

## **NYIPLA PROCEDURAL GUIDELINES FOR *AMICUS* BRIEFING**

### **I. Board Oversight Guidelines**

#### **A. Principal Objectives**

1. The Board should exercise oversight sufficient to ensure that the legal analyses and positions taken by the Association in *amicus* submissions are consistent with the Association's objectives.

2. To the extent possible, the Board should assist the Committee on Legislative Oversight and Amicus Briefs (the "Committee") to avoid positions and arguments which might offend the legitimate concerns of significant minority membership factions.

3. The Board should also assist the Committee in identifying the policy considerations which should be discussed within the context of the legal issues presented -- as Federal Circuit representatives have explicitly requested.

4. The substantive touchstone for the Committee and the Board should be an overriding concern for improvements in the application of the intellectual property laws by the courts and agencies in a consistent fashion which fulfills their Constitutionally mandated objectives. Additionally, the Association's substantive positions should be formulated with a view to transparency, clarity and predictability.

5. Sometimes, although the Committee and the Board may determine that a request for *amicus* support possesses substantive merit, the procedural posture or factual complexities of an appeal may dictate that the Association should not become involved. The Board should assist the Committee in identifying those situations in which a particular appeal may represent an inappropriate vehicle for presentation of an otherwise meritorious legal argument

6. The Board should attempt to ensure that the work product of the

Association's *amicus* submissions remains of the highest order from the standpoint of both legal analysis and draftsmanship.

7. The Committee and Board should strive to prevent undue influence by the parties in interest over the *amicus* process, and will require disclosure of all current representation of the parties in interest by the Committee and Board members.

8. Finally, the Committee and Board should strive for a tone that is neither overtly partisan nor strident.

9. Consistent with the foregoing objectives, the Committee and its volunteer brief writers should be afforded maximum flexibility for their formulation and presentation of appropriate *amicus* arguments to the Federal Circuit, the Supreme Court and other fora.

**B. Volunteer Service Recognized**

10. Without volunteer brief writers, no *amicus* brief would ever be filed on the Association's behalf.

11. The volunteer brief writers often must operate under time pressures that the Committee and Board should attempt not to exacerbate.

12. Volunteer brief writers require varying degrees of supervision and oversight from the Committee Chair.

13. In practice, Committee members usually volunteer to take responsibility for the preparation of a draft brief and will either prepare it without assistance or have it prepared by others from their firms. Other Committee members also sometimes volunteer to supervise research on specific issues or prepare drafts of arguments on such issues.

14. It must be recognized that volunteer brief writers (a) almost always will have a philosophical position they wish to espouse, and (b) may have clients that, although not parties, may be interested in the outcome of the litigation. Neither philosophical bias nor client interest should present any conflict of interest

problem so long as (a) no conflicts exist under the attached guidelines, and (b) the arguments and presentation of the volunteer brief writers are consistent with the Board's views and formulated in accordance with the foregoing objectives.

C. **Specific Oversight Guidelines**

**Initial Communications**

15. All requests for *amicus* support received from a party in interest shall be circulated by the Committee Chair to parties adverse to the requesting party. Such adverse parties shall be afforded the opportunity to comment on such requests.

16. Summaries of all requests and comments received from parties, together with any supporting materials, and summaries of any proposals for *amicus* support generated *sua sponte* from within the Committee or the Board, shall promptly be circulated by the Committee Chair to all Board members and all Committee members, with copies to the NYIPLA Executive Director.

17. Whenever a Board member (a) determines that no *amicus* brief should be filed in response to any request or proposal, or (b) formulates a position as to any legal position or argument that should or should not be presented in a proposed *amicus* brief, he or she should promptly communicate that view to the Board Liaison and Committee Chair, with copies to the Executive Director.

18. The Board Liaison and Committee Chair shall be responsible for coordinating distribution of copies of all Board comments to other members of the Board and Committee.

**Prompt Agreement In Principle**

19. Whenever it is deemed probable that a consensus will favor preparation of a brief *amicus curiae*, the Committee Chair shall appoint a principal volunteer brief writer, together with such additional volunteer brief writers as the Chair shall deem appropriate. The principal volunteer brief writer shall promptly prepare a short outline of the substantive arguments to be made in the brief which, after review by the Committee Chair, shall be circulated to all Committee and Board

members, with copies to the Executive Director.

