

**IN THE SUPREME COURT OF MISSISSIPPI**

**IN RE: THE MISSISSIPPI RULES  
OF APPELLATE PROCEDURE**

**MOTION TO ESTABLISH *PRO BONO* APPELLATE  
PROGRAM AND TO IMPLEMENT THE PROGRAM AS RULE 7  
OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE**

Pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, the undersigned, on behalf of the Appellate Practice Section of The Mississippi Bar, recommend that the Court adopt a *Pro Bono* Appellate Program as set forth in the proposed rule attached as Exhibit A. In support, the movants would show the Court the following:

1.

The Mississippi Supreme Court and the Mississippi Court of Appeals regularly decide cases advanced by *pro se* litigants. These cases can present issues of first impression or complicated legal questions. *Pro se* litigants often do not have the training or skills to adequately address intricate questions of law.

2.

Appellate courts throughout the nation have experienced significant increases in the number of unrepresented parties.<sup>1</sup> While the proliferation of *pro se* parties poses serious challenges to the country's appellate courts, this phenomenon

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<sup>1</sup> See Ex. B, Report on *Pro Bono* Appellate Programs by *Pro Se-Pro Bono* Committee, Council of Appellate Lawyers, American Bar Association at p. 1.

simultaneously presents excellent opportunities for appellate attorneys to fulfill their professional responsibility to render *pro bono* services pursuant to Mississippi Rule of Professional Conduct 6.1; enhance professional development; and provide meaningful assistance to appellate courts.<sup>2</sup> *Pro bono* service by appellate attorneys will also honor the constitutional guarantee of access to the judicial system, as “[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” Miss. Const. of 1890, art. 3, § 24.

3.

The Appellate Practice Section has researched and reviewed *pro bono* appellate programs offered in other jurisdictions. The types and scope of *pro bono* appellate programs vary greatly from jurisdiction to jurisdiction. Regardless, one thing is clear: there is a movement throughout the country for *pro bono* appellate programs to assist the appellate courts. For example, the Appellate Practice Section has identified seventeen states with *pro bono* appellate programs.<sup>3</sup> Furthermore, a

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<sup>2</sup> *Id.*

<sup>3</sup> *E.g., id.* at pp. 13-14 (providing a brief overview of *pro bono* appellate programs in New Hampshire and New Mexico).

*See Ex. C, Manual on Pro Bono Appeals Programs for State Court Appeals, Council of Appellate Lawyers of the American Bar Association (Oct. 5, 2013) (providing a comprehensive overview of pro bono appellate programs in California, Colorado, Florida, Hawaii, Indiana, Minnesota, Montana, New York, North Carolina, Oregon, Tennessee, Texas, Virginia, Wisconsin).*

*See Ex. D, Arizona Court of Appeals Pro Bono Representation Program Manual (overview of Arizona’s pro bono appellate program).*

number of Federal Circuit Courts of Appeals have established *pro bono* appellate programs.<sup>4</sup>

4.

After performing the necessary research into the nature of other programs, many appellate attorneys in Mississippi have worked over the course of the last two years to create the structure for an appropriate *pro bono* program for Mississippi. The intention was to create a *pro bono* appellate program that would be sustainable, beneficial to *pro se* litigants, useful to Mississippi's appellate courts, and valuable to Mississippi's appellate attorneys. After discussion and the opportunity for review by members of the Appellate Practice Section of The Mississippi Bar as well as by the Mississippi Volunteer Lawyers Project and Mississippi Access to Justice Commission, a consensus was reached. The proposal for the *Pro Bono* Appellate Program is set forth in the proposed rule attached as Exhibit A.

5.

The proposed rule is not based on a particular *pro bono* appellate program from a specific state. The vast majority of *pro bono* appellate programs focus on civil appeals. However, the various programs differ greatly in scope, administrative responsibility, and the point in time when *pro bono* appellate counsel begins to participate in the appeal. The rule proposed by the Appellate Practice Section is narrowly-tailored to match the needs of Mississippi's appellate courts and the needs

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<sup>4</sup> See, e.g., Ex. E (overview of the Ninth Circuit Court of Appeals' *pro bono* appellate program) and Ex. F (overview of the Second Circuit Court of Appeals' *pro bono* appellate program).

of *pro se* litigants with the number and availability of Mississippi's appellate attorneys. Arizona and Montana, however, have current *pro bono* appellate programs that are very similar to the proposed Mississippi program.<sup>5</sup> Indeed, as with the rule proposed here, both Arizona and Montana use a model that allows the respective appellate court to request supplemental briefing or oral argument from *pro bono* appellate counsel after the case has been fully briefed by the litigants.

6.

The proposed Mississippi program is designed to be limited to civil appeals. This limitation is a result of the guaranteed right to counsel for criminal defendants and acknowledges the relatively small number of appellate attorneys available to adequately assist with criminal appeals or post-conviction relief motions.<sup>6</sup> The proposed Mississippi program provides for *pro bono* appellate counsel to serve as *amicus curiae* to assist the Court with legal issues presented in a case involving a *pro se* party. It proposes that appointment of *pro bono* appellate counsel will take place after the case is fully briefed, based on the Court's determination that additional

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<sup>5</sup> See Ex. D (overview of Arizona's *pro bono* appellate program).

See Ex. G (overview of Montana's *pro bono* appellate program taken from an excerpt of the Manual on *Pro Bono* Appeals Programs for State Court Appeals, Council of Appellate Attorneys of the American Bar Association (Oct. 5, 2013)).

<sup>6</sup> Granted, there may be the occasional unique circumstance where the Mississippi Supreme Court or Mississippi Court of Appeals seeks to appoint *pro bono* appellate counsel for a post-conviction relief proceeding. For example, the Mississippi Supreme Court recently issued an order requesting the Appellate Practice Section to designate attorneys to serve as *pro bono amicus curiae* in a Post-Conviction Relief proceeding. *Bester v. State*, No. 2013-CT-00058-SCT (Order entered Aug. 4, 2015). For these rare circumstances, the Appellate Practice Section requests that the Mississippi Supreme Court follow the same procedure set forth in the proposed Rule.

briefing would be helpful. The proposed Mississippi program also contemplates using the Mississippi Volunteer Lawyers' Project as the administrator for purposes of identifying and selecting appropriate *pro bono* appellate counsel after the Mississippi Supreme Court or Mississippi Court of Appeals enters an order requesting a supplemental brief from *pro bono* appellate counsel.

7.

The Appellate Practice Section proposes that the Rule be incorporated into the Mississippi Rules of Appellate Procedure as Rule 7, immediately following Rule 6 (Counsel on Appeal in Criminal Cases and Proceedings *In Forma Pauperis* in Criminal Cases). Rule 7 formerly governed Security for Costs on Appeal in Civil Cases, but that rule was omitted from the current rules because costs on appeal are now covered by Rule 11.

WHEREFORE, the undersigned, on behalf of the Appellate Practice Section of The Mississippi Bar, respectfully request the Court to consider the proposed Rule to establish a *Pro Bono* Appellate Program and to implement the *Pro Bono* Appellate Program as Rule 7 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted, this the 18th day of December, 2015.

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DRAFT – November 17, 2015

[PROPOSED] MISSISSIPPI RULE OF APPELLATE PROCEDURE 7.

**Rule 7. *Pro Bono* Appellate Counsel as *Amicus Curiae* in Civil Cases.**

- (a) **Appellate Courts May Appoint *Pro Bono* Appellate Counsel.** The Supreme Court or Court of Appeals may exercise their inherent authority to appoint *pro bono* appellate counsel in civil cases involving parties who are proceeding *pro se*. An authorization to appoint *pro bono* appellate counsel does not represent a determination by the Supreme Court or Court of Appeals regarding the merits of any party's position, but is based on the Court's determination that supplemental briefing and/or oral argument by *pro bono* appellate counsel will serve the ends of justice and assist the Supreme Court or Court of Appeals in its review of a case.
- (b) ***Pro Bono* Appellate Counsel Serves as *Amicus Curiae*.** In authorizing the appointment of *pro bono* appellate counsel, the Supreme Court and Court of Appeals do not direct the appointment of counsel to represent a party or otherwise establish an attorney-client relationship. Rather, *pro bono* appellate counsel, if appointed, will be directed to file supplemental briefs and/or to participate in oral argument as *amicus curiae* on issues selected by the Supreme Court or Court of Appeals. The Supreme Court and Court of Appeals may authorize such appointments during direct appeal, rehearing, post-conviction relief, and/or certiorari proceedings. The appointment of counsel pursuant to such an authorization shall conclude upon the issuance of a mandate in the case.
- (c) **Process for Authorization of *Pro Bono* Appellate Counsel.** Any member of the Court, through a single justice or judge, may enter an order authorizing the appointment of qualified appellate counsel to file a supplemental brief and/or to participate in oral argument. The Supreme Court or Court of Appeals normally will make a determination whether to authorize the appointment of *pro bono* appellate counsel after the parties' briefing has been submitted. The Supreme Court and Court of Appeals will not entertain requests by *pro se* parties for appointment of *pro bono* counsel.
- (d) **The Court will Designate Issues to be Briefed or Argued.** The order authorizing the appointment of counsel shall set out the issues as to which supplemental briefing and/or oral argument is requested, and may include direction that the brief should advocate for a particular party or position. The order shall limit the appointment of *pro bono* appellate counsel to those issues. Consistent with section (b) above, the order shall specify that counsel is appointed as *amicus curiae* and is not appointed to represent a party.

