



NATIONAL EMPLOYMENT LAWYERS ASSOCIATION *Amicus Program Principles, Policies & Procedures*

General Principles, Goals, and Case Selection Criteria

NELA petitions to appear as *amicus curiae* in employment and civil rights litigation that supports the organization's mission of advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace. The cases which are most appropriate for NELA'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 adverse aspects of an existing body of law. As discussed below, NELA's *amicus* priorities will guide the selection of cases in which NELA will appear as *amicus*. NELA also appears as *amicus curiae* in cases in which employees or their attorneys have been improperly subjected to sanctions.

In determining whether to appear as *amicus curiae*, NELA also will consider whether it can make a unique contribution to the case and the resource commitment needed to prepare a quality brief. As *amicus curiae*, NELA will strive to address 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 often skimmed, if not ignored altogether.

NELA generally will decline to appear as *amicus curiae* in support of motions for *en banc* review by federal appeals courts, and NELA will exercise great care in scrutinizing proposals to appear in support of petitions for *certiorari*, because these motions and petitions are rarely granted. NELA generally will defer to its affiliates to submit *amicus* briefs before state appellate courts or federal courts on matters of state law, and thus typically declines to participate in such matters (see section regarding "Guidelines for National-Affiliate Cooperation" below). NELA also will decline to appear in cases which involve requests that NELA take positions that are contrary to the organization's mission and/or present an unwarranted risk of producing negative precedent harmful to the interests of individual employees and their attorneys. Absent approval from the Executive Board, NELA will not file an *amicus* brief on behalf of an employer.

The *Amicus* Advisory Council

Council Membership

The *Amicus* Advisory Council shall be comprised of 12 individuals who each "represent" a federal circuit, the AAC Co-Chairs, the Program Director, and any other individuals appointed by the President who are deemed necessary to further NELA's *Amicus Program*. The AAC Co-Chairs shall consist of at least one current Executive Board member. The President of NELA, in consultation with the Executive Director, shall appoint members of the AAC.

Priority Setting

Every two years, and at about the same time NELA's legislative priorities are being considered, the AAC will make recommendations to the Executive Board as to what should be NELA's top *amicus* priorities,

based upon significant and/or emerging issues in employment discrimination and civil rights law. In doing so, the AAC will consult the Executive Board, NELA's Subject Matter Advisory Groups, and Affiliate Leaders. Because of the importance of maintaining a comprehensive and consistent strategy throughout NELA's programmatic activities, NELA's *amicus* priorities will reflect its organizational priorities where possible and appropriate. The Executive Board will formally adopt *amicus* priorities that will guide the selection of NELA's *amicus curiae* briefs until new priorities are adopted. From time to time, and as circumstances warrant, the AAC may make recommendations to the Executive Board to modify NELA's *amicus* priorities.

Responsibilities of the Council

The AAC Co-Chairs will assist the Program Director in fielding *amicus* brief requests and identifying new cases appropriate for NELA's involvement as *amicus curiae*, and otherwise assisting with NELA's *amicus* work as necessary and appropriate. In particular, the AAC Co-Chairs shall be responsible for helping the Program Director determine whether and the extent to which a proposed *amicus* project, brief, or argument within a brief would be inconsistent with NELA's mission and/or would pose an unwarranted risk of producing negative precedent.

AAC members will help the Program Director identify new cases appropriate for NELA'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 Program Director or an AAC Co-Chair, participate in discussions and deliberations regarding proposed *amicus* briefs, and otherwise assist with NELA's *amicus* work as necessary and appropriate. An AAC member who is consistently unable to fulfill these responsibilities will be replaced.

Conflicts of Interest

Any AAC member (or other NELA member or NELA staff member) with a direct interest in a case should recuse themselves from deliberations regarding NELA's potential involvement as an *amicus* in that case. Any AAC member (or other NELA member or NELA staff member) with an indirect interest (*i.e.*, any substantial interest not requiring recusal) should disclose their interest in the case (or, *e.g.*, in related cases) to other AAC members, the Program Director, the Executive Director and others in involved in deliberations regarding NELA's potential involvement as an *amicus*.

