

NACDL *AMICUS CURIAE* COMMITTEE MISSION STATEMENT

The *Amicus Curiae* Committee's mission is to provide *amicus* assistance on the federal and state level in those cases that present issues of importance to criminal defendants, criminal defense lawyers, and/or the criminal justice system as a whole. Membership in NACDL is not a prerequisite either for *amicus* assistance from the Committee, or for authorship of an NACDL *amicus* brief. However, the Committee's *amicus* endeavors offer an excellent opportunity to recruit new members among those we assist, and those who author NACDL *amicus* briefs. In that context, members who bring *amicus* issues to the Committee's attention are encouraged to urge attorneys for parties benefitting from such assistance to recognize the work NACDL performs on behalf of the criminal defense community, and to join NACDL to support further activities of the organization.

In light of the limited resources of NACDL, in terms of budgetary constraints as well as the finite time authors can devote to *pro bono* efforts, the Committee cannot respond favorably to every request. Nevertheless, the Committee's goal is to submit *amicus* briefs in the majority of criminal cases heard each term by the United States Supreme Court. In addition, the Committee solicits and welcomes opportunities to provide *amicus* assistance at the federal appellate level, and at the highest appellate level in the state courts. The Committee's policy is not to provide such aid at the trial court level except only in the most extraordinary cases presenting issues of first impression with overwhelming importance for the criminal defense community.

The Committee encourages members and non-members to contact the Circuit vice-chairs (whose names and contact information are listed in each issue of *The Champion*) with respect to potential *amicus* issues, and to do so as early as possible in the process. Contacting the vice-chairs enhances the ability of the Committee to respond promptly, since it spreads the workload among a larger, more geographically diverse, group (who are in regular and direct communication with the Committee's four national co-chairs), and to find a suitable author within the allotted time frame. The Committee also recognizes its contributors, as authors of Supreme Court briefs receive at NACDL's annual meeting a handsome certificate of thanks from NACDL's President.

The Committee also joins with other organizations in submitting *amicus* briefs, a practice that not only conserves NACDL resources, but which also creates alliances that increase NACDL's influence on important legal issues in the courts and legislatures. It also furthers the ultimate goals of the Committee, which include not only contributing to the decision-making process on critical legal issues, but also enlarging the community that is exposed to NACDL and its activities (and who might not otherwise know or appreciate the work that NACDL does, and/or how it can have a positive impact on their practices and profession): federal and state public defenders, lawyers at large corporate-oriented law firms, law professors, members of other legal and public policy organizations, law clerks, and judges. Each of those sectors of the criminal justice system and legal profession includes many potential members and supporters of

NACDL.

The Committee is also embarking on an ambitious pro-active program designed to identify critical criminal justice issues and, through scholarship and legal education, raise the consciousness of the criminal justice community with respect to those issues. The Committee will also seek cases that represent appropriate vehicles for raising those issues in the courts. The Committee will also be establishing a Supreme Court Advocate Assistance Program for the purpose of improving and standardizing the level of advocacy in the U.S. Supreme Court on behalf of defendants. The Program will offer counsel in Supreme Court cases a variety of features that will provide them essential tools for preparing briefs and oral argument.

Another salutary effect of the Committee's work is as well as an explicit objective is greater contact, coordination, and collaboration with state affiliate organizations. Through *amicus* assistance NACDL not only demonstrates concretely its value to affiliates, but it also involves affiliate members in the broader context of NACDL's national efforts. That often translates into a more dedicated commitment on the local level, as well as cognizance of the importance of participating in nationwide projects and issues as well.

The *Amicus Curiae* Committee has been an important representative of NACDL in the courts, in the media, and among other sectors of the legal community. It is the Committee's goal to maintain, and even enhance, its productivity and positive impact, and in turn that of NACDL as well, on the criminal justice system. The Committee calls on all NACDL members to join us in accomplishing that objective.

NACDL AMICUS COMMITTEE PROGRAM FOR 2009

I. *Committee Structure and Responsibilities*

A. *Four national co-chairs:*

1. Ultimate decision-makers, particularly for:
 - a. Supreme Court briefs
 - b. controversial issues
 - c. extraordinary situations (*i.e.*, district courts, state courts)
2. Formulate and implement Committee policy.
3. Coordinate, shepherd, and assign Supreme Court briefs.