- (e) **Process for Identification of *Pro Bono* Appellate Counsel.** Upon entry of an order authorizing appointment of *pro bono* appellate counsel, the Clerk of the Court shall forward the order to the Executive Director of the Mississippi Volunteer Lawyers' Project ("MVLP"). Within ten business days after receipt of the order, MVLP shall solicit the participation of qualified appellate counsel as defined below, and, in consultation with the Chair of the Appellate Practice Section of the Mississippi Bar, shall select one or more counsel from among those who respond to the solicitation. Upon selection, the name(s) and address(es) of the selected counsel shall be forwarded to the Clerk of Court. The Clerk is then authorized to issue an order (1) appointing the selected attorney(s) as *pro bono* appellate counsel and (2) directing the attorney(s) to enter an appearance promptly as *amicus curiae*. Should no qualified appellate counsel respond to the solicitation within that time, the Executive Director of MVLP or Chair of the Appellate Practice Section shall so advise the Clerk.
- (f) **Qualified *Pro Bono* Appellate Counsel Defined.** Qualified appellate counsel are attorneys who (1) are members in good standing of the Mississippi Bar and of its Appellate Practice Section, (2) have been in the active practice of law for a minimum of three years, (3) have completed the Appellate Practice Section's continuing legal education program in Ethics in Pro Bono Appeals, and (4) agree to bear the expenses of a *pro bono* appellate appointment under this Rule. The Chair of the Appellate Practice Section of the Mississippi Bar shall be responsible for maintaining a list of qualified appellate counsel and furnishing it to MVLP. If a lawyer is otherwise qualified except that he or she does not meet the three-year minimum active practice requirement, he or she may be selected if another qualified appellate counsel agrees to supervise his or her participation.
- (g) **Record on Appeal Provided.** Upon entry of an order appointing *pro bono* appellate counsel, the Clerk shall prepare and transfer to each designated *pro bono* appellate counsel an electronic copy of the record and briefing in the case. The copy of the record and briefing will be provided at no charge.
- (h) **Briefing Schedule.** Pursuant to Rule 2(c), the entry of an order authorizing the appointment of *pro bono* appellate counsel suspends both any active briefing schedule and the decision-making process by the Court. The Clerk shall issue a revised briefing schedule upon entry of an order appointing a *pro bono* appellate counsel, which shall require the submission of supplemental briefing within 40 days from issuance of the briefing schedule. One 14-day extension may be granted by the Clerk. Any further extensions may be granted by order of the Court upon good cause shown. Any party may respond to a supplemental brief filed by *pro bono* appellate counsel. Such responsive briefs shall be filed simultaneously by all parties pursuant to the

briefing schedule entered by the Clerk, 30 days after filing of the supplemental brief. No reply shall be permitted absent further order from the Court. Upon filing of the responsive brief, if any, the decision-making schedule of the Court will resume.

- (i) **Form of Supplemental Briefing.** Supplemental briefing submitted by *pro bono* appellate counsel shall be captioned “Supplemental Brief of Appointed Counsel.” Responsive briefing submitted by the parties, if any, shall be captioned “Response to Supplemental Brief of Appointed Counsel.” Supplemental briefs and responsive briefs shall conform to the requirements of Rules 28 and 32. Except by permission of the Court, supplemental briefs and responsive briefs shall not exceed 25 pages, exclusive of pages containing certificates of counsel, certificates of service, table of contents, tables of citations, and any addenda containing statutes, rules, or regulations.
- (j) **Determination that Appeal is Not Meritorious.** Should *pro bono* appellate counsel determine that the appeal is not meritorious as to the issues designated for supplemental briefing, he or she should file a brief to the Court which certifies that, as to those issues, there are no arguable issues supporting the party’s appeal, and that this conclusion was reached after scouring the record thoroughly. *See Lindsey v. State*, 939 So. 2d 743, 748 (Miss. 2005). The brief may be accompanied by a motion for leave to withdraw as *pro bono* appellate counsel.
- (k) **Oral Argument.** *Pro bono* appellate counsel may request oral argument in the Supplemental Brief of Appointed Counsel, in the manner set out in Rule 34.

**REPORT ON PRO BONO APPELLATE PROGRAMS**

by

Pro Se-Pro Bono Committee  
Council of Appellate Lawyers  
American Bar Association

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Appellate courts throughout the nation have experienced significant increases in the number of unrepresented parties. While the proliferation of pro se parties poses serious challenges to our country's state and federal appellate judicial systems, this phenomenon simultaneously presents excellent opportunities for appellate lawyers to meet their ethical obligations to render pro bono services, enhance their professional development, and provide meaningful assistance to the appellate courts. The need for legal representation of pro se parties in the appellate system can be constructively addressed by pro bono appellate programs in ways that are beneficial to the parties, the volunteer attorneys, and the appellate courts.

Approximately two years ago, the Pro Se-Pro Bono Committee ("Committee") of the American Bar Association's Council of Appellate Lawyers ("CAL") undertook to contact various appellate courts around the country to gather information on any programs they had developed to either address the increase of pro se litigation or promote the availability of pro bono appellate legal services.<sup>1</sup> The Committee received a number of responses reflecting a wide array of activities, ranging from efforts to provide informal instruction and assistance to pro se parties, to self-help materials, to extensive studies and reports prepared by outside consultants on

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<sup>1</sup> It bears noting that the ABA's Section on Litigation is currently in the process of gathering similar information from various bar organizations through its Pro Bono Appeals Subcommittee.

the issues, to elaborate and well-developed pro bono programs. The variety of creative approaches to pro se and pro bono aspects of the appellate process was both impressive and highly informative.

Although the Committee initially planned to develop a prototypical or a model program from this information, it eventually concluded that these are not matters that can be effectively addressed with a “one size fits all” approach. The Committee felt it would be more helpful to serve as a clearinghouse of information for courts and bar organizations that may be interested in either initiating new programs or developing and improving existing programs. With that in mind, the Committee has prepared this report.

This report is made up of three parts.<sup>2</sup> Part one provides a discussion of the issues raised by pro se participation in the appellate process and the complementary manner in which pro bono legal services can provide an effective way of dealing with these issues. Part two discusses the practical benefits that can be realized from volunteering to take *pro bono* appeals. Part three summarizes the information received from state and federal appellate courts around the country in response to the Committee’s inquiry. Finally, this report is supplemented by an appendix that indicates those responses, and provides contact information for those who may be interested in obtaining further details as to the status of any of the programs that have been utilized by these particular courts.

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<sup>2</sup> Portions of the discussions in the balance of this report were initially developed and are significantly derived from an article by Thomas H. Boyd, *Minnesota’s Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. App. Prac. & Pro. 295 (2004).

## **I. The Dynamics of Pro Se Litigation and Potential for Pro Bono Opportunities.**

Federal and state courts throughout the country have experienced dramatic increases in pro se litigation.<sup>3</sup> The challenge posed by self-represented litigants is now recognized as one of the highest priorities for the courts.<sup>4</sup> The increased presence of pro se litigants shows no signs of subsiding, and appellate courts have not been spared from this growing trend.<sup>5</sup>

The challenges posed by the increase in pro se litigation offer a corresponding increase in opportunities for lawyers to render pro bono legal services. The American Bar Association has formally advocated and encouraged lawyers to provide legal services to those who cannot afford them for nearly a century.<sup>6</sup> This promotion of pro bono work is now expressed in the Model Rules of Professional Conduct.<sup>7</sup> The substantial increase of pro se litigation—particularly in appellate proceedings—presents a prime opportunity for attorneys to provide significant assistance to parties and courts alike, while at the same time meeting their professional and ethical obligations.

Parties engage in pro se litigation for a variety of reasons. Some individuals simply prefer to represent themselves without assistance of counsel. Perhaps they do not like lawyers, or believe they can represent themselves as well as or better than an attorney would represent them. However, there are many other people who wish to be represented but are unable to afford

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<sup>3</sup> See generally Conference of Chief Justices and Conference of State Court Administrators, *Final Report of the Joint Task Force on Pro Se Litigation*, submitted July 29, 2002 (Rockport, Maine) [hereinafter, *Joint Task Force on Pro Se Litigation*]; *A National Conference on Pro Se Litigation: A Report and Update*, AM. JUDICATURE SOC'Y (2001); Conference of State Court Administrators, *Position Paper on Self-Represented Litigation*, submitted August 2000; Goldschmidt, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers*, AM. JUDICATURE SOC'Y (1998).

<sup>4</sup> *Joint Task Force on Pro Se Litigation*, at 3-4 (citing Conference Proceedings [of the] National Conference on the Future of the Judiciary (1996)).

<sup>5</sup> See, e.g., *Court of Appeals Facilitate Handling of Pro Se Cases*, The Third Branch (July 1995); *2002 Annual Report of Administrative Office of the U.S. Courts*, Table B-9, U.S. Court of Appeal – Pro Se Appeals Commenced and Terminated.

<sup>6</sup> Burns, Patrick R., *Pro Bono: It's Good And It's Good For You!* MINN. LAWYER (Apr. 19, 1999) (citing Canon 12).

