

## 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, and to do so in a manner that is consistent with NACDL policy and complements NACDL's public policy advocacy initiatives. 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 the Association assists, 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 here and on the Web site's *Amicus Curiae* page) 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 six 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 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.

*Adopted by*  
*NACDL Board of Directors: 11/2/2019*

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The Committee has 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 seeks cases that represent appropriate vehicles for raising those issues in the courts. The Committee also has 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 offers 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—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**

### **I. *Committee Structure and Responsibilities***

#### **A. *Seven national co-chairs:***

1. Ultimate decision-makers for:
  - a. Supreme Court briefs
  - b. controversial issues
  - c. extraordinary situations (*i.e.*, district courts, state courts)
2. Formulate and implement Committee policy, subject to Board approval.
3. Coordinate, shepherd, and assign Supreme Court briefs and ensure that the Executive Director and the Staff Liaison, NACDL's Senior Resource Counsel, are notified of the intent to file a brief as early as possible, but in no event less than 72 hours prior to the submission of any brief.
4. Submit an electronic copy of the brief to the National Office when filed.

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Specifically, an electronic copy of every brief should be immediately forwarded to the Staff Liaison, Senior Resource Counsel.

5. 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. In no event shall an *amicus* brief on behalf of NACDL, whether filed jointly with others or not, be submitted without an Amicus Committee national co-chair or circuit vice chair (or a national co-chair designee, as set forth above) as a signatory.
6. Supervise and monitor performance of Circuit vice-chairs, including ensuring that the most current version of NACDL's Statement of Interest language is consistently used in each and every brief (this is accomplished by consulting with the Staff Liaison, NACDL's Senior Resource Counsel), and ensuring compliance with the notification provisions set forth in Sections I(A)(3) and (B)(6).
7. Maintain liaison and coordination with NACDL office staff and resource attorneys<sup>1</sup> and chairs of other committees. It is the responsibility of the national co-chairs to ensure that no brief contravenes NACDL policy or any public policy initiative. This is accomplished by ensuring that the Executive Director and Staff Liaison, NACDL's Senior Resource Counsel, are advised of the intent to file a brief as early as possible in the process, as set forth elsewhere in these protocols.
  - 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.
8. Present controversial issues to the Executive Director, who in his/her discretion may forward the same to the Board or Executive Committee for resolution. Examples of controversial issues include any matter on which NACDL does not have clearly defined policy and/or any which is likely to

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<sup>1</sup> Included among those are the NACDL staff attorneys and resource counsel handling Legislative, White Collar, Indigent Defense, Death Penalty, National Security, Resource Counsel and State Legislative Affairs.

generate significant media attention.

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 prepared by the Administrative Coordinator, who will provide them to NACDL's home office for inclusion in the board book and circulate it electronically to the Amicus Committee.
  - b. the national co-chairs will be provided an electronic copy of the quarterly and annual NACDL Board Book regardless of whether they are members of NACDL's Board of Directors.
10. Complete an annual performance review of the committee, including the Circuit vice-chairs, the Co-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 seven 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 Arizona  
James E. Rogers College of Law, Tucson, AZ)

Fifth Circuit  
Tenth Circuit

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

D.C. Circuit  
Fourth Circuit

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

Ninth Circuit

David Porter (Federal Defenders, Sacramento, California) and  
Joshua L. Dratel (New York, New York)

First Circuit  
Second Circuit  
Third Circuit

David O. Markus (Markus/Moss, PLLC, Miami, FL)

Sixth Circuit  
Eleventh Circuit

Jeffrey T. Green, Coordinating National Co-Chair (Sidley Austin  
LLP, Washington, D.C.)

Seventh Circuit  
Eighth 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;

*Adopted by  
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- a. communicate that division of the Circuit(s) to the national co-chairs, the Administrative Coordinator, the Staff Liaison (NACDL's Senior Resource Counsel) 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." above 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 Administrative Coordinator and 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 every federal and state court brief within their respective jurisdictions and ensure that the Executive Director and the Staff Liaison, NACDL's Senior Resource Counsel, are notified of intent to file a brief as early as possible, but in no event less than 72 hours prior to the submission of any brief. In no event shall an *amicus* brief on behalf of NACDL, whether filed jointly with others or not, be submitted without an Amicus Committee national co-chair or circuit vice chair (or a national co-chair designee, as set forth in ¶I(A)(5) above) as a signatory. In addition, it is the responsibility of the Circuit Vice Chairs to ensure that the most current version of NACDL's Statement of Interest language is consistently used in each and every brief. This is accomplished by consulting with the Staff Liaison, NACDL's Senior Resource Counsel.

7. Submit an electronic copy of the brief to the National Office when filed. Specifically, an electronic copy of every brief should be immediately forwarded to the Staff Liaison, NACDL's Senior Resource Counsel.

8. The current Circuit Vice-Chairs are as follows:<sup>2</sup>

First Circuit: Marissa L. Elkins  
Dan Gelb  
Michael Iacopino

Second Circuit: Lindsay Lewis  
Joel Rudin  
Richard Willstatter

Third Circuit: Daniella Gordon  
Lisa Mathewson  
Alan Silber

Fourth Circuit: Elizabeth A. Franklin-Best  
David Smith

Fifth Circuit: Nicole DeBorde Hochglaube  
Cynthia Orr

Sixth Circuit: Stephen Ross Johnson  
Stephanie Kessler  
Anne Passino

Seventh Circuit: Clifford W. Berlow  
Richard Kammen

Eighth Circuit: Elizabeth Carlyle  
Justin Johnston

Ninth Circuit: Gia L. Cincone  
Donald M. Falk  
Robin E. Wechkin

Tenth Circuit: Randall L. Hodgkinson  
Norman R. Mueller

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

Eleventh Circuit: Jenny Carroll  
H. Eugene Lindsey  
Howard Srebnick

D.C. Circuit: Kobie Flowers  
Timothy O'Toole

C. *Co-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 Co-Chair for Certiorari Screening and Coordination, who will submit to the other co-chairs a recommendation with respect to each request. The co-chairs will then decide whether NACDL will file an *amicus* brief at the *cert.* stage in each particular case.
3. The Co-Chair for *Certiorari* Screening and Coordination is Jeffrey T. Green (Sidley Austin, LLP, Washington, D.C.).