4. Signatory (at least one co-chair) on all Supreme Court briefs. Circuit vice-chairs may sign briefs in the lower courts provided the national co-chairs approve the filing of the brief. A chair of another committee may also sign a brief provided that authority is delegated by the national co-chairs.
5. Supervise and monitor performance of Circuit vice-chairs.
6. Delegate authority as appropriate to Circuit vice-chairs and NACDL staff attorneys.
7. Maintain liaison and coordination with NACDL office staff attorneys¹ and chairs of other committees.
 - a. ensure that cases and issues germane to their responsibilities and constituencies are brought to the committee's attention, and addressed if possible (and *vice versa*);
 - b. utilize their resources to recruit and cultivate authors; and
 - c. develop articles for *The Champion* that improve the committee's coverage and performance on important developing issues in accordance with ¶ II(F)(2), below.
8. Present controversial issues to the Board and Executive Committee for resolution.
9. Prepare and submit to the NACDL Board of Directors a report of Committee activity each quarter (for inclusion in the quarterly Board meeting book), including an annual report for the annual NACDL meeting each summer.
 - a. the quarterly and annual reports will be provided to the Administrative Coordinator, who will provide them electronically to all Circuit vice-chairs and NACDL state affiliate personnel identified by Circuit vice-chairs, as well as to chairs of other NACDL committees identified by the national co-chairs.
 - b. the national co-chairs will be provided an electronic copy of the quarterly and annual NACDL Board Book regardless whether they are members of NACDL's Board of Directors.

¹ Included among those are the NACDL staff attorneys handling Legislative, White Collar, Indigent Defense, Death Penalty, and State Affiliate affairs.

10. Complete an annual performance review of the committee, including the Circuit vice-chairs, the Deputy Chair for *Certiorari* Screening and Coordination, and the Administrative Coordinator.
 - a. organize awards recognizing and rewarding outstanding service to the committee and its mission:
 - i. Supreme Court *amicus* authors (certificates);
 - ii. recommend NACDL Presidential Commendations.
11. Author a periodic column in *The Champion* (entitled "Friend of the Court") apprising the membership of *amicus* activities, including important cases and issues in which the committee is involved. The national co-chairs will author the column on a rotating basis to be decided among them.
12. In conjunction with the NACDL Board, its officers, and Executive Committee, develop incentives and rewards to increase *amicus* participation and membership recruitment.
13. Upon request by NACDL's Washington, D.C. office, develop and submit the Committee budget for each fiscal year.
14. The four national co-chairs, and their geographical responsibilities (which encompass not only federal courts but state courts within these respective jurisdictions) are:

Professor Barbara E. Bergman (University of New Mexico Law School, Albuquerque, New Mexico)

Fifth Circuit
Seventh Circuit
Tenth Circuit

Jon Hacker (O'Melveny & Myers, LLP, Washington, D.C.)

D.C. Circuit
Fourth Circuit
Eighth Circuit
Eleventh Circuit

Professor Jeffrey L. Fisher (Stanford Law School, Palo Alto, California)

Ninth Circuit

Joshua L. Dratel (New York, New York)

First Circuit

Second Circuit

Third Circuit

Sixth Circuit

15. Upon mutual consent of the co-chairs, a national co-chair with geographical responsibility for a case may transfer responsibility to another co-chair who possesses particular subject-matter expertise.

B. *Circuit Vice-Chairs:*

1. Divide up Circuits geographically with other vice-chairs in that Circuit, and assume responsibility for the assigned territory;
 - a. communicate that division of the Circuit(s) to the national co-chairs, the Administrative Coordinator, and the staff coordinator, currently the Public Affairs Director, in NACDL's Washington, D.C., office.
2. Develop *amicus* opportunities within their jurisdiction.
 - a. make and maintain contact with an appropriate person (*i.e.*, *amicus* chair) in NACDL state affiliates, or any other appropriate organization;
 - b. make and maintain contact with the federal defender (and/or the chief of appeals for the federal defender) in the districts for which the Circuit vice-chair has responsibility;
 - c. provide the names and contact information for the persons in "a" and "b" to the Administrative Coordinator; and
 - d. maintain coverage of state and federal issues within the area of the Circuit vice-chair's responsibility.
3. Maintain contact with national co-chairs regarding *amicus* projects:

- a. follow the procedures set forth below in ¶¶ II(B)(1)-(2).
4. Assist the national co-chairs in the preparation of the quarterly and annual committee reports to the extent necessary and requested.
5. Find and cultivate potential authors (and assign them when appropriate). Follow the procedures set forth below, at ¶¶ II(C)(1)-(2).
6. Coordinate, shepherd, and sign Circuit Court and state high court briefs within their respective jurisdictions.
7. The current Circuit Vice-Chairs are as follows:²

