Report on
ABA AMICUS BRIEFS

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ABA Amicus Briefs

General Policy

According to a memo written by the ABA Standing Committee on Amicus Curiae Briefs, the American Bar Association has filed over fifty amicus briefs in the past decade. The Standing Committee on Amicus Curiae Briefs, which was created twenty-five years ago at the recommendation of Erwin Griswold, makes recommendations to the Board of Governors regarding the adequacy of proposed briefs that have been prepared by entities of the ABA for filing by the Association. The Standing Committee is comprised of five people and currently chaired by Nicholas J. Spaeth of Cooley Godward of Palo Alto.

If a section or committee within the ABA becomes interested in filing an amicus brief, it must submit a preliminary application to the Standing Committee. Only entities authorized to make recommendations to the House of Delegates or other organizations represented in the House may apply to file an amicus brief in the name of the ABA. It must also provide copies of the application to all sections, divisions and committees that may have an interest in the brief. This application must be submitted to the Committee to get permission to draft an Amicus brief. Once the preliminary application has been approved the entity must submit the actual brief to the Standing Committee at least thirty days before it must be filed, except in emergencies.

The standards that the Standing Committee follows in approving amicus briefs are set out in the American Bar Association Handbook on Policies and Procedures ("The Green Book"). The Standing Committee will recommend an amicus brief to the Board of Governors if the brief:

1) fairly represents the policy of the American Bar Association;
2) is of high professional quality; and
3) constitutes a significant contribution to the issues involved.

The Board of Governors will authorize a brief to be filed when it:

a) is consistent with a previously adopted American Bar Association policy; or
b) is a matter of compelling public interest which the Board of Governors then adopts as policy; or
c) is of special significance to lawyers or the legal profession.

Provisions b and c do not require a brief to be consistent with existing ABA policy in order to be approved. In addition, provision c does not require the Board of Governors to officially accept a policy in order to approve a brief. Many briefs submitted to the Committee in "emergencies," which must be submitted only two weeks before filing, are approved under provisions b and c. The Standing Committee is not supposed to recommend briefs to the Board that address or argue factual issues only and the Standing Committee is supposed to recommend briefs to be filed only in the highest court in which a case is likely to be heard.

Virtually every amicus brief filed by the American Bar Association asserts its general interest as amicus as "the leading national membership organization of the legal profession." This assertion is always followed by a disclaimer that states that the brief should not be interpreted to reflect the views of any judicial member of the ABA.

Recent Filings

The ABA recently filed an amicus brief in the Sixth Circuit Court of Appeals case of *Grutter v. Bollinger*, the University of Michigan School of Law affirmative action case. This brief was filed in the Sixth Circuit, though there is a significant chance that the case will be heard by the Supreme Court. The ABA stated its specific interest in the case as its long-time promotion of racial and ethnic diversity as "crucially important to legal education, the practice of law, and the administration of justice." The ABA maintained that the District Court's decision, which held that the University's racial preference program violates the Fourteenth Amendment, undermines "the country's ability to ensure equal justice and the rule of law."

The ABA's brief focused on the compelling interest prong of strict scrutiny analysis, asserting that diversity of the bar is vital to the legal profession's ability to serve all Americans fully and fairly. The brief supports this assertion by referring to the ABA's initiatives to diversify the legal profession. The ABA refers to Standard 211 in their accreditation standards for law schools. This standard requires full opportunity for racial and ethnic minorities. Standard 211 does not mention, however, special preference

programs such as Michigan's "critical mass" program. In fact, a proposed 1980 amendment that would have endorsed such programs was subsequently rejected by the ABA House of Delegates.

The ABA brief also suggests that diversity is vital to the attorney-client relationship: an attorney with the same racial background as his client is more likely to pursue shared, unpopular interests. And the brief further claims that a client is more likely to trust an attorney of the same racial or ethnic background who "is capable of true empathy."

The Sixth Circuit made its decision on May 14, 2002, reversing the District Court's decision. They ruled that Michigan's limited consideration of race is legitimate and consistent with Justice Powell's concurring opinion in *Regents of the Univ. of Calif. v. Bakke*. The opinion, written by Chief Judge Boyce Martin, asserted the compelling interest that diversity in the bar served, echoing many of the arguments made in the ABA's brief. Shortly after the court's decision, Robert Hirshon, the current ABA President, released a statement: "The American Bar Association is absolutely delighted that the Sixth Circuit Court of Appeals advanced the cause of justice for all Americans by ruling that the University of Michigan Law School and all law schools in the Sixth Circuit may consider race as a factor in admissions."