Confidentiality

All conversations and communications among members of the AAC for the purpose of furthering NELA's *Amicus* Program (including requests for *amicus* assistance, related materials, and emails sent via the listserv) are the confidential work-product of NELA. Such communications, including emails received via the AAC listserv, should not be forwarded outside of the AAC, advisory group (as defined below), and Executive Board and should not be forwarded to the requestor.

Procedure to Review Requests for *Amicus* Assistance

The Program Director will review every request for *amicus* assistance and make a determination whether to (1) decline the request based on the "General Principles, Goals, and Case Selection Criteria" stated above; or (2) seek further review from members of the AAC and/or others as described below. The Program Director shall make reasonable efforts to determine the views of the relevant local affiliate (if any) on the particular case or issue at hand (see section regarding "Guidelines for National-Affiliate Cooperation" below). If there is controversy or potential controversy surrounding a request for *amicus* assistance, the Program Director will consult the Executive Director, the Co-Chairs of the AAC, and, where appropriate, the President. Requests for briefs regarding ethics issues shall follow the same procedures set forth herein.

Except as provided below, NELA only will appear as *amicus* in a case if there is a consensus to do so among the Program Director, the AAC and the additional NELA members, if any, who are consulted for input on the decision because of their familiarity with the relevant legal issues or the case law of the relevant court (these additional NELA members will be referred to as the “advisory group”).

The process to determine whether NELA will appear as *amicus* in a case is as follows:

- 1) The Program Director fields the request. The Program Director may reject the request or decide to seek further review of the request.
- 2) If further review is considered appropriate, the Program Director may consult with the AAC Co-Chairs, the relevant local affiliate leader (if any), the relevant AAC circuit representative, and the advisory group (if any) to discuss whether the *amicus* request warrants presentation to the full AAC, and, if so, what the proposed focus of an *amicus* brief should be, and, if necessary, who are likely candidates to write such a brief.
- 3) If the Program Director believes *amicus* assistance may be appropriate, the Program Director will prepare a memorandum setting forth the relevant facts and issues in the case, the proposed focus of a NELA *amicus* brief, the proposed brief writer (if known), and a deadline for responses to the memorandum. This memorandum will be circulated to the full AAC and the advisory group.
- 4) If there is consensus to file the proposed *amicus* brief, then the request for *amicus* assistance will be granted. If there is no consensus, the Program Director will make reasonable efforts to find common ground among members of the AAC and the advisory group on the content of an *amicus* brief in the case. If no consensus emerges, then the request for *amicus* assistance will be rejected unless there is substantial support for the filing of an *amicus* brief and the AAC Co-Chairs, in consultation with the President and Executive Director, agree that the filing of a NELA *amicus* brief in the case is in NELA’s best interests. Where appropriate, the AAC Co-Chairs may seek guidance from the Executive Board. Once the AAC has reached consensus about how to proceed with a particular request, the consensus position of the AAC and the rationale for that position will be communicated to the requestor by the Program Director. Thereafter, Executive Board and AAC members may communicate the consensus position and rationale for that position to interested parties or anyone inquiring about the matter outside the AAC but should maintain as confidential the specifics of deliberations within the AAC.
- 5) The Program Director shall identify and communicate with the brief writer as needed to clarify the proposed focus of the *amicus* brief, and the Program Director shall review and approve the final brief before it is filed.

It is the goal and intent of the NELA Executive Board 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 Board, NELA 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 Officers of the Executive Board (*i.e.*, the Executive Committee of the NELA Executive Board), or of the Board itself, will be required only in rare cases.

Additional Guidelines for Requests for *Amicus* Briefs to the U.S. Supreme Court

Requests for *amicus* assistance before the U.S. Supreme Court shall be handled in the same way as all other requests, except:

- 1) The Program Director will make special effort to coordinate NELA's *amicus* strategy with and consider the *amicus* briefs and strategies of other organizations.
- 2) The Program Director will make special effort to find common ground among members of the AAC and advisory group as to whether to file an *amicus* brief and regarding the substantive focus of such a brief.
- 3) The Program Director shall elicit the cooperation of up to two individuals who will agree to review the substance of the brief during the drafting process, and their identities and availability shall be made known to the volunteer brief writer(s). Such individuals shall make themselves reasonably available to assist the Program Director and *amicus* brief writer(s).
- 4) In general, the Program Director will make special effort to preserve and advance the credibility of NELA as a strong and influential voice on behalf of employees' rights before the Supreme Court.