First Circuit:	Matthew H. Feinberg Stephen J. Schwartz
Second Circuit:	Richard Willstatter Joshua L. Dratel
Third Circuit:	Peter Goldberger Lawrence S. Lustberg
Fourth Circuit:	Thomas K. Maher David Smith Gerald Zerkin
Fifth Circuit:	James Boren Timothy Crooks Jason Hawkins Rebecca Hudsmith Cynthia Orr
Sixth Circuit:	Jenny Carroll David M. Eldridge Adam N. Steinman
Seventh Circuit:	Carol A. Brook Richard Kammen Stephen J. Meyer

² All Circuits should have at least two Circuit vice-chairs, while some Circuits require more due either to volume or geographical area covered.

Eighth Circuit: Deborah K. Ellis
Grant J. Shostak

Ninth Circuit: Sheryl Gordon McCloud
David M. Porter

Tenth Circuit: Stephen J. Greubel
Randall L. Hodgkinson
Norman R. Mueller

Eleventh Circuit: H. Eugene Lindsey
David O. Markus
Donald F. Samuel

D.C. Circuit: Blair G. Brown

C. *Deputy Chair for Certiorari Screening and Coordination:*

1. Responsible for determining which petitions for *certiorari* merit NACDL *amicus* support:
 - a. parsimonious standards; NACDL *amicus* participation at the *cert.* stage is the exception; abstention is the rule
 - b. centralized decision-making in order to maximize strategic benefits and allocate resources effectively and efficiently.
2. All requests for *amicus* support at the *cert.* stage are to be submitted to the Deputy Chair, who will submit to the national co-chairs a recommendation with respect to each request. The national co-chairs and Deputy Chair will then decide whether NACDL will file an *amicus* brief at the *cert.* stage in each particular case.
3. The Deputy Chair for *Certiorari* Screening and Coordination is Jeffrey T. Green (Sidley Austin, LLP, Washington, D.C.).

D. *Administrative Coordinator:*

1. Transform incoming requests (other than for Supreme Court merits stage cases) into concise memos for the national co-chairs (and/or appropriate Circuit vice-chairs);

2. Create and maintain chart enabling instant ability to determine who is shepherding what brief, who is writing what brief, and what other organizations are signing on (or what brief NACDL is signing);
3. Ensure that the staff coordinator receives all NACDL *amicus* briefs (and the above information re: authors and shepherds) promptly for purposes of (a) maintaining a complete and current archive of briefs and (b) directing press inquiries to the right person(s) at the right time, and provide the staff coordinator with an electronic copy of each brief in order to maintain a digital library of all NACDL *amicus* briefs;
4. With the assistance of the national co-chairs, the Circuit vice-chairs, committee chairs, and NACDL staff, create and maintain a list of authors and potential authors in order to match the right authors to the right issues (or jurisdictions) as quickly as possible;
5. Maintain and circulate on a weekly basis a list of *cert.* petitions filed by the Solicitor General, and *cert.* petitions by state and local governments in criminal and habeas corpus cases, including the identity and contact information for counsel for defendant (or petitioner);
6. Create and maintain e-mail lists for contact purposes (for use by the national co-chairs, Circuit vice-chairs, NACDL staff attorneys, NACDL officers, and chairs of other NACDL committees);
7. Upon direction of the national co-chairs, coordinate with the NACDL Washington, D.C. office regarding preparation of annual awards noted above, at ¶ I(A)(10);
8. The Administrative Coordinator is Meaghan McLaine, Esq., of O’Melveny & Myers’s Washington, D.C. office; and
9. Maintain a list of “issues to watch for,” which will be circulated periodically to the *amicus* committee, NACDL committee chairs, staff, and affiliates. Any member of the *amicus* committee can submit issues for inclusion on this list, and NACDL membership is encouraged to submit issues as well.

II. *General Committee Principles and Operations*

A. *General Goals:*

1. Responding to important issues and cases with quality briefs.

2. Affirmatively developing important issues for court and legislative review and reform.
3. Developing Circuit vice-chairs as the first line of review of possible issues in each jurisdiction.
4. Recruiting authors.
5. Recruiting new members for NACDL.
6. Promoting contact and coordination with NACDL affiliates, and improving affiliate participation in NACDL activities.
7. Creating and implementing written protocols to achieve these goals.