<sup>7</sup> See Rule 6.1 Voluntary Pro Bono Publico Service.

counsel. Regardless of the motivation, the presence of pro se litigants injects a host of serious issues and challenges for the Court as well as the other parties to the proceedings who are represented by counsel.<sup>8</sup>

Self-represented litigants impose additional burdens and demands on court staff and resources compared to attorney-represented litigants.<sup>9</sup> Pro se litigants require greater assistance in understanding and following appropriate procedures,<sup>10</sup> and are more likely to make mistakes in their submissions due to their lack of legal training and experience.<sup>11</sup> Further, interaction and communication between court staff and pro se litigants may raise ethical and legal concerns because “[a]t times their request for assistance [from the court staff] may cross the gray line between legal information and legal advice.”<sup>12</sup>

Counsel face challenges when dealing with pro se litigants whose interests are adverse to their own clients. The professional rules of conduct address the manner in which an attorney shall deal with unrepresented parties.<sup>13</sup> However, these rules focus on the manner in which an attorney may communicate with an unrepresented party, and do not explicitly address how an

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<sup>8</sup> The Conference of Chief Justices and the Conference of State Court Administrators recently addressed the dramatic and serious impact that growing pro se litigation has on our justice system:

A number of social, economic and political factors – especially the rising cost of legal representation relative to inflation, decreases in funding for legal services for low-income people and increased desire on the part of litigants to understand and to actively participate in their personal legal affairs – are believed to be at the root of the increase. Regardless of the underlying causes, however, *the trend towards self-representation reflects a significant deviation from a fundamental assumption by the courts – namely, that litigants are represented by licensed attorneys who are trained in applicable law and court rules.* The influx of large numbers of litigants who may not be informed about law and court procedures *poses significant implications for the administration of justice – especially, demands on court staff and resources and ethical dilemmas about how to compensate for self-represented litigants’ lack of knowledge without jeopardizing judicial requirements of neutrality and objectivity.*

*Joint Task Force on Pro Se Litigation*, at 3 (emphasis added).

<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (noting concerns the unauthorized practice of law and citing to Greacen, John M., *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 *Judicature* 198 (Jan. – Feb. 2001); Greacen, John M., *No Legal Advice from Court Personnel! What Does That Mean?* 34 *Judges’ J.* 10 (Winter 1995)).

<sup>13</sup> See Rule 4.3 of Model Rules of Professional Conduct (Dealing with Unrepresented Person).

attorney should act so as not to take undue or unfair advantage of a pro se litigant. “Many lawyers dislike participating in court proceedings when the opposing party is self-represented, as they find it awkward to represent their client’s interest without appearing to take unfair advantage of the self-represented litigant’s relative lack of knowledge and experience and risking the animosity of the trial judge.”<sup>14</sup>

Pro se litigation also “challenge[s] the neutral role of judges”<sup>15</sup> given that the judicial canons impose competing and sometimes conflicting obligations vis-à-vis pro se litigants. While judges are required to maintain impartiality toward all parties,<sup>16</sup> they must “accord every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”<sup>17</sup> When confronted with pro se litigation, “[m]any judges find it difficult to reconcile the requirement to provide self-represented litigants with an opportunity for a fair hearing with the requirement to remain impartial”<sup>18</sup> due to the need to lead pro se parties through the necessary procedures. Thus, “[a]n uninformed or unprepared pro se litigant can place an uncomfortable tension on the judicial search for important justice.”<sup>19</sup>

Finally, apart from these professional and ethical obligations, the presence of pro se litigants presents practical challenges for attorneys and judges alike in terms of effective communications and other logistical considerations “that clog court dockets and consume unnecessary amounts of court time and attention.”<sup>20</sup> Due to their lack of a legal education and experience, pro se litigants may tend to focus on facts and issues that, while important to them

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<sup>14</sup> *Joint Task Force on Pro Se Litigation*, at 4.

<sup>15</sup> Report of the Minnesota Conference of Chief Judges Committee on the Treatment of Litigants and Pro Se Litigation, at 7.

<sup>16</sup> ABA CANONS OF JUDICIAL CONDUCT 3(B)(5).

<sup>17</sup> *Id.* at 3(B)(7).

<sup>18</sup> *Joint Task Force on Pro Se Litigation*, at 4 (citing Goldschmidt, Jona, *Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, Family Ct. Rev. 40 (2000)).

<sup>19</sup> *Report of the Minnesota Conference of Chief Judges, Committee on the Treatment of Litigants and Pro Se Litigation* at 7 (April 1996).

<sup>20</sup> *Joint Task Force on Pro Se Litigation*, at 4.

personally, are not relevant to adjudicating the particular issues and claims in a given case. As a result, pro se litigants will often insist on pursuing extraneous and irrelevant matters that interfere with and/or compromise the development of the evidentiary record, as well as the presentation and framing of the relevant factual and legal issues. Pro se litigants may also have greater difficulty in effectively communicating through written submissions due to their lack of legal education, training, and experience. In those circumstances, judges and the court staff must expend greater resources in researching and deciding pro se cases due to the limited assistance that the pro se parties themselves can provide.

In summary, while there is no doubt that individuals have the right to represent themselves in legal proceedings, our nation's laws and justice system are based on an adversarial system in which all parties are expected to be represented by competent counsel. When parties appear pro se, this assumption and the corresponding balance of procedures and rules are thrown off, thus jeopardizing the fairness and equity in the final result.

## **II. The Practical Benefits to Counsel of Taking Pro Bono Appeals.**

While clients without lawyers raise many serious problems for appellate courts, appellate lawyers without clients have their own needs. Newer lawyers need experience, which includes opportunities to present oral argument, in order to establish their credentials. More experienced lawyers need to find ways to serve the public with their appellate skills. A program of volunteer help for pro se appellate litigants would serve these needs of newer and more experienced appellate attorneys alike.

Volunteer attorneys who handle appeals on a pro bono basis clearly benefit their clients. The clients receive these attorneys' considered judgment and advice on the merits and strategy of the appeal, valuable assistance in preparing the briefs and appendices, and effective presentation of oral argument. Volunteer attorneys can also assist these clients to better understand the role of

the appellate courts, comprehend the process, and anticipate the likely results of an appeal. Lastly, when the decision is rendered, volunteer attorneys provide an important service to these clients in explaining the substance and practical result of the ultimate decision by the appellate court, including the procedural posture of the case and any options for further review.

Additionally, volunteers who take on pro bono appeals also benefit the appellate court system by resolving some of the above-described challenges presented by parties who would otherwise proceed pro se. These volunteer attorneys effectively restore the adversarial balance to the appellate system which is so crucial to the presentation of the material facts and applicable law in a given case. With this balance, the appeal can be presented in a more effective and efficient manner without the drawbacks and distractions created by an untrained and inexperienced pro se litigant.

In addition to these various positive contributions, there are also very practical benefits to counsel who take pro bono appeals.

The most obvious benefit of pro bono appellate work is that of experience. Responsibility for full-fee appeals is often shared among the hierarchy of lawyers in the same firm. New lawyers are often caught in a “Catch 22”—these lawyers need experience in order to attract clients, yet clients are reluctant to entrust their appeals to lawyers who do not already have experience with appeals. A pro bono appeal is a perfect opportunity for a new lawyer to take responsibility for an entire appeal from start to finish. Indeed, while the opportunities for first chair trial experience have become scarce for newer lawyers, pro bono appeals are more plentiful and offer excellent prospects for new lawyers to take on primary responsibility for a case.

Moreover, pro bono appeals are legitimately included in any curriculum vitae of appellate cases that lawyer wishes to compile for marketing purposes. An appeal is an appeal.

The more appeals that an attorney has done, the better that attorney can demonstrate and market his or her appellate experience.

A further benefit to attorneys who take on pro bono appeals is the opportunity to be seen outside the office, meet other lawyers in the community, and develop a reputation for rendering a valuable service to the bench, the bar, and the larger community. While there are a multitude of opportunities for members of the bar to render pro bono service, there are fewer that make direct use of the specialized skills of appellate lawyers. In short, pro bono appeals offer that potential and will positively enhance an attorneys' reputation, as well as reflecting well on the profession as a whole.

A corollary benefit of pro bono appellate work is the opportunity to become acquainted, through repeated exposure, with the judges before whom the appellate lawyer practices. Those judges fully understand and appreciate the value of the effort that a pro bono lawyer devotes to an appeal. These judges are also typically quite appreciative of the assistance these pro bono lawyers render in facilitating the proper presentation of a case to the appellate court.

Of course, these practical benefits only supplement, and do not replace, the fundamental reason to represent appellate clients on a pro bono basis, which is the important objective of insuring that access to justice is available to all persons, regardless of wealth or influence. Nonetheless, to the extent that pro bono work has the pragmatic side effect of enhancing practitioners' skill levels, promoting community recognition, and assisting with business development efforts, it is clear that pro bono participation allows practitioners to do well by doing good.

### **III. Programs Developed in Response to Pro Se Parties in Appellate Proceedings.**

Volunteer programs are, of course, not the only means of handling pro se appellate litigants. A survey of state and federal appellate courts, as well as information obtained from

various bar organizations, reveals a variety of different methods and programs that have been developed to address the increase of pro se litigants in appellate proceedings. This section describes some of the programs to show how appellate courts have responded to the pro se challenge and how volunteer programs might fit into the full spectrum of activity.

