf of the profession and from the perspective of lawyers who have experienced the issue while practicing in the relevant field.

9.9.2. Explain how ABA policy is directly relevant to the issue presented.

9.9.3. Explain the basis for ABA policy and ABA expertise, which may include the consensus views of practitioners, research conducted by the ABA or the development of, for example, the ABA’s Model Codes.

9.9.4. Do not include party arguments or a recitation of the facts of the case, unless necessary to explain the ABA’s position.

9.9.5. Do not use an adversarial tone. Rather, they should strive to be of a more neutral, “magisterial” tone, and should be offered to assist the Court by presenting the practitioners’ consensus views on the issue.

9.9.6. Are not used to gain members.

9.9.7. Are not filed too frequently.

9.9.8. Are concise. An amicus brief of ten pages has a better chance of being read through than an amicus brief over twenty pages.

10. Contact Information.

10.1. For information on ABA policies and Board and Executive Committee procedures, contact Alpha M. Brady, at (312) 988-5155 or Alpha.Brady@americanbar.org.

10.2. For information on submitting applications or drafting ABA amicus briefs, contact Annaliese f. Fleming, Associate General Counsel, at (312) 988-5777 or Annaliese.Fleming@americanbar.org.