B. *Policies Regarding and Considerations for Amicus Participation and Support*

1. The committee pursues a strategic approach to *amicus* participation. NACDL cannot, should not, and chooses not to, provide *amicus* support in every case for which a request is made. The committee's resources are finite (and wholly voluntary); its outstanding reputation cannot be jeopardized; and its impact must not be diluted. As a result, NACDL will provide *amicus* support only for those cases that meet the following criteria:
 - a. cases that constitute appropriate vehicles for promoting NACDL values and interests, and in which *amicus* support is consistent with NACDL's policies and positions;
 - b. cases of broad application in the field of criminal justice, or of such overwhelming importance that NACDL must participate as *amicus*;
 - c. cases that benefit from *amicus* participation, *i.e.*, when the party cannot (for reasons of space, strategy, or otherwise) raise a particular issue that should and can be readily addressed in an *amicus* brief;
 - d. cases that present clear legal issues ripe for resolution (and which are not too heavily reliant on particular facts);
 - e. cases that promote the committee's goal of marshaling resources

effectively and efficiently; and

- f. cases in which the committee is afforded sufficient time to provide assistance of the outstanding quality to which the committee is accustomed.
2. Regarding particular courts, except in extraordinary circumstances, the committee's general policy is as follows:
 - a. The committee seeks to provide *amicus* assistance on the merits in all United States Supreme Court cases implicating criminal law, and in which the party consents to, and would benefit from, *amicus* participation by NACDL.
 - b. The committee's policy with respect to petitions for *certiorari* is set forth above, at ¶¶ I(C)(1)-(2).
 - c. The committee does not provide *amicus* assistance at the federal district court level.
 - d. The committee does not provide *amicus* assistance at the state court level below a state's highest court.

C. *Procedural Protocols for Soliciting, Authoring, and Filing Amicus Briefs:*

1. All requests for NACDL *amicus* assistance must be forwarded to at least one of the four national co-chairs for approval, and to all four if time permits. A national co-chair can delegate the responsibility to specific Circuit vice-chairs or NACDL staff attorneys in particular cases. Every *amicus* request from a Circuit vice-chair shall be in the form of a memo to a national co-chair and the Administrative Coordinator that identifies (a) the issue the *amicus* brief will address; (b) the NACDL and/or public policy interest at stake; and (c) NACDL's position on the issue. If an *amicus* request originates from another source, the Administrative Coordinator will prepare the memo, and circulate it to the appropriate national co-chair and Circuit vice-chair(s). Circuit vice-chairs will also be responsible for ensuring that the main party briefs in each such case, as well as any oral argument schedule, are forwarded to the Administrative Coordinator, who will forward the above-described memo, as well as the briefs and schedule, to the Public Affairs Director in NACDL's Washington, D.C., office.
2. NACDL *amicus* brief assignments will be made by either a national co-

chair or a Circuit vice-chair, but if it is the latter, the appropriate national co-chair shall be informed of the author's identity as soon as possible, and certainly in advance of the brief's preparation.

3. The Administrative Coordinator shall be informed of all *amicus* assignments, including the case name and docket number, jurisdiction, author, and shepherding national co-chair (and Circuit vice-chair), and due date of the brief, as soon as practicable once the assignment is made.
4. Each NACDL *amicus* project initially will be approved by at least one national co-chair, who retains the option of submitting the proposal to the other national co-chairs for approval by a majority of the national co-chairs. Once such approval is granted, the *amicus* brief will be monitored (*i.e.*, reviewed, proofread, and/or approved) prior to filing by at least one Circuit vice-chair. The national co-chairs retain discretion to participate in the monitoring of particular *amicus* briefs. Each *amicus* brief will be signed by a national co-chair unless the appropriate national co-chair delegates that responsibility to either a Circuit vice-chair, an NACDL staff attorney, or the chair of another NACDL committee.
5. Each filed NACDL *amicus* brief must be forwarded electronically (and, for United States Supreme Court briefs and petitions for *certiorari*, in "hard copy" as well) to the appropriate national co-chair and the Administrative Coordinator (who will be responsible for forwarding a copy to NACDL's staff coordinator in the national office in Washington, D.C.).
6. Except for United States Supreme Court submissions, costs will be borne by the author of the *amicus* brief (which provides additional incentive for finding co-sponsor organizations that might contribute to the cost). NACDL will pay for printing and filing of U.S. Supreme Court submissions via its account with the designated printer. NACDL will not bear any costs without prior approval by the national co-chairs.

