



## **MEMORANDUM**

**TO:** CML Executive Board  
Interested Persons

**FROM:** Dianne Criswell, Legislative Counsel

**SUBJECT:** **League *Amicus* Participation: Process and Considerations**

**DATE:** Revised: September 19, 2017

### **Introduction: The League's Appellate Role**

Many cases reaching Colorado (or federal) appellate courts have the potential to impact at least some Colorado municipalities. The League has sought to limit its appearances before the appellate courts to cases of particular legal significance to a broad range of Colorado municipalities.

The League's disposition to be selective about the appeals in which it participates reflects several considerations. For one thing, we have always assumed that, if CML began to appear routinely, we would diminish the significance of our *amicus* participation. Additionally, our legal staff has a variety of legislative and member service obligations, apart from writing *amicus* briefs.

League legal staff, who act as advocates before the General Assembly, are *regularly* involved in creating or preventing the creation of law that has a broad and very direct impact on our member municipalities. Thus, an important consideration affecting the League's decision to focus its legal staff on preparation of an *amicus* brief is whether this effort could detract from important legislative work of League legal staff.

### **Introduction: The Amicus Committee**

The Amicus Committee is comprised of seven veteran municipal attorneys, who are voting members of the Committee. CML legal staff will participate in Committee discussions as nonvoting members. The current President of the CML Attorney's Section will serve as an ex officio voting member of the Committee during his or her term. Amicus Committee members are appointed by the CML President, who will also designate a chairperson of the Committee. Should a vacancy occur on the Committee, League staff will recommend a replacement to the President.

As volunteers, the Amicus Committee members donate their time to the broad municipal legal community. Because the Committee members are balancing this service with all other demands on their time, requests should be made with as much advanced notice to the Committee membership as possible.

### **Considerations Affecting CML's Decision Whether to Participate as *Amicus Curiae***

Among the considerations affecting the League's decision are the following:

- Was the request made with sufficient time for the Committee to review the materials, meet to discuss the request, and make a recommendation to the CML Executive Board?
- How broad an impact does the lower court decision have, or would an adverse appellate decision have on Colorado municipalities? Would a broad spectrum of municipalities or only a very few be affected? Would municipalities be able to sidestep the problem caused by this decision by making a simple change in some procedure or practice? Does a narrow set of facts limit municipal exposure in this case? As a practical matter, is this decision likely to have a *lasting* impact on Colorado municipalities, or will this be a lot of work for a result that the legislature will reverse anyway?
- How serious would an adverse decision be on *certain* of our members, even if the impact is not felt across our membership?
- Does this case involve the fundamental division of power between municipalities and the state or federal government (as in preemption or home rule authority cases)?
- Does this case involve some critical aspect of municipal authority or liability, such as control of land use, right-of-way authority, personnel management, taxation and revenue, or governmental immunity?
- Does this case present an opportunity to accomplish in the judicial branch a result that we would be unlikely to achieve in the legislative branch (as has been the case, until recently, when cases involved division of regulatory authority between the state and local governments over oil and gas operations)?
- Do the parties and *amicus* lining up on the other side make League participation advisable?
- Does the briefing schedule require that CML's brief be filed during the legislative session? Are the CML attorneys already pressed with other obligations?
- Alternatively, is outside counsel agreeable to preparing a brief for the League at no cost? The availability of an outside attorney to prepare a brief on behalf of the League can significantly affect the likelihood of the League's participation.

### **Procedure for Requesting CML Participation as *Amicus Curiae***

1. A request for CML *amicus* participation must be by letter, directed to the CML Legislative Counsel, Dianne Criswell. The letter and attachments should be submitted electronically ([dcriswell@cml.org](mailto:dcriswell@cml.org)). Please mail a courtesy hard copy of the letter and attachments to the League.
2. The letter must be from the governing body, or from the attorney for the governing body, acting on behalf of the jurisdiction or entity requesting the League's participation as *amicus curiae*.
3. The letter must describe:
  - The nature of the case and the issues presented;
  - Why this appeal is of particular importance to Colorado municipalities statewide;
  - The procedural status of the appeal, including the briefing schedule, if known; and
  - The name, title and contact information for the person or persons representing the municipality in the appeal.
4. The letter should be accompanied by whatever attachments the applicant believes the League's *Amicus* Committee would find useful in making its decision. A copy of the court order or decision appealed from must be attached. Briefs to the lower court(s) on relevant issues, notices of appeal, cert petitions, orders setting briefing schedules, and so forth, are often included with the letter.

### **Procedure for Review of Request**

1. CML legal staff and the League's *Amicus* Committee will review the *amicus* request and attached materials. Staff and the Committee may solicit advice from attorneys with expertise in the particular area or areas of law addressed in the appeal, as necessary or useful to assist in their analysis. Committee members are also free to consult directly with the applicant. *Applicants, on the other hand, are encouraged to make their case for League involvement in their letters, and refrain from additional lobbying of Committee members.*
2. Staff and the *Amicus* Committee may discuss an *amicus* request through whatever means are convenient, (ordinarily discussion occurs via conference call). Staff will make a recommendation to the Committee, as a starting point for Committee discussion.
3. CML staff or the Committee may suggest that a request be resubmitted at another time. For example, it might be suggested to a municipality that its request for League participation be resubmitted after the Court of Appeals has reached its decision, or after the Supreme Court has ruled on a pending cert petition, thus more precisely defining the issues on appeal.

4. The recommendation from the *Amicus* Committee will be submitted to the Executive Board. The Committee may recommend whether to participate in the appeal, or not, and may also recommend the manner of League participation (e.g., preparation of the League's brief by outside counsel).
5. A member of the Committee whose firm or client is requesting CML *amicus* participation may not vote on the Committee's recommendation to the Board. The Board is not bound by the Committee's recommendation. The Board will authorize League participation as *amicus curiae* in any appeal in which the League participates.
6. Those involved in appellate litigation generally have plenty of time to avoid last minute requests for *amicus* participation to the League. Consequently, the Executive Board ordinarily has an opportunity to consider a request *before* a filing deadline arrives. Nonetheless, late requests do occasionally occur. Staff may proceed with preparation of a brief (or cooperate with others in the preparation of a brief) should the briefing schedule so require, prior to Executive Board consideration of a request, upon a recommendation from the *Amicus* Committee, and with the consent of the Executive Director.