

I. Amicus Brief Advisory Committee Guidelines

The Committee's recommendation on whether to file an amicus brief in a judicial proceeding should be guided by the following factors: (A) Whether the Academy has a significant interest in a case before the court, (B) Whether there is consensus on a viewpoint to advocate in the case, (C) Whether Academy resources are available for drafting the submission, and (D) Whether the likely impact of the submission warrants the expenditure of resources.

A. The Academy's Interest

The following five indicators point to the significance of the Academy's interest in the issue:

1. The integrity of the process, as in the central importance of neutrality or arbitral independence
2. The essential value of finality
3. The policies set forth in the Academy's governing documents and policies adopted by the Board of Governors
4. Impact on the membership
5. Effect on labor-management relations
6. Impact on the visibility of the Academy

These factors should be weighed qualitatively rather than simply quantitatively. The question should be whether one or more factors are sufficiently weighty to justify participation, rather than simply counting whether a majority of these factors are implicated. For example, in an Nevada state court disclosure case, *City of North Las Vegas v. Michael Thomas and John Strong*, the ABAC decided for the first time that the trial court's ruling was sufficiently threatening to the integrity of the process including the impact on arbitrators to warrant participation in the case, even though the case was being decided in a state Supreme Court.

The circumstances surrounding the filing may also implicate the Academy's interest. For example, the Academy's core interest in neutrality may be called into question when partnering with other organizations in the filing of amicus briefs. The issue under A.1 of these Guidelines would be whether the Academy's reputation for neutrality would be undermined by such a partnership.

These factors are not mutually exclusive. The weight of the Academy's interest would seem to increase with the involvement of multiple factors.

B. Viewpoint Consensus

In an organization such as ours it is not feasible to think of consensus in the popular sense of unanimity. It does seem that consensus, meaning general agreement, should be reflected in a positive decision on amicus participation. This still leaves the question of how consensus should be determined.

Committee consensus is to be determined by relying on policies that have passed membership muster as contained in the Code, By-Laws, Resolutions and other statements of policy. The ABAC can and should vote on whether to file an amicus brief, and the Chair should assess whether the vote reflects general consensus of the Committee as a whole. Ultimately, the Executive Committee, in some circumstances, and the Board of Governors in others, will exercise their judgment in deciding whether the advocated position would reflect a consensus of the Academy. The ABAC may seek to inform their judgment about whether there is, or is likely to be, a consensus within the Academy by consulting those who are knowledgeable in the field including past committee chairs or members of the Committee.

C. Available Resources

This factor has two aspects. First, as we have done historically we may choose to draft the brief internally and use outside (generally local) counsel only when procedurally necessary to effect an appearance before the court. Using our members to draft amicus briefs assumes enough lead time to fit such a project within busy schedules. When lead time is sufficient, ABAC or NAA members should have the first opportunity to write such a brief assuming the expertise and subject to the procedures below for supervision by the Executive Committee.

Second, if after solicitation no Academy members are available and qualified, the Committee may seek to have a brief drafted by outside counsel pro bono on behalf of the Academy. If pro bono assistance is not available, the Committee may recommend solicitation of outside assistance insisting on the highest quality submissions. The availability of a pro bono outside writer should not itself be a factor in deciding whether a case is appropriate for an amicus brief. Outside brief writers should ordinarily be a last resort. The following factors should guide the Committee in recommending whether the Academy employs outside counsel:

(a) Qualifications

(b) Cost

(c) NAA Supervision and control

(d) Conflicts of Interest due to identification of outside counsel with members of the ABAC, parties to member arbitrations, or clients/positions that are antithetical to collective bargaining.

The Committee's recommendation should reflect its assessment of these factors.

D. Likely Impact

The use of the Academy's scarce resources to submit amicus briefs should be reserved for cases that are likely to have a substantial impact on the development of the law of arbitration particularly as related to labor management and employment. The determination of impact involves an evaluation of both the nature of the issues and the level of the court. Unsettled issues involving a split between the circuits or issues of first impression that bear significantly on arbitration law and policy will be

considered. Cases appealed to the United States Supreme Court or influential federal circuits likely to have a substantial impact on other courts will be given priority.

II. Procedures for Evaluation and Approval

(1) Requests from members at large or from outside sources for Academy participation in the filing of amicus briefs should be submitted to the ABAC Chair and, unless clearly not qualifying for consideration under the guidelines, circulated to Committee members.

(2) Following the Committee guidelines the ABAC will discuss the merits of amicus participation and Committee members and will then vote on a recommendation to be submitted to the Executive Committee.

(3) The recommendation favoring or disfavoring the amicus submission will be submitted to the Executive Committee along with a cover memorandum describing the case, the source of the request, the tally by member, a summary of the Committee's deliberations, reasons that members voted for or against the recommendation and suggestions about the drafting process.

(a) If a determination has been made at the time of the recommendation as to who should write the brief assuming the request to file is approved, the Executive Committee shall be so informed.

In the event the ABAC is recommending outside counsel, an accounting of the Committee's assessment of its guidelines (Section C) will be included in its recommendation. The recommendation should reflect the brief writer's agreement to the conditions of their retention set forth below. If an outside brief writer is not identified until after the Executive Committee approves the submission of an amicus, the recommendation of the outside brief writer will be submitted in a similar fashion.

The following conditions will apply to the retention of an outside brief writer:

- The drafter agrees to be supervised by a member of the ABAC
- The drafter agrees not to file the brief until written consent is given by the President
- The drafter affirms there are no conflicts of interest or other client associations that may have an appearance of a conflict with its role as writer of the Academy's amicus brief
- The drafter agrees to include the following certification or words to this effect in its brief: "The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission."

(4) The Executive Committee may either adopt or reject the Committee recommendations.

(5) Upon the writer(s)' completion of the draft the brief shall be submitted to the ABAC for discussion and potential modification.

(6) Following the Committee's approval of the draft with modifications the ABAC Chair shall submit the brief to the Executive Committee for approval on an expedited basis where appropriate.

(7) No amicus brief may be filed without Executive Committee approval.

(8) It is understood that exigencies from time to time may require the Executive Committee's responsibilities to be delegated to the President.

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