D. *Recruiting Amicus Authors and NACDL Members*

1. Cultivate contacts and relationships in the following sectors for purposes of developing a roster of capable potential authors, and for promoting NACDL and recruiting new members:
 - a. large firms (which can also help shoulder *amicus* costs more easily than small firms or solo practitioners);

- b. law school professors;
 - c. other organizations (*i.e.*, criminal defense and civil liberties organizations, or those with interests that coincide with those of NACDL).
2. The national co-chairs and Circuit vice-chairs should develop rosters of potential capable authors (including their areas of expertise) in order to improve the committee's response time and matching the appropriate author with the right case. Such lists should periodically be provided to the Administrative Coordinator for integration into a national roster.

E. *Maintaining Communication and Liaison With Other NACDL Committees*

1. The national co-chairs will devise a means of creating and maintaining communication and liaison with the following NACDL committees in order to ensure adequate coverage of all potential *amicus* opportunities, and to facilitate the affirmative policy goals of the committee:
- a. White Collar;
 - b. International Law;
 - c. Death Penalty;
 - d. Indigent Defense;
 - e. Sentencing Guidelines;
 - f. Military Law;
 - g. Ethics;
 - h. Legislative;
 - i. Public Affairs; and
 - j. Strike Force.
2. Such liaison should involve sharing of resources, including finding potential authors, identifying key issues, and joining with other organizations in *amicus* submissions.

3. The national co-chairs shall also devise a means for regular communication and coordination with NACDL's state affiliate coordinator (Scott Ehlers) to improve coverage of state courts and access to state affiliate resources (*i.e.*, authors, and organizational support).
4. The national co-chairs shall also devise a means for regular communication with NACDL staff that administers NACDL's web site, and for submission of relevant articles to *The Champion*.

F. *Supreme Court Advocate Assistance Program*

1. At the direction of the national co-chairs, the committee shall develop a Supreme Court Advocate Assistance Program. The purpose of the Program is to improve and standardize the level of advocacy on behalf of defendants in the Supreme Court cases. The services the Program will provide include:
 - a. providing counsel assistance in framing issues and writing briefs (and at oral argument);
 - b. providing counsel moot court resources, if needed;
 - c. enlisting and organizing other *amici*;
 - d. developing media support and coverage, and assisting counsel in handling media coverage;
 - e. preparation of an assistance package that includes the following features:
 - i. coordination with appropriate national co-chair and/or Circuit vice-chair for purposes of contact, advice, and assistance;
 - ii. coordination with Supreme Court clinics at various law schools (*i.e.*, Yale, Stanford);
 - iii. help in finding an appropriate person to assist counsel (but who will not insist on exercising control over the case).³

³ The committee's policy is clear and categorical: it does not provide this assistance, or its *amicus* support, with the aim of replacing any counsel of record, and will not seek any such conditions or concessions from counsel of record. Any such activity would be conducted without
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G. *Additional Means of Promoting the Committee's Policies and Purposes*

1. The committee shall make an effort to identify issues that the Supreme Court and lower courts should be addressing, and to locate cases that provide the best vehicles for raising those issues in the appropriate judicial forum.
2. The committee shall make affirmative efforts to raise such issues by the following means (but not limited to them):
 - a. seeking opportunities to write scholarly articles on issues the committee identifies as meriting attention from the courts;
 - b. obtaining press coverage generally to raise consciousness on those issues, but also specifically with respect to those issues that are percolating toward consideration or resolution in the courts;
 - c. writing op-ed articles for both purposes listed above (and, when appropriate, in conjunction with NACDL's Public Affairs Committee);
 - d. seeking opportunities to do the same at seminars and other legal education events; and
 - e. developing NACDL position papers for submission to Congress on legislative issues either before or after key court decisions (*i.e.*, responses to post-*Booker* proposals to resuscitate the mandatory guidelines).

H. *Budget Process*

1. Seek to share resources by filing joint briefs with like-minded organizations, including NACDL affiliates.
2. When possible, use the resources of large law firms that can absorb costs more easily than can small firms or solo practitioners.
3. Provide authors advice on how to reduce certain costs (*i.e.*, by providing Supreme Court *amicus* briefs to Cockle Printing in Acamera-ready@ format).

the authority or approval of the committee.

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4. Monitor costs in order to have them reflected accurately and adequately in the following year's budget request.