D. *Administrative Coordinator:*

1. The Administrative Coordinator is Deanna M. Rice, Esq., of O'Melveny & Myers's Washington, D.C., office; and
2. Prepares the quarterly and annual committee reports, including current information about the disposition of each case in which NACDL has filed an *amicus* brief. The Administrative Coordinator provide the reports to NACDL's home office for inclusion in the board book and circulates it electronically to the Amicus Committee.

E. *Staff Liaison*

1. The Staff Liaison is NACDL Senior Resource Counsel

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Vanessa Antoun.

2. Digests and post amicus briefs to NACDL's website immediately upon receipt after filing;

3. Forwards the same to the Administrative Coordinator for use in connection with the preparation of the quarterly and annual reports of the Amicus Committee;

4. Fields amicus requests that come in to NACDL's home office, ensuring that necessary background documentation, procedural posture, and an identification of the issue or issues on which amicus support is sought are provided and then forwarding to the appropriate Amicus Committee Co-Chairs and/or Vice Chairs for consideration; and

5. Fields and directs media inquiries concerning NACDL amicus briefs.

## **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 two of the six national co-chairs for approval, and to others if time permits. A national co-chair can delegate the responsibility to specific Circuit vice-chairs or NACDL staff or resource attorneys in particular cases. Every *amicus* request from a Circuit vice-chair shall be in the form of a communication 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 Staff Liaison will prepare or (where provided by the party requesting *amicus* assistance) forward 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 above-described memo, as well as any oral argument schedule, is forwarded to the Staff Liaison, NACDL's Senior Resource Counsel 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 Staff Liaison 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. All requests for NACDL *amicus* assistance must be forwarded to at least two of the six national co-chairs for approval, and to others if time permits. 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 upon filing be immediately

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 to the Staff Liaison, NACDL’s Senior Resource Counsel. Upon digesting and posting the brief to NACDL’s website, the Staff Liaison is to forward the digest and brief to the Administrative Coordinator to aid in the preparation of the quarterly and annual reports.

6. As a general matter, 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). When approved by the national co-chairs, NACDL will pay for printing and filing of amicus submissions via its account with the designated printer.
7. It is the responsibility of the Amicus Committee Vice Chair or Co-Chair overseeing the author(s) of each NACDL amicus brief to ensure that, in addition to (and together with) immediately electronically forwarding the final as-filed brief to NACDL’s Senior Resource Counsel per No. 5 above, the author of the brief provide a digest of the brief in the form provided below. This will enable the prompt posting of the same to NACDL’s online amicus library on its website.

### **Digest Format**

*Kansas v. Glover*, U.S. Sup. Ct., No. 18-556, decision below 422 P.3d 64 (Kan. Jul. 27, 2018), brief filed 9/6/19. Fourth Amendment---Reasonable-Suspicion Analysis---Automated License-Plate Readers (ALPR)---Suspended or Revoked Drivers License---*Terry*---Traffic Stops---Unreasonable Seizures---Privacy---Disparate Impact. Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Respondent. *Argument*: Kansas's bright-line rule is incompatible with the flexible reasonable-suspicion standard. Automated license-plate reader technology highlights the constitutional problems with Kansas's rule. Kansas's rule lets computers, not case-by-case judgments, control the constitutional analysis. The proposed cure for "mistaken stops"--that they will be brief--is no substitute for the Fourth Amendment's protections against unreasonable seizures. Adopting Kansas's rule would create an incentive against investigation. The erosion of privacy would disproportionately affect the poor. A suspended or revoked license indicates economic status, not unsafe driving. ALPR technology unduly affects the poor. *Authors*: David Debold, Brandon L. Boxler, Travis S. Andrew, and Raymond D. Moss Jr., Gibson Dunn & Crutcher LLP, Washington, DC; Barbara E. Bergman, NACDL, Tucson, AZ.

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As reflected above, the digest should provide the (i) case name, (ii) court, (iii) case number, (iv) cite to the decision below, (v) the date the amicus brief was filed, (vi) keywords identifying the central legal issues and areas addressed in the brief, (vii) title of the brief, (viii) summary of the argument, and (ix) names of authors (including firm name, city, and state). It should be noted that the NACDL Vice Chair or Co-Chair on the brief should be included in the author section.

If the brief is a joint amicus onto which NACDL has signed on, then in the discretion of the Vice Chair or Co-Chair overseeing the brief, the digest can be prepared by the author or by the supervising Vice Chair or Co-Chair.

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.

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 NACDL committees and task forces, including but not limited to those listed below, 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. The national co-chairs shall also devise a means for regular communication and coordination with appropriate members of NACDL's staff in order to secure the input from the key policy staff on the subject matter of the amicus project, thereby facilitating the affirmative policy goals of the Association.
  3. Such liaison should involve sharing of resources, including finding potential authors, identifying key issues, and joining with other organizations in *amicus* submissions.
  4. The national co-chairs shall also devise a means for regular communication with NACDL staff that administers NACDL's website, ensure that the National Office receives an electronic copy of the brief for the Web site in a timely manner, 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*;

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- 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).<sup>3</sup>

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

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<sup>3</sup> 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 the authority or approval of the committee.