

Elder Law and Disability Rights Section of the State Bar of Michigan Policy Regarding Consideration of Litigation and Amicus Curiae Matters

Preamble

The members of the Elder Law and Disability Rights Section (the Section) see the impact on the elderly and those with disabilities of state and federal policy and administration on a regular basis. The members also observe administration which exceeds the constraints of governing statutes, as well as occasional arbitrary and capricious harmful policy. Part of the role of the Section is to protect the elderly and those with disabilities from such administrative overreaching. The Section has resources, although limited, to provide litigation and amicus briefs and argument to support positions in ongoing litigation and appeals, and, therefore, will consider commencing or participating in litigation against the state or federal government and their agencies and employees.

Amicus/Litigation Committee Members

Committee membership is limited to active members of the Elder Law and Disability Rights Section of the State Bar who have been appointed to the Committee by the Chairperson of the Section ("Chair"). Section members may volunteer for the committee by informing the Committee Chairperson or the Section Chair in writing (including by email) of their interest in serving. Potential members of the Committee may also be nominated by other members of the Section. There shall be a minimum of five participating members on the Committee and a maximum of seven members.

Committee members shall not be required to participate in review or analysis of any case in which they have or feel they might have a conflict of interest.

The Committee Chair will be an active member of the Elder Law and Disability Rights Section of the State Bar who has been appointed by the Chair of the Section. The Committee Chair is not required to be an elected member of the Elder Law and Disability Rights Section Council.

Function of the Committee

1. The Committee of the Elder Law and Disability Rights Section of the State Bar of Michigan reviews and considers requests to the Section:
 - a) To participate in and/or commence and file litigation
 - b) To file amicus curiae briefs;
2. The Committee makes recommendations to the Section's Council:

Whether to file and/or participate in Litigation and/or to file amicus curiae brief, and

 - a. Identifies or approves legal counsel to prepare and/or participate in litigation, or
 - b. Identifies legal counsel to prepare and file amicus curiae brief and to potentially participate in oral argument, and
 - c. Oversees the work of legal counsel doing so.
3. The Committee receives monthly written progress reports from appointed legal counsel in each case and provides a progress report to the Council.

Note: If events are progressing so rapidly that the Committee does not have adequate time to review the progress for a meeting, the Committee will report to the Section Chair who will determine how the matter should be reported.

Budget Considerations

Because the resources of the Section are limited, the impact on the Section's finances must be considered. The Committee shall weigh the priority of the request against other requests and/or anticipated future requests. As part of its report, the Committee will report the anticipated impact on the Section's finances for the current budget year as well as future budget years. If the requesting attorney knows of possible resources (i.e. NAELA funds, other interested attorneys who are willing to donate funds, other interested organizations), then the requesting attorney will report that other funds may be available and will actively seek out such funding (see below in **Counsel Actions** for criteria for payment with such funding).

Limitations on Litigation and Amicus Policy

It is the policy of the Section that litigation or amicus curiae briefs shall only be initiated, participated in or supported if the matter involves a significant impact in the areas of elders, those with disabilities, guardianships and conservatorships, or involving cases related to the practice of law in these areas. The Section may file litigation and amicus curiae briefs in cases pending in a probate or circuit court, but these filings will be very rare. The Section does file litigation meeting the criteria in the Court of Claims and Federal Court. The Section also files amicus curiae briefs in cases pending in the Michigan Court of Appeals, the Michigan Supreme Court, and federal court.

The Section **does not** participate in or file litigation involving private parties unless a very significant policy issue is involved in the matter. However, the Committee and/or Section may provide resources such as reference to statutes, copies of decided cases, administrative policies, administrative submissions, and the like, to legal counsel in such cases.

Litigation Committee's Consideration of Litigation or Amicus Curiae Brief

The Litigation Committee reviews and considers requests for litigation or amicus curiae brief:

1. Upon receipt of a completed *Application for Consideration*, including all requested documentation of the case, from a party to the litigation, or
2. In response to an invitation from the court before which a case involving an issue of significance to the Section is pending, or
3. Upon the request of a Council member at the discretion of the Chair of the Committee, or
4. By the Committee at its own discretion.

