

BUSINESS LAW SECTION AMICUS GUIDELINES AND PROCESS

EXTRAORDINARY MEASURE: The Section's appearance as a friend of the court is the rare exception and not the rule. The strength of the Section's reputation as an *amicus* stems in large part from the Section's unwillingness to request court approval as an *amicus* every time we sense an injustice is upon us. Our ability to befriend a court is a privilege. To the extent we abuse it, our carefully considered words will lose their significance. The Amicus Committee accordingly views all requests for participation with skepticism as its role is to promote the interests of the Section and to assist the Section in promoting statewide laws that promote the interests of the businesses and citizens of the State of Florida.

GOVERNANCE: The Section's involvement as a friend of the court is governed by the bylaws of the Section and rules promulgated by The Florida Bar. The Section's By-laws and prior standing legislative positions set forth the scope of issues that the Section might be involved in as a friend of the court. Any involvement of the Section as a friend of the court requires approval of The Florida Bar. Subject to reversal by the Executive Council of the Section, support of previously approved Section legislative positions will be presumed to be within the scope of issues and positions on which the Section may offer an amicus brief. The Section's Bylaws effective 2016 require that an amicus position may only be taken after approval by the Executive Council at a properly called meeting of the Council at which more than a majority of members are present. Bylaws Section 6.2 (e). In addition, The Florida Bar requires that Sections may only participate as amicus curiae if the issue is within the subject matter of the Section, the issue does not carry the potential of deep philosophical or emotional division among a substantial segment of The Florida Bar, the position is clearly identified as an action of the Section and not The Florida Bar as a whole, and the brief is expressly approved for filing by The Florida Bar Board of Governors. Florida Bar Standing Procedures § 800.10.

MISSION: Advocate implementation and improvement of laws that promote businesses in the state in keeping with the Section's mission on behalf of the Section when requested by a court or when it appears a court may need assistance with respect to a confusing or specialized aspect of business law. We generally do not participate in a case before it reaches the Supreme Court of Florida or the Eleventh Circuit Court of Appeals, unless requested by a court or there are extraordinary circumstances. We take great pains to limit our arguments to the law as we understand it and the policies the court may be considering - avoiding to the extent possible - the specific facts of the case. We also carefully review each case presented to us for consideration to assess and report to the Section on whether we believe it prudent for the Section to become involved in a case.

COLLABORATION: At all times we work with The Florida Bar and its counsel to seek

Bar approval of our planned or ordered involvement as a friend of the court and to identify any potential conflicts we see with other Sections or Bar positions.

REPORTING: During all phases of the work of the Amicus Committee, the Committee reports to the Chair or the Chair's designee.

GENERAL PROCEDURES:

1. Issue and conflicts identified. Typically, involvement begins by a member of the Section identifying simultaneously to the Amicus Committee and a relevant substantive committee of the Section a particular case that may warrant Section involvement or when a court issues an order respecting the Section's involvement. A request should be made by letter or email to both the Amicus Committee and Substantive Committee, attaching the court decision sought to be reviewed and explaining why the proponent believes Business Law Section participation is warranted under these guidelines. The Amicus Committee will identify any conflicts the Committee may have and attempt to identify any conflicts members of the Executive Council may have and will attempt to exclude the conflicted persons from further involvement with the amicus process as it relates to the particular case. The Amicus Committee shall also identify whether other Substantive Committees other than that identified by the requestor should review the request prior to presentation to the Executive Council. The Amicus Committee will make a preliminary and nonbinding decision as to whether the participation requested meets these Guidelines and make a recommendation to the Substantive Committees and Chair accordingly.

2. Substantive Committee Review. The Substantive Committee(s) charged with reviewing the request shall, after consultation with the Amicus Committee, determine whether its members believe the Section should take a position and identify what that position should be and which Section committee(s) (or individuals) has or have an expertise in the issue identified as possibly warranting Section involvement as a friend of the court and are willing to prepare a brief and any required accompanying motion for leave to appear on behalf of the Section. A Substantive Committee, by a majority vote of its members, can then request that the Executive Committee call a special meeting of the Executive Council to consider the position, or else place the request on the Agenda for a planned meeting. Such request shall include an outline of the deadlines that the Section must meet if it is to participate, the position to be taken, and an explanation as to why the issue warrants Section participation as a friend of the Court. The Substantive Committee(s) may also, in its discretion, propose a Task Force to study the issue and make recommendations to the Substantive Committee(s) and the Amicus Committee.