**A. *Informal Instruction by Court Staff***

The first point of contact between pro se parties and the justice system is the clerk's office. Many appellate courts have endeavored to sensitize the clerk of court's staff to the needs of pro se litigants. For example, the Missouri Court of Appeals, Western District, provides pro se appellants with detailed procedural information.<sup>21</sup> The attorneys and administrative personnel who staff the clerk's offices for the New York Court of Appeals also provide extensive assistance to pro se litigants and direct those parties to relevant resources, including outlines of the Court's civil and criminal jurisdiction and information on the Court's website.<sup>22</sup>

While staff personnel endeavor to be helpful to pro se appellants, these activities are tempered by concerns that court employees should not provide legal advice. For example, while Ohio's First District Court of Appeals attempts to assist pro se litigants by providing various forms, many of the pro se litigants have problems completing the forms and making other submissions, and seek out assistance from the clerk's office.<sup>23</sup> Indeed, as a result of these types of concerns, the Council of Chief Justices for the State of Texas has expressly prohibited the

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<sup>21</sup> E-mail from Terence Lord to Tom Boyd dated November 15, 2002.

<sup>22</sup> Letter by Marjorie S. McCoy to Thomas H. Boyd dated November 20, 2000. The Clerk's Office personnel for the New York Supreme Court, Appellate Divisions, provide similar assistance to pro se appellate litigants. *See, e.g.*, letter by Catherine O'Hagan Wolfe to Thomas H. Boyd dated January 22, 2003; letter by James Edward Pelzer to Thomas H. Boyd dated November 19, 2002.

<sup>23</sup> E-mail by Tom Rottinghaus to Tom Boyd dated November 20, 2002 ("Dealing with the pro se litigant is a major concern since the employees of the Court cannot provide legal advice. We try to assist the litigants in any way we can by explaining the rules; however, when it comes to preparing a brief, there is little we can do.").

clerks' staffs of the Texas Court of Appeals from advising pro se litigants or providing pro bono representation, even if their cases are pending in courts outside of their jurisdiction.<sup>24</sup>

### **B. *Written Self-Help Materials***

Recognizing the limits on staff time as well as these ethical concerns of non-lawyers appearing to be giving legal advice, several courts and bar organizations have prepared written materials to assist pro se parties who are participating in appellate proceedings. For example, a number of courts such as the Supreme Court of Delaware, the Wisconsin Supreme Court, and the Georgia Court of Appeals have developed "Citizen Guides" that provide descriptions of the judicial system and the court's procedures, provide answers to frequently asked questions, and include forms and checklists for use by pro se parties.<sup>25</sup> Other courts have placed responses to frequently asked questions on their websites.<sup>26</sup>

Some bar associations and appellate courts have developed fairly extensive written materials to assist pro se litigants, such as the Illinois Appellate Lawyers Association's extensive and updated "Guide to Civil Appellate Procedure for Pro Se Litigant"<sup>27</sup>; the Missouri Court of Appeals, Eastern District's "The ABC's of Appellate Practice"<sup>28</sup>; and, most recently, the Appellate Practice Section of the Florida Bar's soon to be released "The Pro Se Appellate Handbook."<sup>29</sup>

### **C. *Pro Bono Programs in Federal Appellate Courts***

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<sup>24</sup> Letter by Linda Rogers to Thomas H. Boyd dated November 13, 2002.

<sup>25</sup> *See, e.g.*, letter by Cathy L. Howard to Thomas H. Boyd dated November 14, 2002 (Supreme Court of Delaware); letter by William L. Martin, III to Thomas H. Boyd dated November 12, 2002 (Court of Appeals of Georgia); letter by Cornelia G. Clark to Thomas H. Boyd dated November 15, 2002 (Supreme Court of Wisconsin).

<sup>26</sup> E-mail by Marcia Mangel to Tom Boyd dated November 13, 2002 (Supreme Court of Ohio); letter by Kenneth A. Richstad to Thomas H. Boyd dated November 13, 2002 (South Carolina Court of Appeals).

<sup>27</sup> Letter by Steven M. Ravid to Thomas H. Boyd dated November 19, 2002; letter by Robert J. Mangan to Thomas H. Boyd dated November 14, 2002.

<sup>28</sup> Letter by Mr. Ravid to Mr. Boyd dated November 19, 2002.

<sup>29</sup> Dorothy F. Easley, "The Appellate Practice Section Moves to Alleviate Explosive Appellate Nightmare."

In addition to these forms of assistance to pro se litigants, some courts have already taken the next step toward formal volunteer programs.

The federal judiciary's traditional practice of appointing counsel to represent indigent criminal defendants on appeal has resulted in the development of some pro bono programs for civil appellants. Specifically, while all of the federal courts of appeal have procedures for facilitating representation through the Criminal Justice Act ("CJA"), some courts have gone a step further to develop programs to provide pro bono representation to pro se litigants in civil appellate proceedings. One notable example is the United States Court of Appeals for Seventh Circuit which operates an appointed counsel program that is coordinated through Counsel to its Circuit Executive.<sup>30</sup> While this program focuses primarily on the representation of indigent litigants in criminal appeals under the CJA, the program has also been used when the Court has determined that assistance of pro bono counsel would aid the court in prisoner civil rights cases or other civil appeals.<sup>31</sup>

The Second Circuit is the most recent federal appellate court to formalize an approach to pro se litigation through pro bono legal services with the announcement of the Pro Bono Panel.<sup>32</sup> The Court will draw from volunteer attorneys on this panel to appoint counsel either pursuant to motion or *sua sponte* in "cases presenting issues of first impression, complex issues of fact or law, or raising potentially meritorious claims or otherwise warranting further briefing and oral argument."<sup>33</sup> The Panel will be coordinated through the Director of the Office of Legal Affairs,

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<sup>30</sup> Seventh Circuit Court of Appeals' Appointed Counsel Program, 6 Wisconsin Lawyer 3 (No. 2 Spring 2003).

<sup>31</sup> *Id.*

<sup>32</sup> Plan for the Appointment of Pro Bono Counsel (December 1, 2004).

<sup>33</sup> *Id.* at 1.

subject to the Chief Judge’s oversight, and is open to eligible attorneys through a formal application process.<sup>34</sup>

One of the longest standing and most developed approach to pro se litigation in federal civil appellate proceedings is the Pro Bono Program established by the Ninth Circuit’s Judicial Conference Resolution in 1993.<sup>35</sup> The Ninth Circuit concluded that “complex non-frivolous pro se appeals would be greatly assisted in many cases by the appointment of pro bono counsel for the litigant” and the Court therefore undertook to establish “a comprehensive Pro Se Project to provide for the appointment of pro bono counsel in complex civil appeals while a party is proceeding pro se.”<sup>36</sup> Under this program, pro se appeals are reviewed by the Court’s pro bono coordinator, under the supervision of a staff attorney, to determine whether counsel should be appointed.<sup>37</sup> Panels of private volunteer attorneys in each district of the circuit are coordinated and maintained by an attorney in that district who serves as the district coordinator for the program.<sup>38</sup> The Court’s pro bono coordinator works with and relies heavily on these district coordinators in recruiting volunteers for the program and locating counsel for appointment in each of the cases.<sup>39</sup> In addition to the volunteer attorneys, the program also facilitates participation by law students through the cooperation with law school clinics located within the Ninth Circuit.<sup>40</sup>

The Veterans Consortium Pro Bono Program was created in 1992 by several national veterans service organizations for the dual purpose of recruiting and training attorneys in the

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<sup>34</sup> *Id.* at 1-4.

<sup>35</sup> United States Court of Appeals for the Ninth Circuit/Pro Bono Program 1 & 7-8 (resolution submitted by The Ninth Circuit Lawyer Representatives Coordinating Committee and The Ninth Circuit Senior Advisory Board).

<sup>36</sup> *Id.* at 7 (quoting 1993 Resolution No. 3 “Encourage Ninth Circuit Attorneys to Participate in the Pro Se Representation Project”).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 6.

then-fledgling field of veterans' law, and to provide assistance to unrepresented appellants before the U.S. Court of Appeals for Veterans Claims.<sup>41</sup> Even where appointment of counsel is not eventually made, veterans who request legal services will receive substantive legal advice and direction through the program.<sup>42</sup> In 2003, the program provided legal assistance or advice at no cost to 100% of those appellants who met the eligibility requirements.<sup>43</sup>

#### **D. *Pro Bono Programs in State Appellate Courts***

Some state appellate courts, like the federal appellate courts, have also developed formal pro bono programs. The New Mexico Court of Appeals has established one of the most developed programs among state appellate courts which came about as a result of an extensive study conducted by an outside consultant that focused on how that court was dealing with pro se appellants.<sup>44</sup> As part of these efforts, a group of staff attorneys and judges drafted forms for docketing statements for criminal cases, general civil cases, domestic relations cases, and a certiorari petition form for administrative appeals; forms for the notice of appeal, applications for free process and service of process; and a pamphlet responding to frequently asked questions that is made available through all of the district court clerk's offices.<sup>45</sup> The Court is also in the process of having an instructional CD made that will explain how an appeal proceeds in the Court of Appeals and provide interactive instructions for filling out the forms.<sup>46</sup> In addition, the Court has compiled a list of attorneys who are agreeable to representing pro se litigants either for free or for a reduced fee where the court has determined those litigants would benefit from and

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<sup>41</sup> See The Veterans Consortium Pro Bono Program website at [www.vetsprobono.org](http://www.vetsprobono.org).

<sup>42</sup> *Id.*

<sup>43</sup> The Veterans Consortium Pro Bono Program, 2003 Annual Report at 6.