Cooperation with the Parties and Other *Amicus* Authors

The position that NELA takes in its capacity as *amicus curiae* shall not be drafted, approved, or financed by the party NELA supports on appeal. This separation is required by the rules of certain courts, including the U.S. Supreme Court, and ethical principles governing *amicus* brief preparation. Independence and cooperation are not mutually exclusive, however, and 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. This also does not preclude other forms of assistance to the party's counsel, especially when such counsel is a NELA 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.

NELA and its members are part of a larger civil rights community whose members care greatly about employment and civil rights issues and have a great deal of expertise to offer. While it is generally NELA's preference to draft its own brief expressing its own views, NELA may join another organization in filing a joint *amici curiae* brief, or may invite another organization or one of its affiliates to join NELA's brief. When numerous groups are working in coalition to determine an overall *amicus* strategy, NELA will participate in such strategic discussions (except where to do so would compromise NELA's integrity and independence) and will work to coordinate with other *amicus* writers.

Guidelines for Submitting an *Amicus* Request

Unless a request is initiated by staff, NELA 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.

*These materials can be submitted by email, fax, or regular mail.

If an attorney or litigant believes that a particular case is one in which the court will benefit from the views of NELA as *amicus curiae*, that attorney or litigant should contact NELA as early in the appellate process as possible. If NELA is asked to draft a brief, a minimum of 40 days' notice (absent exceptional circumstances) prior to the due date is required. If NELA is being asked to sign on to the brief of another organization, a minimum of 7 days' notice is required (absent exceptional circumstances).

Guidelines for Volunteer Brief Writers

The volunteer attorneys who draft NELA's *amicus* briefs generally work in private practice, and cannot be expected or asked to neglect the interests of their own clients in order to answer a last minute call for an *amicus* brief.

Attorneys who agree to author NELA's *amicus* briefs should agree to 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 Program Director as soon as possible, so that alternate brief writers can be identified, if possible. The commitment to write a brief includes a commitment to honor all deadlines imposed by the court, the printer (if applicable), and the Program Director. Eleventh-hour brief preparation is highly discouraged, since last-minute work may affect NELA's ability to produce a timely brief of the highest quality. A NELA attorney's history of honoring brief-writing commitments and complying with deadlines will be taken into account when selecting brief writers for future briefs.

Often a NELA *amicus* brief will be prepared by two or more attorneys on NELA'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 NELA attorney(s) will author NELA's *amicus* brief, the Program Director, in consultation with the Executive Director, will make the final decision as to who will author the brief. NELA 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 Program Director, who shall resolve any major disputes in conjunction with the Executive Director, the Co-Chairs of the AAC, and, where appropriate, the President. The volunteer attorney agrees to communicate with NELA after the brief is filed regarding any news or information he or she receives about the case. The attorney must notify NELA when the court issues its decision, and when possible, forward a copy of the decision to the NELA Program Director.

A copy of these guidelines shall be forwarded to every volunteer brief writer at the time that he or she is selected to draft a brief for NELA.

Expenses

NELA will reimburse volunteer attorneys for the following expenses related to the cost of preparing *amicus* briefs: any filing fees, costs of reproduction, messengers, postage, and similar expenditures, unless otherwise agreed to by the NELA and the volunteer. NELA is unable to reimburse volunteer attorneys for any other expenses, including the cost of on-line research, such as the use of Lexis or Westlaw. As NELA's *amicus* budget is limited, any contribution volunteer attorneys choose to make in terms of foregoing reimbursement is appreciated.

Staff Review

A final (or very nearly final) draft of every *amicus* brief should be sent to the NELA Program Director, at least 10 days prior to the filing deadline to allow sufficient time for review and editing, and, where applicable, to ensure compliance with the deadlines imposed by NELA's printing service. The Program Director shall take responsibility for circulating this draft for review to the Executive Director, and, as appropriate, any NELA members who have agreed to serve as reviewers in a particular project. When a brief will be filed directly from the volunteer attorney's office, the final version of the brief must be sent to the Program Director for final review immediately prior to filing.