In determining whether to file or participate in litigation or to file an amicus curiae brief, the Committee (and the Section's Council) will consider all relevant factors, including the anticipated impact of the matter on elders and those with disabilities and the impact of the lower court and appellate court opinions on the Section's attorneys and their clients.

Examples of cases in which the Section favors participation in, or filing of an amicus curiae brief are:

- Cases involving facts or principles with widespread applicability,
- Cases that affect the practice of law regarding the rights of elders and those with disabilities by members of the Section, and
- Cases in which the Michigan Court of Appeals, or other court, has erred in a published opinion.

With respect to amicus curie briefs, the Committee and the Section's council will consider:

- Whether the lower court erred,
- The perceived likelihood a court to which leave to appeal has been sought will accept the case,
- Whether the lower court's opinion is a published opinion,
- Whether the case involves facts that are likely to recur,
- Whether a higher court is likely to grant leave to appeal in a particular case,
- The possibility of recovering attorney fees and expenses, and
- The financial resources of the Section.

In determining whether to file an amicus curiae brief, the Committee will:

1. Contact the legal counsel for the party or parties in the particular case to determine the facts and legal principles involved,
2. Obtain and review all relevant pleadings,
3. Independently review the applicable law, and
4. Evaluate possible positions the Section might wish to take in the matter.

After completing its review, the Committee will submit a written report and recommendation to the Section's Council regarding what action should be taken by the Council, and what position(s) the Section should take on the issues presented. (Generally the Section will take positions and advocate for what the Section believes the law is or should be and will not advocate or favor a result for any particular party to the litigation.)

When time permits, the Committee will submit its written report and recommendations before the Council's next regularly scheduled meeting following the Committee's receipt of the request. Also, when time permits, a decision regarding whether to file litigation or an amicus curiae brief will be made by the Council at the meeting at which the Litigation Committee's recommendation is presented. If time is limited, the Committee may make the report to the Chair of the Section who will determine how to proceed.

Reporting Required by Legal Counsel Involved in Litigation or Amicus Curie Brief

Legal counsel for the party or parties in the case will be expected to provide monthly written reports to the Committee Chair and to answer specific questions from Committee and Council members.

Oral presentations by legal counsel for a party or parties will not be permitted at Council meetings unless requested by a vote of the Council members. Legal Counsel representing parties in the proceeding (including Counsel affiliated with law firms representing the party or parties)

at Council meetings shall identify themselves at the commencement of the Committee's presentation of the matter and shall excuse themselves and not be present during the Council's discussions nor during Council's vote whether to accept the Committee's recommendation.

Council Actions

Notwithstanding any discussion or vote by any committee, group, or otherwise, the Section's Council retains final authority to determine whether the Section will file or participate in litigation or file an amicus curiae brief and the position(s) that the Section will take.

All votes by the Council to accept the Committee's report and recommendation, to file or participate in litigation or to file an amicus curiae brief, and to determine the position(s) to be taken in the litigation and/or brief shall be submitted by a roll call vote, and the votes for, against, and in abstention shall be recorded in the minutes by the Secretary or the acting secretary of the Section.

Where possible, the Section will seek opportunities to file joint amicus curiae briefs and share in the cost of their preparation with other sections of the State Bar of Michigan or other interested organizations.

The Section will pay the costs of preparing and filing litigation or amicus curiae briefs from Section funds, and shall not accept contributions to defray the costs from any party to the proceeding. However, outside parties, groups, and organizations are not prohibited from making payments directly to the law firm or firms to whom payment is being made by the Council.

In connection with any case in which the Section's Council votes to file litigation or an amicus curiae brief, the Council ordinarily shall authorize the Committee to retain legal counsel, and shall authorize a sum, ordinarily not to exceed \$7,500.00 per case, to be paid to legal counsel, to file the case or a brief on behalf of the Section setting forth the Section's position(s) in the case.

When the Council, after discussion and consideration of the Committee's report, votes not to participate in litigation or file an amicus curiae brief on a matter the Committee Chair shall inform the applicant of the Council's decision not to act on the request. The information shared with the applicant will provide no further information to the applicant unless the Council has voted to provide an explanation to the applicant.

Amendments

This policy is subject to change by majority vote of the Section's Council members present at a meeting.

Adopted: May 7, 2016; amended February 4, 2017