3. Executive Committee. The Executive Committee of the Executive Council shall preliminarily consider whether the Substantive Committee's request meets the substantive and procedural requirements of these Guidelines. Without regard to its

members' individual feelings about the substantive issue, the Executive Committee shall either authorize the Chair to call a special meeting or place the request on the agenda of a regularly scheduled meeting if the proponent has made a prima facie showing that these guidelines have been met. Upon approval of taking the position, the Chair or the Chair's designee, with the assistance of the Amicus Committee, will ensure that the draft brief meets these requirements and is within the scope of the Executive Council's charge prior to submission of the draft to The Florida Bar for approval.

4. Executive Council: Pursuant to Section Bylaws, the Section may authorize Amicus participation by a majority vote, either at a properly noticed meeting, or by written consent. Bylaws Section 6.2(c)-(e).
5. General Counsel to Bar: During the approval process, the Amicus Committee will coordinate with General Counsel to The Florida Bar, letting that person know the issue, the case, and any potential conflicts with other sections of The Florida Bar. Upon receiving permission to appear in a case, the Amicus Committee will follow the required procedures to obtain Bar approval of the Section's position and share draft briefs and our final product with The Florida Bar's general counsel as per the procedures outlined in Florida Bar Standing Procedures.

TIMING GUIDANCE:

It is incumbent upon the proponent of any *amicus* actions to check the rules of the court to which the Section is being asked to appear as *amicus*, understand the deadlines, and clearly state the deadlines in any request. The rules of appellate procedure in state and federal courts vary and should be confirmed. In addition, the Section must follow Florida Bar Standing Rules Part 800 regarding procedures for amicus participation. Subject to revision of any of those rules, the timing is generally as follows:

- **Submission to The Florida Bar:** The Florida Bar Standing Procedures require that Bar sections requesting approval of filing an amicus curiae brief submit the draft to The Florida Bar (through the Executive Director) at least ten days prior to the date the brief is due to be filed. It is possible to obtain a waiver of this requirement with the express consent of The Florida Bar president, but please endeavor to keep this 10 day rule in mind when preparing drafts and making requests for Section participation. The Section endeavors to avoid asking for a waiver of the 10 day requirement, and if such a waiver is to be requested, it must be done as early in the process as possible to get the best chance of approval. Such waiver will be requested by the Chair or the Chair's designee.
- **Florida Supreme Court or District Court of Appeal Amicus Briefs.** Consider Florida Rule of Appellate Procedure 9.370 carefully. An amicus curiae brief must be served no later than 10 days after the first brief, petition, or response of the party being supported, or if no party is being supported, after the initial brief or petition is filed. Because of timing, the Section will generally file its motion for leave to appear with the proposed brief and ask for the Court to accept the attached brief as-filed. As such, the draft amicus brief must be submitted to The Florida Bar for approval prior to the filing of the brief of the party being supported or initial brief.
- **Florida Supreme Court Notice of Intent to File Amicus Brief.** Consider Florida Rule of Appellate Procedure 9.370 carefully. Pursuant to Florida Rule of Civil Procedure 9.370(d), the Section may only file such a notice if the Executive Council has approved appearing as amicus. The Substantive Committee should provide to the Executive Council the draft Notice of Intent to file as part of the approval process outlined above. The notice may be filed at any time after the request for review has been commenced and before the Court has ruled on jurisdiction. However, keep in mind that briefing on jurisdiction, absent an extension of time granted to one or both parties, is complete 40 days after the notice is filed. Florida Rule of Appellate Procedure 9.120(d). The Florida Supreme Court may rule at any time after jurisdictional briefing is complete.
- **Eleventh Circuit Amicus Briefs.** Consider Federal Rule of Appellate Procedure 29 and Eleventh Circuit Rules 29-1 through 29-4 carefully. An amicus brief must be filed

with the accompanying motion for leave to accept the attached proposed brief no later than 7 days after the principal brief of the party being supported is filed, or after the Appellant's brief if no party is being supported. As such, the draft amicus brief must be submitted to The Florida Bar for approval prior to the filing of the brief of the party being supported or appellant's or petitioner's brief.

- **United States Supreme Court Amicus Briefs.** Consider Supreme Court Rule of Procedure 37 carefully. If the amicus brief is submitted prior to the Court's ruling on a petition for writ of certiorari, it shall be filed within 30 days after the case is placed on the docket or a response if called for by the Court, whichever is later. Amicus briefs require consent of the parties, or else a motion for leave to appear must be filed (but is disfavored). An amicus brief must be filed with the accompanying motion for leave to accept the attached proposed brief no later than 7 days after the principal brief of the party being supported is filed, or after the Petitioner's brief if no party is being supported and accompanied by a motion if the parties have not consented to the participation of amicus. As such, the draft amicus brief must be submitted to The Florida Bar for approval prior to the filing of the brief of the party being supported or Petitioner's brief.