<sup>44</sup> Letter by Bridget Gavahan to Thomas H. Boyd dated November 13, 2002.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2.

welcome such assistance.<sup>47</sup> Finally, the Court has initiated a program where senior staff attorneys are “on call” to take questions from pro se litigants.<sup>48</sup>

In some states, the appellate courts and the state bar associations have collaborated on the development of very effective pro bono appellate programs through which the bar coordinates a pool of volunteer lawyers who will provide pro bono representation in appeals where the court has deemed pro se parties should have legal counsel. In New Hampshire, the New Hampshire Supreme Court and the New Hampshire Bar Association operate pro bono programs in tandem.<sup>49</sup> In Wisconsin, the Appellate Practice Section of the Wisconsin State Bar has developed an excellent relationship with the Wisconsin Supreme Court and the Wisconsin Court of Appeals to enlist volunteer attorneys who regularly accept appointments to represent pro se litigants in cases that have been identified by the court as raising significant legal issues.<sup>50</sup>

### **Conclusion**

As the Committee’s report demonstrates, there is a significant need for pro bono legal services at both the state and federal appellate levels. There has been no lack of creativity and initiative in the development of different approaches to deal with the pro se challenge. However, the potential benefits available to pro se parties, volunteer appellate attorneys, and the appellate courts remain relatively untapped even as pro se appellate programs develop and expand. The Committee is hopeful that this report can serve as a useful resource for those courts and bar organizations interested in crafting programs that would incorporate pro bono legal services in efforts to address the pro se challenge faced by appellate courts.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Letter by Stephanie A. Bray to Thomas H. Boyd dated December 8, 2003.

<sup>50</sup> Bell, Colleen D., “*Do Good: APS Appeals Program*,” 7 *De Novo* 6 (Summer 2004)(State Bar of Wisconsin Appellate Practice Section).

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# MANUAL ON PRO BONO APPEALS PROGRAMS

FOR STATE COURT APPEALS



**EXHIBIT C - Part 1**

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## PREFACE

The unmet need for legal services by those who cannot afford to hire a lawyer is a problem that every bar association and court in the country confronts and attempts to solve. We all recognize that we can have the best legal system in the world, which we do, but for those who cannot afford a lawyer to help solve their legal problem, it is as if there is no legal system at all. Much of the focus on providing legal services to the poor naturally involves the person's initial contact with the lower courts, but a somewhat less obvious but nevertheless real need is for services at the appellate level.

Attempting to design a system in the state appellate courts to match lawyers who are willing to take pro bono appeals with clients who need their services is sometimes viewed as complicated and difficult to implement. However, in a number of states, bar associations working with the courts have established successful appellate pro bono programs. As lawyers, we look for precedents and forms so that we are relying on what has been determined or used before. For those reasons, I thought putting together a resource book describing the existing pro bono appellate programs around the country would aid bar associations and courts in other states in establishing such programs in their jurisdictions.

I know of no better group to prepare such a resource than the Council of Appellate Lawyers of the American Bar Association, and I knew of no better person to chair this effort than Cynthia Feathers, an appellate attorney who had been the New York State Bar Association director of pro bono affairs and was instrumental in establishing an appellate pro bono program in New York. I asked Cynthia to chair the committee; and her very able and motivated committee reviewed every existing pro bono appellate program in the country and prepared a summary of each program, together with forms and contact people in each state, all of which are included in this manual. They did all this work in less than a year.

As chair of the Council of Appellate Lawyers, and on behalf of its members and the clients who may be served as a result of their work, I want to express our admiration and thanks for their extraordinary efforts. If the manual inspires you or aids you in the effort to establish a pro bono appellate program, our mission will be fulfilled. We would appreciate any comments or any reports of your successful use of the manual.

*A. Vincent Buzard  
Council of Appellate Lawyers  
American Bar Association Judicial Division  
October 5, 2013*

## INTRODUCTION

Throughout the country, pro bono programs for state court appeals have been created to help litigants of modest means who cannot afford quality appellate representation. The American Bar Association's Council of Appellate Lawyers (CAL) has designed this manual to serve as a practical tool that can make the path easier for the next generation of such programs and for the expansion of existing programs. Building on valuable surveys previously done by CAL and other groups, this resource seeks to provide a detailed examination of each state's programs, advice from program leaders, samples of various forms, articles, and contact information for each state. The manual surveys only pro bono programs that operate in state courts; it does not cover federal court pro bono programs, because the ABA Litigation Section will be creating a resource describing such programs. Nor does the manual describe law school clinics, because our focus is on representation by appellate attorneys.

We learned about existing programs via the most recent prior report by CAL and current court and state bar websites. In contacting 17 states with a pro bono appeals web presence, we learned that only 13 actually have a current program, and one state is on the brink of launching a program. We made extensive efforts to contact the other states to confirm that they do not have a program. If such states do have such a program now, we encourage interested persons to email [denise.jimenez@americanbar.org](mailto:denise.jimenez@americanbar.org) and provide relevant information so that we can supplement the online version of this manual. The CAL Pro Bono Committee also encourages leaders of the programs detailed here to update us on their efforts and thanks them for their generous cooperation and assistance in compiling this manual. We also thank all of the persons who provided permission to reprint the invaluable program material included in this manual.

Thanks to A. Vincent Buzard, Esq. (Harris Beach, Rochester, NY), Chair of CAL, for his vision in suggesting the development of this manual and to the members of the Pro Bono Committee who created this resource, including by interviewing attorneys involved with existing programs to gain insights about each state's initiative.

The Pro Bono Committee members are Cynthia Feathers, Esq. (Chair, Albany, NY), Sean Andrussier, Esq. (Duke University School of Law, Durham, NC), Michael J. Bentley, Esq. (Bradley Arant Boult Cummings LLP, Jackson, MS), Karin Bohmholdt, Esq. (Greenberg Traurig, LLP, Los Angeles, CA), Kira Klatchko, Esq. (Best Best & Krieger, Indian Wells, CA), Linda L. Morkan, Esq. (Robinson & Cole LLP, Hartford, CT), Matthew Schettenhelm, Esq. (Best Best & Krieger, Washington, D.C.), and Charles G. Wentworth, Esq. (The Law Office of Lofgen & Wentworth, P.C., Glen Ellyn, IL). Thanks also to the Rural Law Center of New York (Plattsburgh, NY) for the assistance of George J. Hoffman, Jr., Esq. and paralegal Laura Charland. Finally, special thanks to Counsel Press for its generosity in printing this manual. Copies of the complete manual will be made available on the CAL website.

## **BASIC CONSIDERATIONS IN CREATING A PROGRAM**

This manual cannot tell you how to create or expand a pro bono appeals program. However, it can help you consider the relevant elements of such a program and identify likely obstacles and benefits. Some of the basic questions and issues to consider are set forth below.

### **1. Appellate experience**

Is the goal of your program to find opportunities for experienced appellate attorneys to use their skills in order to provide quality representation in addressing an unmet need in the community? Or would you like to train attorneys to do appeals? If so, will you use a mentoring system, in which seasoned appellate practitioners guide the work of other volunteers, and will you limit the kinds of cases less experienced volunteers handle?

### **2. Appellate attorney committees and sections**

One theme that emerged in our research was the central role of the organized appellate bar in creating programs, screening cases, and representing litigants. Such attorneys know how difficult appeals can be and have been a significant force in mobilizing their own colleagues to offer free appellate representation. Pro bono appeals are thus a distinct genre of pro bono service, which often starts *not* with a group of attorneys with a particular skill set, but with a particular need, and sometimes uses paid pro bono staff to train volunteers. The appeals programs are also distinct in often operating on a statewide, not a local, level in the recruitment of volunteers and screening of cases.

### **3. Role of the appellate courts**

What role will the appellate courts play? There are many possibilities. In some instances, the courts themselves were the primary force behind creation of a program. More often the program was started by a state bar appellate group. In those situations, a question to address is whether the appellate court will be considered a full partner in the program. Other questions are whether the court will refer cases to the pro bono program and will appoint counsel, as is often done in federal court programs, but less often in state programs.

### **4. Role of nonprofits and funding**

What role will existing legal services/pro bono programs play? Are there programs in your community that can provide administrative assistance, malpractice insurance, and other support? Partnerships of state bar appellate groups and pro bono organizations

work well where there is a mutual understanding and respect for each other's role. The attorneys are grateful for the infrastructure and guidance offered by pro bono professionals, who in turn support the vision and expertise of the appellate bar.

Is the pro bono program local, regional or statewide? Will it handle the income qualification of applicants, and what standards will apply? Can it identify possible funding sources, prepare grant proposals, and administer funds? If so, how will such funds be used? In one state, two members of the state bar appeals committee receive a stipend in recognition of their ongoing role in helping to run the program. In other states, the appellate attorney administrator is fully voluntary, and the pro bono program donates staff time. Funding can also be used for transcripts and printing costs, where the volunteers cannot absorb such costs, and for outreach efforts. Several programs have no funding, and volunteers must cover their costs.

## **5. Appeal topics**

Another threshold consideration is whether a program will cover any and all appeal topics or will narrow the subject matters in which appeals will be handled, based on perceived high-need areas.

## **6. Promoting the program**

Except where the court runs the program and identifies the cases warranting pro bono appellate counsel, a basic issue programs face is getting the word out about the program to lawyers and litigants. States have found a number of ways to promote their programs: placing information on court, pro bono program, and state bar websites; distributing materials at Continuing Legal Education (CLE) programs; making brochures and posters available via the above entities and in trial and appellate court clerks' offices; creating a LawHelp.org presence; and publishing articles in the general circulation or legal press about the program generally or an interesting case specifically.