Because cases in which NELA is involved as *amicus* may have a broad effect on policy as it relates to NELA's mission, the brief writer must consult with the Program Director and designated NELA members about strategic or philosophical decisions being made while briefs are being drafted. Draft briefs always will be reviewed by the Program Director and, where appropriate and as needed, one or more additional reviewers, including, in particular, designated reviewers for U.S. Supreme Court briefs. These guidelines enable NELA to provide editorial and substantive assistance where appropriate and needed, and to ensure that NELA's policy remains consistent throughout various *amicus* briefs.

The authors of NELA's *amicus* briefs generally have considerable discretion and latitude in drafting a brief so long as it is consistent with guidance provided by the Program Director's memorandum summarizing the substantive focus of the brief, as well as subsequent guidance afforded during the *amicus* review process (*i.e.*, by the AAC, AAC Co-Chairs, and/or members of the advisory group) regarding the focus of the brief. However, the Program Director, together with a designated member(s) of the advisory group may (after consultation with the Executive Director, the Co-Chairs of the AAC, and, where appropriate, the President) edit or override the volunteer attorney's draft brief in order to assure the filing of a high quality brief consistent with NELA's mission and policies and/or the position taken in prior *amicus* briefs submitted by NELA on the same or similar subjects.

Unless alternative arrangements are made, the Program Director will prepare NELA's Statement of Interest to be incorporated into the brief.

Guidelines for National-Affiliate Cooperation

NELA supports communication with and from its state and local affiliates in order to avoid conflicting or inconsistent positions and duplication of efforts. As stated above, NELA generally defers to local affiliates to submit briefs before state appellate courts or in the federal courts on matters of state law. Regarding matters in the federal appellate courts that are national in character, NELA strongly encourages open and timely coordination between local affiliates in the relevant jurisdiction(s) and NELA.

NELA monitors with particular attention the issues identified in its *amicus* priorities. In identifying *amicus* priorities, NELA endeavors to create a consistent nationwide body of law on targeted issues that will advance equality and justice in the workplace and serve NELA members and individual employees. To further this effort, NELA strongly encourages and invites consultation with local affiliates considering participating as *amici* in cases involving NELA's priority issues.

If NELA and a local affiliate are considering participating as *amici* in the same case, arguments should be evaluated to determine if two briefs are in fact necessary, if NELA and the affiliate might jointly submit a brief, or if other arrangements are appropriate. Because submission of two briefs with similar or the same arguments could negatively impact both briefs' reception by the court, NELA strongly encourages coordination with affiliates to avoid such duplication.

If NELA and a local affiliate cannot agree on a position and, in turn, file briefs with conflicting positions (as permitted under NELA's Board Resolution "provided that [the affiliate's position is] not fundamentally inconsistent with the principles of NELA set forth in its certificate of incorporation or its By-Laws"), NELA and the local affiliate should take great care to announce publicly that their briefs are separate and independent from each other. The NELA Executive Board or the NELA staff may, in its discretion, state publicly that the affiliate's action is its own and does not represent the policy of NELA. However, such divergence is viewed as a last resort, and NELA is committed to a coordinated process for the integration of NELA's and local affiliates' views.

Unless otherwise directed, NELA will communicate with an affiliate's *Amicus* Liaison or Affiliate Leader to ensure that all persons taking action on NELA's or an affiliate's behalf operate within the framework of these guidelines.

Brief Format and Counsel of Record

All *amicus* briefs submitted on NELA's behalf shall bear the name of the NELA Program Director and the National Employment Lawyers Association as co-counsel. Ordinarily, the name, address and telephone number of the volunteer attorney(s) should appear at the top of the cover sheet, followed by the NELA Program Director, as follows:

Volunteer Attorney(s) Name(s)
Counsel of Record (if required by court rules)
FIRM
Address
Telephone Number
Fax Number (if required)

NELA Program Director's Name
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway
Suite 402
Oakland, CA 94612
(415) 296-7629
(866) 593-7521 (if fax number is required)

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 NELA Program Director, so that appropriate arrangements to secure a counsel of record can be made.

Effective October 9, 2009

(Revised Version Adopted by the NELA Executive Board on 10/9/09)