The ABA also recently filed an amicus brief in the Supreme Court case *Boy Scouts of America v. Dale*. In this case, the Boy Scouts of America (BSA) terminated a counselor after learning that he was openly homosexual. Dale brought suit against the Boy Scouts under New Jersey's Law Against Discrimination (LAD). The brief asserts its interest as amicus based on its policies to rid the legal profession, the judicial process and the law of invidious discrimination. The ABA points to a number of endorsements it has made in support of this assertion. These include an endorsement of proposed amendments to Title II of the 1964 Civil Rights Act that would define private clubs that received revenue from businesses as public accommodations. The brief states that the common thread running through their policy statements is that discrimination based on sexual orientation "should be eliminated in all civic and professional settings." This statement is followed by the assertion that although the ABA is committed to protecting the First Amendment, the LAD would not "seriously" infringe on the BSA's freedom of expressive association.

The basis of the ABA's argument is that the BSA's "talismanic incantation of the First Amendment" does not shield its discriminatory practices because the LAD does not seriously burden the group's freedom of expressive association. The brief supports this by stating that there is no persuasive evidence that the BSA holds a genuine view regarding homosexuality or that it is central to the BSA's mission. It claims that any BSA policy against homosexuality is a tacit one. In fact, the ABA says, there are a number of differing views within the BSA concerning homosexuality, and that accepting gay members is not equivalent to speech condoning homosexual activity. Essentially the ABA claims that the BSA would have to be overtly anti-gay to receive expressive association protection.

The ABA brief then goes on to maintain that the LAD passes strict scrutiny analysis because the Court has long held that eradicating discrimination in public accommodations constitutes a compelling state interest. This interest would, therefore, permit the infringement of the First Amendment. The ABA argues that the BSA is a public accommodation because it "indirectly benefits its members through the advantage of a large influential network."

The Supreme Court, in an opinion written by Chief Justice Rehnquist, rejected almost all of the ABA's arguments. It held that the First Amendment does not require every member of an organization to agree on every issue for the policy to be included as an expressive association. Furthermore, the court stated that mere acceptance of homosexuals would impair the BSA's message and that compliance with the LAD materially interferes with their First Amendment right. The court also held that defining the BSA as a public accommodation was exceedingly expansive.

In 2001 the ABA filed an amicus brief in the Supreme Court case of *McCarver v. State*. *McCarver* concerned a mentally retarded defendant who was sentenced to death in North Carolina. North Carolina subsequently banned the execution of mentally retarded persons in July 2001, rendering the case moot. However, the Court considered the same amicus brief filed in *McCarver* when it decided the case of *Atkins v. Virginia* on June 20, 2002. The same issues were at stake in *Atkins*.

The ABA based its interest as amicus on a number of papers written by the Special Committee on the Death Penalty and the Commission on Mental and Physical Disability Law. These papers condemn the practice of executing mentally retarded persons. In addition, the brief cites Resolution 110, passed by the House of Delegates in 1989, which urges that no person with mental retardation should be sentenced to death or executed.

The ABA maintained that mentally retarded persons are less likely to receive a fair trial. The brief suggests, for example, that persons with mental retardation are less likely to receive adequate representation. On this view, an ordinarily competent counsel may become incompetent when dealing with a mentally retarded client, and the attorney-client relationship deteriorates because the client will often unintentionally mislead or misinform his counsel. The brief further asserts that mentally retarded persons are more likely to be convicted and sentenced despite being innocent, and that many mentally retarded defendants will confess to crimes they did not commit to please their interrogators. Finally, the brief claims that retarded persons are more likely to be sentenced by fact-finders who do not, or cannot, give appropriate mitigating weight to their condition. The brief suggests, without citing to specific cases, that there have been sentencing hearings where evidence of retardation was not heard.

The brief concluded that these shortcomings are inevitable outcomes of our judicial system. A complete ban on the execution of the mentally retarded is therefore necessary. According to the Association, a "modern and enlightened system of justice cannot tolerate the execution of individuals with mental retardation."

Justice Stevens echoes many of the ABA's arguments in the *Atkins* opinion for the majority. In the 6-3 decision, the majority holds that the mentally retarded present a "special risk of wrongful prosecution." This special risk exists because they are less able to give meaningful assistance to their counsel, they make poor witnesses, and they often make false confessions. Chief Justice Rehnquist denounces the decision in his dissent, and criticizes the majority's decision to place weight on the views of the ABA and other professional organizations. Rehnquist says that the court's suggestion that these sources are relevant is "antithetical to considerations of federalism." A dissent by Justice Scalia also criticizes the court's appeal to the views of professional organizations. Scalia criticizes both the Court's and the ABA's notion of a special risk: "I suppose a similar 'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people."