## **7. Tenacity**

The road to creating a pro bono appeals program may not be smooth. Once the program is launched, getting a steady flow of cases and managing the program to place the cases and ensure timely and quality representation can be difficult. Reinvigorating an existing program with new leadership or outreach efforts is often required. Innovative approaches may be called for. For example, one jurisdiction that initially sought to represent primarily litigants who could not obtain assigned counsel has created a partnership with providers of mandated representation to expand services to indigent persons in family law appeals.

## **8. Defining success**

Even the most vibrant programs do not define success by a high-volume of appeals handled each year. For many programs, doing 10 appeals a year is typical. That number belies the value of such programs. For one thing, a single appeal involving an enormous record and multiple complex issues can be a very labor-intensive undertaking.

For another thing, the power of appeals in creating binding precedent that will serve other similarly situated persons of modest means should not be under-estimated. Indeed, many pro bono programs have made important new law in their jurisdictions. Working with legal services groups to identify possible impact cases or areas where amicus curiae briefs could make a critical difference seems to be a largely untapped frontier. Even in appeals not deemed to be “impact” cases, each appeal can have an enormous impact on the life of the individual litigant represented. Finally, the number of appeals handled is not indicative of the number of applications screened and valuable information provided to trial counsel and pro se litigants about the appeal process and possible problems with rejected appeals.

## **9. A few comparisons**

The most common model involves a collaboration of a state bar appellate section, a public interest nonprofit organization, and a court. In some cases, the nonprofit entity performs the income qualification of applicants, whereas in others, the appellate attorneys do so. Perhaps the state with the greatest court control of a program is Montana. In Oregon, the court also chooses the cases, but the state bar plays a major role in the program. In Colorado, in some cases that were briefed by pro se litigants, the court issues an order inviting the litigant to seek pro bono counsel through the program and provides an extension for supplemental briefing. In most programs, referrals flow from a variety of sources, which may or may not include the court.

As to topics, unique approaches are taken in Minnesota, which handles only unemployment insurance appeals, and North Carolina, which involves only guardian ad litem representation of children in appeals. Many states apparently do not limit topics. A middle ground is taken in Hawaii and New York, where appeals are restricted to several enumerated high-need areas. A unique program is Los Angeles County’s, which emphasizes a brief advice clinic that helps a high volume of pro se litigants, while referring a small number of cases for pro bono representation. States with regional programs that do not cover the entire state include California and New York. In creating or expanding your program, you may find especially useful the extensive program literature and forms provided by Colorado, Montana, and New York and an article about Minnesota’s program. Finally, a number of states offer pro se appeals guides, as well as pro bono representation, and links to such guides are provided in this manual.

## **CALIFORNIA: LOS ANGELES COUNTY**

### **When was the program created?**

2006.

### **How was it started?**

The program started after Justice Laurie Zelon of the Second District Court of Appeal decided that her court needed to do something to help the unrepresented civil litigants who were having a difficult time navigating the system. She contacted Public Counsel, a public interest nonprofit law firm, the Appellate Court Section of the Los Angeles County Bar Association, and a few prominent appellate lawyers in L.A. Then a series of meetings was held to brainstorm and design a program. In the meantime, Public Counsel created an appellate law program and received a five-year grant through the State Bar to get the program started. An appellate self-help clinic was established in a partnership of the court and Public Counsel. It is now held in a small office at the courthouse two days a week.

### **How are cases and volunteers chosen?**

Lisa Jaskol of Public Counsel identifies meritorious cases and places them with pro bono lawyers. Cases are typically snapped up quickly. The L.A. County Bar Association set up a special listserv for Public Counsel to use. The volunteer lawyer decides if the appeal presents non-frivolous issues and if he wants to keep it or give it back to Public Counsel to find another lawyer to handle it. When respondents come to the clinic, their appeals are immediately placed with pro bono lawyers.

### **Do volunteers need to have appellate experience?**

Appellate Court Section members typically possess appellate expertise. If the volunteer lacks experience, a mentorship arrangement is created with a more experienced appellate lawyer.

### **On average, how many appeals are handled each year?**

Several thousand pro se litigants have been helped at the clinic, and in six years, about 30 appeals have been placed, several of which have resulted in published decisions.

**How do you promote the program?**

The program is promoted to litigants through the Court of Appeal. The website has a lot of information about the program. When an unrepresented litigant files an appeal, he or she receives a packet from the court. Flyers are distributed throughout the county. Lawyers learn about the program through the Appellate Courts Section or Public Counsel.

**What obstacles had to be overcome to establish the program?**

Largely funding. In other districts, there seems to be resistance to establishing similar programs.

**Where can I learn more about this program?**

A law journal article offers a detailed discussion of the program. *See* Meehan Rasch, "A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono 'Triage' for Indigent Pro Se Civil Litigants on Appeal," 11 J. APP. PRAC. & PRO. 461 (2010).

**Does California have a pro se appeals guide?**

Yes, go to <http://www.courts.ca.gov/8676.htm>.

**Who is the contact person for the L.A. program?**

Lisa Jaskol, Esq.  
Public Counsel  
(213) 385-2977, ext. 151  
[ljaskol@publiccounsel.org](mailto:ljaskol@publiccounsel.org)

# COLORADO

## **Program creation**

The state's pro bono program was inspired by two Court of Appeals judges, one of whom started his career in Legal Aid. The culture in the state helps to explain the deep judiciary support. The state has a "Self-Represented Litigant" program in the trial courts, with help available in person for pro se litigants in civil cases. There is a national program headquartered at the University of Denver—the Institute for the Advancement of the American Legal System, headed by a former Colorado Supreme Court judge—which seeks to improve accessibility to courts. The Colorado Bar Association formed a five-person committee to develop a pro bono program. That committee looked at model programs in Austin and Houston, Texas. It took seven or eight months to get going and craft language. Before posting information about the program on its website, the Bar Association received numerous requests for help. Members of the committee took pro bono appeals while the process was being developed.

## **Appeal sources**

Information about the program is available from many sources. The Colorado Court of Appeals provides an information sheet to appellants and appellees. Litigants also find out about the program online, from district court clerks and appellate clerks or other pro bono programs. The application may be revised to have applicants indicate who referred them in order to gain a better understanding of how litigants are learning about the program. Another source of referrals is Metro Volunteer Lawyers (MVL) in the Denver area. Volunteer attorneys are covered under MVL's malpractice insurance.

## **Types of cases**

Since its launch in summer 2010, the program has received approximately 140 applications and has agreed to representation in more than 30 appeals. About half are domestic relations cases. The cases come from all over the state. The volunteers may represent parties on either side of an appeal. The volunteer attorney, not the program, is the attorney of record for the appeal.

## **Process**

Attorney Jane Ebisch is the voluntary administrator, and applications flow to her after they are submitted by applicants to the Colorado Bar Association. She is a member of the Appellate Subcommittee of the Litigation Committee of the State Bar. A small screening committee decides on what cases to accept, usually meeting via conference calls. There are mentor-mentee relationships between experienced attorneys and newer attorneys. The Litigation Committee has a small war chest to absorb costs. Ms. Ebisch

often calls applicants to discuss procedural issues. The program does not require the notice of appeal to be done before an application is submitted; and if the case is accepted, sometimes the volunteer attorney prepares the notice of appeal for the applicant.

Full information about the process is available on the Colorado Bar Association website: <http://www.cobar.org/index.cfm/ID/20004/dpwfp/For-the-Public/>.

### **Unique element**

There have been several court orders from the Court of Appeals, with copies to the program, giving pro se litigants who filed a brief an extension of time to apply for pro bono representation from the program. However, it is up to the litigants to follow up and apply to the program, which they do not always do.

### **Contact person**

Jane Ebisch, Esq.  
The Ebisch Law Firm  
Lakewood, CO  
(303) 233-1232  
[jebisch@ebischlaw.com](mailto:jebisch@ebischlaw.com)

# FLORIDA

## **How was the program started?**

The program was created several years ago at the impetus of the Pro Bono Committee of the Appellate Practice Section of the Florida Bar (Committee). The Committee's website is found at [http://www.flabarappellate.org/about\\_committee\\_PROB.asp](http://www.flabarappellate.org/about_committee_PROB.asp).

## **What entities are involved with this program?**

The Committee, the Florida Supreme Court, and legal aid organizations.

## **On average, how many appeals are handled each year?**

Around 15.

## **How does it work?**

Cases generally are referred to the Committee from legal aid organizations or the Florida Supreme Court. The Committee maintains a roster of volunteer lawyers who have expressed interest in serving as pro bono appellate counsel. When the Committee receives word of a potential pro bono appeal, it distributes an email to the roster to ask who is interested in handling the appeal. With this inquiry, the Committee will forward basic information about the case. The Committee generally forwards any request for pro bono assistance in a civil or family law matter. Criminal or post-conviction appeals are not handled unless the Florida Supreme Court seeks to appoint counsel in such cases.

## **How do referrals from legal aid organizations work?**

A legal aid organization may refer a party to the Committee for pro bono representation after the organization ensures that he or she qualifies financially for assistance. If a party contacts the Committee directly seeking appellate representation, the Committee tries to route the applicant to a legal aid organization for financial screening. Such organizations do the financial screening because the Committee lacks the resources to do it. Rarely do parties contact the Committee directly seeking pro bono appellate counsel.

After the Committee notifies the roster of volunteer lawyers about a referral from a legal aid organization, interested attorneys contact such organization directly. If multiple lawyers volunteer, the legal aid program (or the client) may make the selection. Typically, the volunteer who expresses interest first is selected. Screening as to the merits of an appeal is done by the volunteer attorney after he or she connects with the referring organization or client.