20. The Committee Chair shall periodically inform the Board Liaison on the progress of the drafting work, and copies of all formal and informal reports on such work shall be sent to the Executive Director.

21. Any negative comments and suggestions from members of the Board regarding the proposed filing shall be submitted to the Board Liaison and Committee Chair with copies to the Executive Director no more than seven days after circulation of the substantive outline.

22. Whenever it may appear that some members of the Board do not favor filing an *amicus* brief containing one or more of the arguments proposed, the Committee Chair and principal volunteer brief writer should be informed of that fact along with any proposed revisions which would obviate the objections of the Board members involved.

23. The Board members, the Committee Chair and the principal volunteer brief writer should consider proposed revisions to the draft *amicus* brief in an effort to reach a consensus among the Board in favor of filing an acceptable revised brief.

#### Board Review Of Drafts

24. Semifinal drafts of all proposed *amicus* briefs setting forth virtually complete substantive arguments should be circulated to all Board members and the Executive Director no later than seven days prior to its due date and discussed during at least one meeting of the Board by teleconference or in person.

25. The final draft of all proposed *amicus* briefs shall be circulated to all Board members and the Executive Director no later than one day prior to its due date.

#### Board Voting

26. No proposed *amicus* brief shall be filed on behalf of the Association unless and until at least nine members of the Board (from the total of

sixteen officers and members of the Board) have voted in favor of filing such proposed amicus brief, either in person, via written proxy or via e-mail. If one or more Board members do not vote for any reason, including recusal, that circumstance shall not reduce this absolute majority requirement for nine votes.

27. Adverse Board comments regarding an initial proposal under Paragraph 19, or regarding a semifinal draft under Paragraph 24, shall not foreclose subsequent presentation of modified drafts for Board consideration.

28. Any inaction by the Committee or recommendation by the Committee not to prepare an amicus brief shall not foreclose the Board from considering, preparing, and filing a Brief without involvement of the Committee.

29. All discussions and voting on *amicus* matters shall be maintained in confidence, except for publication of the decision of the Board to file or not to file the amicus brief.

## **II. Conflict Of Interest Guidelines**

### **A. Board Guidelines**

1. Attached hereto as Exhibit A is a copy of the “Board Of Directors Conflict Of Interest Guidelines” (“Board Guidelines”) that were considered and adopted by the Board on April 1, 2008.

### **B. Committee Guidelines**

2. Attached hereto as Exhibit B is a copy of the “Committee on Legislative Oversight & Amicus Brief Conflict Guidelines” (the “2007 Committee Guidelines”) that were based upon the AIPLA’s amicus brief conflict guidelines; were enacted by an 18-1 vote of the Committee; were transmitted to the President by the Committee Chair on July 16, 2007; and were intended to govern the Committee’s conflict policy “unless and until the Board should instruct the Committee to modify such Guidelines”.

3. Attached hereto as Exhibit C is a copy of the “Committee on Legislative Oversight & Amicus Brief 2008 Conflict Guidelines” (the “2008

Committee Guidelines”) that were adopted at a meeting of the Board on April 1, 2008, at which the Board voted to conform the 2007 Committee Guidelines to the Board Guidelines and to instruct the Committee to begin employing the revised 2008 Committee Guidelines.

### **III. Perpetuation Of Disclaimers**

1. The substance of the following first disclaimer shall be incorporated into every *amicus* brief filed on behalf of the Association:

The arguments set forth in this brief were approved on [date] by an absolute majority of the total number of officers and members of the Board of the NYIPLA (including such officers and Board members who did not vote for any reason, including recusal), but do not necessarily reflect the views of a majority of the members of the Association or of the firms with which those members are associated.

2. The substance of the following second disclaimer shall be incorporated into every *amicus* brief filed on behalf of the Association:

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

3. The substance of the following third disclaimer shall be incorporated into every *amicus* brief filed on behalf of the Association:

After reasonable investigation, the NYIPLA believes that no member of its Board or Amicus Committee who voted to prepare this brief on its behalf, or any attorney in the law firm or corporation of such a Board or Committee member, or attorney who aided in preparing this brief, represents a party with respect to this litigation. Some

Committee or Board members or attorneys in their respective law firms or corporations may represent entities, including other amicus curiae, which have an interest in other matters which may be affected by the outcome of this litigation.