ABA president Robert Hirshon issued a statement on the day the Court handed down the decision. He stated that "the American Bar Association applauds the decision." He also claimed that "The court's decision protects the integrity of the criminal justice system and recognizes our contemporary standards of decency that acknowledge a lesser degree of culpability in mentally retarded defendants."

The ABA filed an amicus brief in the recently decided Supreme Court case *Republican Party of Minnesota v. White*. The case centers on the constitutionality of Minnesota's "announce clause." The clause states, "A candidate for a judicial office shall not announce his or her views on disputed legal or political issues." The plaintiffs challenged the statute, on a First Amendment basis, because they were restricted from expressing their political views during their candidacies. The Supreme Court, in a 5-4 decision, rejected this limit on judicial candidate speech.

The ABA claimed an interest as amicus because Minnesota's "announce clause" has the same scope as the corresponding provision in the 1990 ABA Model Code of Judicial Conduct. That provision reads, "a judicial candidate shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The ABA stated that "acting on behalf of the legal profession" it has promoted such model regulations for more than three-quarters of a century.

The brief begins by arguing that provisions such as the "announce clause" have the "long standing support of a broad spectrum of the American legal profession." It cites the history of the 1990 ABA Model Code of Judicial Conduct. The ABA Judicial Code Subcommittee had compiled extensive material including codes from every United States jurisdiction, law review articles, and statistical studies. The clause was drawn up after "an extensive deliberative process," conducted by this broad spectrum of the American legal profession, at the ABA's Midyear and Annual meetings. The Supreme Court disagreed, though. Justice Scalia, in his opinion, stated that the practice of prohibiting judicial candidate speech on disputed issues "is neither long nor universal." Scalia referred to a number of states which elect judges that do not use restrictive speech statutes.

The ABA further contended that the independence and impartiality of the judiciary is a compelling state interest that justifies the regulation of speech. It argued that judicial candidates differ from other types of candidates in two respects. First, judges are bound by precedent and statute. Second, judges do not represent constituencies and do not make decisions with the purpose of pleasing those who elected them. However, the Court had difficulty precisely defining the "impartiality" referred to, specifically in the ABA Model Code. The Court posed the hypothetical of a judge who is impartial concerning the parties before him while taking a stance on the legal issues that are posed. In this case, the Court stated, the "announce

clause" is not narrowly tailored to its compelling interest because it would prohibit speech concerning certain issues. The Court then speculated that partiality may refer to a judge who holds predispositions respecting relevant legal issues. But, absence of this predisposition, the Court held, has never been a necessary component of equal justice. This is because it would be impossible to find a judge without such predispositions.

The ABA stated the preservation of due process is a second compelling state interest for restricting judicial candidate speech. A trial before an unbiased judge is essential to due process. According to the ABA brief, a judge who takes legal or political stances may feel obligated to please the voters and keep his promises to maintain his post.

Finally, the ABA argued that the "announce clause" is narrowly tailored to meet its interests of promoting judicial impartiality and preserving due process. The brief claimed that the provision allows for "a myriad of proper topics." The ABA suggested that these topics are qualifications, approaches to judicial decision-making and judicial administration. The prohibited statements, according to the ABA, "do not contribute to an informed electorate." The Court, though, did not agree that the provision is narrowly tailored. The Court held that the provision is grossly under-inclusive. Justice Scalia pointed out that, under Minnesota's provision, a judicial candidate can espouse his political stances up to the moment he declares himself a candidate and again in office until there is pending litigation. The Court stated that the provision is also over-inclusive because there is almost no legal or political issue that is unlikely to come before a court.

After the decision was reported on June 27, 2002, Robert Hirshon stated, "This is a bad decision. It will open up Pandora's box." He went on, "[Judicial candidates] will know that the voters will evaluate their performance in office on how closely their rulings comport with [their position on particular issues]." Justice Scalia anticipated the ABA's reaction in his opinion. He cited the ABA's long opposition to judicial elections, and observed that "the First Amendment does not permit [the bench or bar] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."

The ABA has filed numerous amicus briefs over the past two decades, often in cases involving contentious issues that split the legal community, including ABA members. The constitutionality of the line-item veto and independent counsel law, the limitations on capital punishment, and the scope of the Fourth Amendment and the good-faith exception to the exclusionary rule are among the areas addressed by ABA amicus briefs. But the breadth and controversial nature of at least some of this activity is not proscribed by the Association's policies. The standards governing the approval of amicus briefs are broad enough to allow the Standing Committee on Amicus Briefs and the Board of Governors to sign off on briefs supporting controversial positions on which the ABA has not yet adopted any policy. At present, Board of Governors discretion, and the potential political effects of especially vocal ABA entities objecting to some other committee's proposed brief, are the principal blocks on the process.