### **How do court-originated appointments work?**

When the Florida Supreme Court grants review in a case involving a pro se party, the court alerts the Committee, which notifies the roster of attorneys to determine who is interested. The Committee then forwards to the Supreme Court the names of interested persons, along with recommendations about attorney selections. The court then chooses appellate counsel. For this type of appointment, it helps if a lawyer is certified in appellate practice or is working with a certified attorney, whether from his or her firm or from the Committee.

The Committee has contacted Florida's intermediate appellate courts to find ways to work with those courts in providing pro bono representation. However, for various reasons—including the absence of a process to screen cases worthy of appointment before the cases are sent to merits panels—those intermediate appellate courts have not been a consistent source of pro bono appointments.

### **Must volunteers have appellate experience?**

Lack of appellate experience may be a factor when the Florida Supreme Court appoints appellate counsel. Otherwise, appellate experience is not required for cases referred from legal aid organizations. Members of the Florida Bar's Appellate Practice Section may sign up for the roster, but they need not have appellate experience to do so.

### **Is there any oversight after cases are assigned?**

If a case is assigned to a lawyer lacking appellate experience, the Committee assigns a mentor to that attorney. Mentors are selected from among certified appellate specialists in the Appellate Practice Section. A mentor may review a brief before it is filed.

### **Are there length-of-engagement guidelines or rules?**

Length of engagement is governed by the arrangements reached between the client and volunteer attorney.

### **How is the program funded?**

The program has no funding. The referring legal aid organization generally pays any costs necessarily incurred in handling the appeal. At the volunteer attorney's option, any costs not covered by a legal aid organization may be paid by the volunteer attorney's law firm (however, volunteers and their law firms are not required nor expected to incur costs). Any costs not paid by a legal aid organization or the volunteer's law firm remain the client's responsibility.

**Does Florida have a pro se appeals guide?**

Yes, go to <http://prose.flabarappellate.org>.

Also, “Ensuring Meaningful Access to Appellate Review in Non-Criminal Cases Involving Self-Represented Litigants,” a paper by Jacinda Haynes Suhr of the Second District Court of Appeal, Florida State Courts System, examines self-representation in non-criminal cases filed in Florida’s intermediate appellate courts. *See* [http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2009/suhr\\_accesstoappellatereview.ashx](http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2009/suhr_accesstoappellatereview.ashx).

**Who is the program contact person?**

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## HAWAII

### **When was the program started?**

Planning began in 2012 and is ongoing. Before it is implemented, the program must be approved by the Hawaii Access to Justice Commission (Commission), which may happen later in 2013. The program will launch as a pilot project.

### **What entities are involved with this program?**

The groups involved are the Appellate Section of the Hawaii State Bar Association (Appellate Section); Volunteer Legal Services of Hawaii (VLS); and the Commission, an organization created by the Hawaii judiciary to expand civil legal services for residents with low or moderate incomes. The Commission is involved in the pilot project's creation, but will not play a direct role in the program's execution, once it is launched.

### **What types of cases are covered?**

In Hawaii's Intermediate Court of Appeals, the program will cover foreclosure, summary possession, employment discrimination, workers' compensation, tax appeals, probate, and divorce—the types of cases in which the court sees numerous pro se parties. In the future, if the pilot is successful, the program might expand to include other types of cases and matters pending in Hawaii's Supreme Court.

### **How will it work?**

Step one:

Request for services and initial screening. Cases will not originate from any court. Rather, an unrepresented party seeking appellate counsel must contact the Appellate Section, which will initially screen the case to ensure that it is a type listed above. If it is, the process will proceed to step two.

Step two:

Financial screening. After confirming that the appeal fits within one of the included categories, the Appellate Section will notify the pro se party to contact VLS so that the latter organization can confirm that the party meets the income eligibility threshold. The party must pay VLS an administrative fee to cover that organization's financial screening. The amount is minimal; and all organization clients must pay such a fee.

Step three:

Obtaining a volunteer attorney. When financial screening is successfully completed, the Appellate Section will send an email to a listserv of volunteer attorneys who have expressed an interest in pro bono appellate work. This listserv will not be limited to members of the Appellate Section. The email to the listserv will include any information the Section has about the pending appeal, including relevant documents. The first attorney to volunteer for an appeal will be selected. The volunteer will send his or her own engagement letter to the client.

The Appellate Section will send a confirmation letter to confirm the match. After that, the Section will have no further involvement in the case; and neither will VLS, but it will provide volunteer attorneys with legal malpractice coverage.

**Must volunteers have appellate experience?**

No. One of the program's objectives is to provide an opportunity for lawyers to get appellate experience. For attorneys lacking such experience, the program will have a mentoring component: experienced appellate lawyers can volunteer with the Appellate Section to serve as mentors. Mentors will not enter an appearance.

**Are there length-of-engagement guidelines or rules?**

The program imposes no obligation on a volunteer attorney to represent a client beyond the disposition of the Intermediate Appellate Court.

**Are there reimbursement programs for attorneys volunteering?**

No. Volunteer lawyers agree to serve without compensation for their service. Costs are expected to be minimal. As noted, the party must pay a small fee for financial screening. As for filing fees, an unrepresented party will have already filed a notice of appeal. Other costs remain the client's responsibility, though parties deemed indigent by the trial court do not bear appellate costs. Printing costs are minimal because appellate briefs are not filed in hard copy; they are electronically filed.

**How will the program be promoted?**

The Appellate Section will advertise on its website and send marketing materials to legal aid organizations. Courts will have informational flyers available for the public, and so will the HSBA. The program is described on the HSBA Section website at [www.hawaiiappellatesection.org](http://www.hawaiiappellatesection.org)

**Who is the contact person?**

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# INDIANA

## **Program creation**

The Indiana Appellate Pro Bono Project was established in 2007 as a joint project of the Indiana Bar Association Appellate Practice Section (Indiana Bar APS) and the Indiana Pro Bono Commission (Commission), a state agency within the judicial branch. \

The program is administered primarily by the Commission, with attorney-placement assistance from the Indiana Bar APS.

## **Case selection and eligibility**

All civil matters are eligible for the program, so long as the party meets the financial-eligibility guidelines established by the Commission. Case assignments are made at the discretion of the Commission, which also screens applicants for financial eligibility, according to its general guidelines for providing representation to low-income individuals.

## **Program funding**

The program costs are absorbed by the Commission, which promotes access to legal services for Indiana's low-income residents. The Commission and the Indiana Bar are the primary promoters of the program.

## **Pro se appeals guide link**

<http://www.in.gov/judiciary/cofc/2332.htm>

## **Program contact**

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# MINNESOTA

## **Program creation**

The Minnesota Appellate Pro Bono Program was established in 2002 by the Minnesota Bar Association Appellate Practice Section (Minnesota Bar APS), with encouragement and input from the Minnesota Court of Appeals. The program's primary purposes are to give Minnesota attorneys an opportunity to gain appellate experience and to serve a particular pro bono need that was identified by the appellate court in the area of pro se unemployment compensation appeals.

The program is officially administered by the Minnesota Bar APS, but Thomas Boyd serves as the program coordinator from his office at Winthrop & Weinstine and has done so since the program's inception.

## **Case selection and eligibility**

The program accepts only unemployment compensation appeals by pro se litigants whose fees have been waived pursuant to state law. The program focuses on these appeals because the court receives a significant number of such cases each year. These appeals involve limited legal standards that are manageable and easily grasped by volunteer attorneys who do not have previous experience in such matters. There was also a concern that a more expansive program could sweep in cases that would otherwise have gone to paid attorneys.

The program's narrow focus benefits volunteer attorneys by limiting cases to a pre-determined area of the law governed primarily by statute and well-defined legal principles. In addition, all appeals are from an administrative agency and are based on an easy-to-compile record. Generally, eligible cases are screened by Mr. Boyd and the volunteer attorneys, who weed out meritless appeals before a volunteer attorney agrees to provide pro bono representation.

## **Selection, service, and oversight**

Attorneys volunteer for the program by expressing their interest in an email to Mr. Boyd or the Minnesota Bar APS or signing up for the program at various State Bar Association events. All licensed attorneys are eligible to volunteer; prior appellate experience is not required. Mr. Boyd maintains a list of volunteers and assigns cases to attorneys according to their availability. Generally, there is no oversight of the attorney after he or she has accepted an eligible case. Mr. Boyd, however, makes himself available to answer basic questions about administrative issues and court procedure. Attorneys are expected to represent the party for the duration of the appeal.

**Program funding**

The program has no funding source and thus cannot defray costs associated with the pro bono representation, and it is voluntarily administered by Mr. Boyd. The lack of independent funding presents an issue for sole practitioners and small law firms. Generally, volunteer attorneys come from larger firms in Minnesota that can absorb the costs associated with pro bono representation. All court fees are waived, pursuant to unemployment compensation laws.

**Program statistics**

On average, the program accepts 10 to 15 appeals each year.

**Program contact**

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# MONTANA

## **Program creation**

The Montana Appellate Pro Bono Program (APBP) was established in May 2012 by order of the Montana Supreme Court. Confronted with an increase in pro se litigants that nearly overwhelmed its Pro Se Law Clerk, the Court established the APBP, along with an Access to Justice Commission, to address the needs of low-income litigants in Montana.

The APBP is administered by the Supreme Court's Pro Bono Coordinator (Coordinator) with assistance from the Court's Pro Se Law Clerk. The Montana Legal Services Association (Montana LSA) screens applicants for financial eligibility.

## **Case selection and eligibility**

Only pending cases involving a pro se litigant are eligible for placement. The pro se litigant must have perfected the appeal (if the appellant) and filed an initial brief before the APBP screening process is triggered. Pro se cases are then selected through the Court's established supplemental-briefing procedure.

To be eligible for pro bono assistance, the pro se litigant must meet the financial criteria established by the Montana LSA for representation of low-income persons and must have a case pending before the Court that requires supplemental briefing or oral argument. There are no subject matter limitations. In any pending case, the justices may order supplemental briefing—triggering the appointment of pro bono counsel for a pro se litigant. If multiple parties are self-represented on appeal, the Court will offer pro bono counsel to each party who is appearing pro se.

## **Selection, service, and oversight**

Attorneys volunteer for the program by completing an online form. All licensed attorneys are eligible to volunteer; prior appellate experience is not required.

The Coordinator is responsible for placing volunteer attorneys with eligible litigants. The pro se litigant must consent to the appointment of the selected attorney. Young lawyers or lawyers with no appellate experience may be paired with experienced attorneys to provide an attorney-mentoring element to the APBP.

The Court does not guarantee that a case selected for the APBP (and briefed by a volunteer attorney) will have oral argument. While the Coordinator recognizes that oral argument experience is a significant draw for volunteer attorneys, she does not believe

that this rule has discouraged attorneys from volunteering. After a volunteer attorney is assigned, the APBP remains in contact with the attorney and provides answers to questions, general information regarding the appeal process and administrative issues, and, if needed, information regarding practice resources, in order to ensure that the attorney has a positive pro bono experience. Volunteer attorneys receive malpractice insurance through the Montana LSA.

### **Program funding and promotion**

The costs of the APBP are absorbed by the Montana Supreme Court. Court employees, led by the Coordinator and the Pro Se Law Clerk, manage the program. Some program costs are defrayed by the Montana LSA's agreement to screen pro se litigants for financial eligibility.

There are no fee-waivers associated with program eligibility. Though a pro bono attorney is appointed, the party is responsible for all costs associated with the appeal, unless those costs are waived in accordance with existing court rules (unrelated to the pro bono program). The Coordinator may, however, facilitate the volunteer attorney's access to an electronic record from the trial court (when available), at no cost to the attorney or party.

The APBP is promoted primarily by the Montana Bar Association, which absorbs any costs associated with program promotion. The Montana Supreme Court and the Montana LSA also promote the program on their websites.

### **Program statistics and notes**

Because the program has only operated for one year, the Court has not published any reports and has not yet compiled statistics on the APBP.

### **Program contact**

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# NEW YORK

## **History of the program**

New York State's Pro Bono Appeals Program (PBAP) was established by the State Bar Association in 2010 and now covers 50 of the state's 62 counties. The State Bar's Committee on Courts of Appellate Jurisdiction (CCAJ) had reviewed an American Bar Association report which revealed that only a handful of states offered programs that provided pro bono representation in appeals. The committee decided to create a program in which experienced appellate attorneys would offer free, quality representation in selected appeals.

CCAJ focused on state court appeals, because the U.S. Court of Appeals for the Second Circuit has its own pro bono appeals program. The committee further determined to handle appeals to the four judicial Departments of the state's Appellate Division, the mid-level appeals court for most appeals. The Clerks of all four Departments were consulted, and all voiced support for a pro bono appeals program, but did not want to have responsibility for choosing cases or volunteers. CCAJ realized it could not provide statewide coverage from the outset and decided to launch a pilot program in the Appellate Division, Third Department, based in Albany, covering appeals from 28 counties.

The committee partnered with two nonprofits, the Rural Law Center of New York, which provides legal services in the state's 44 rural counties, and the Legal Project, which provides legal services in the state's wider capital region. They helped shape the program, do outreach and intakes, and provide malpractice insurance. CCAJ met with the leaders of the Third Department to obtain the support of the court and its input as to the proposed program description. Finally, the Executive Committee of the State Bar Association approved the pilot. Since then, the Association—from the President to the staff—has provided extraordinary support to the program.

## **Family Court and other appeals**

Initially, the program handled only Family Court appeals for persons making 250% or less of Federal Poverty Guidelines (FPG). That income cap was chosen based on the premise that many persons denied assigned counsel because of income above 150% of FPG could not afford to retain counsel. Then the program branched out to also cover other "Civil Gideon," topics, that is, education, health, housing, and subsistence income—including unemployment insurance and Workers' Compensation cases. Program applications and brochures were widely distributed.

A seven-person working group screens cases, accepts only those that appear meritorious, and provides rejected applicants with a manual on how to do an appeal pro

se, as well as insights on potential problems presented by the case. Accepted cases are described and disseminated on a confidential listserv to volunteers from CCAJ and other participating appellate attorneys. Appeals are typically assigned on a first-come, first-serve basis. The program will only represent one side in a given case.

### **Cases of interest and outreach efforts**

Eventually, the program became firmly established in the Third Department, and CCAJ was taking about 10 appeals a year. Cases of interest have included one that changed the case law on the modification of out-of-state child support orders and on whether ministers of the Universal Life Church can officiate at weddings; one on the violation of a claimant's constitutional rights in an unemployment insurance matter; and another one regarding whether 9/11 volunteers not affiliated with an organization can receive Workers' Compensation benefits. While many topics are covered, the vast majority of applications concern family law.

The committee recently did a renewed outreach effort in the Third Department, including by sending brochures and posters to chief clerks at all Supreme Courts (a New York trial court) and to Family Courts and by meeting with Administrative Judges in all affected Judicial Districts. Program literature was also provided to all local, minority, and special bar associations.

### **Expansion and funding**

In spring 2013, the PBAP was also expanded to the Appellate Division, Fourth Department, based in Rochester, which covers 22 counties in the western part of the state. The leadership of the court and the State Bar were instrumental in the launch of the program there. In both Departments, the PBAP also offers representation for further appeals to the Court of Appeals, New York's highest court.

At the same time, with the support of the Rural Law Center, the program established an office in Albany. The office is staffed by two part-time appellate attorneys from CCAJ who do the initial vetting of all applications and provide substantive support to volunteers, including compiling records when representing appellants. A paralegal also assists with administrative matters. Funding comes from the State Bar's philanthropic arm, The New York Bar Foundation; the State Office of Court Administration; Interest on Lawyer Account grants; and attorney's fees awards in divorce and family law cases where fee-shifting based on a disparity in income is permitted.

The private bar has enthusiastically embraced the program. Dozens of appellate attorneys have volunteered to handle cases. In addition to carrying on its existing model—emphasizing merits review for persons who cannot obtain assigned or retained counsel—the PBAP has added a new model. Through collaborations between the

PBAP, a legal aid office in Onondaga County, and a public defender in Monroe County, volunteers will serve as of counsel for several Family Court appeals a year for each of those offices. These new initiatives are inspired by a successful model in New York City, in which an institutional provider of indigent criminal appellate defense services collaborates with major law firms that provide pro bono representation.

As we go to press, the PBAP is slated to meet in fall 2013 with colleagues at the City Bar in New York City to discuss how the CCAJ model could be adapted to create a pro bono appeals program to meet the needs of New Yorkers in the First and Second Departments, covering the state's remaining 12 counties—its most populated counties. When that effort comes to fruition, CCAJ's initial dream will be realized—anywhere in the state of New York, a litigant of modest means facing an appeal involving the essentials of life will have a place to turn to apply for free appellate assistance.

Among the program's goals is providing greater recognition of volunteers. Currently, attorneys are recognized via certificates of appreciation, a listing on the program's website, and occasional articles. The PBAP hopes to do more in the future, including creating a special awards program for volunteers. A special housing court appeals initiative and pro bono opportunities for law school students are also in planning stages.

#### **Pro se appeals guide link**

<http://www.nysba.org/probonoappeals>

#### **Program contact**

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Committee on Courts of Appellate Jurisdiction  
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## NORTH CAROLINA

### **What is the scope and nature of the program?**

The North Carolina Guardian ad Litem program (GAL) advocates on behalf of juveniles. The state legislature created the program in 1983 to provide legal representation to children who allegedly have been abused, neglected, or are dependent. The program relies heavily on a partnership between volunteer child advocates and attorney advocates. Program staff recruit, train, and supervise volunteers.

When a petition alleging abuse or neglect of a juvenile is filed in the trial court, the judge appoints a volunteer guardian ad litem advocate and an attorney advocate to provide team representation to the child. Trial court proceedings include custody hearings; adjudicatory disposition, permanency planning, and review hearings; and proceedings to terminate parental rights. A juvenile has full party status in the trial court and appellate proceedings. (The parents have their own legal representation, and the Department of Social Services is usually also involved as the petitioner.) The attorney advocate's duty is to represent the child at the trial level.

The program has offices in each county. Staff and contract attorneys employed by the state focus on trial-level representation. At the appellate level, the caseload is too large for state attorneys to handle alone, so the program relies heavily on volunteer appellate attorneys. The greatest need for volunteers is at the appellate level because the program has only one state-employed attorney dedicated to appeals; and state-paid attorneys are typically consumed with work at the trial-court level. Volunteer attorneys handle more than 30% of all guardian ad litem appeals. About 200 appeals are currently open.

Appeals from the district court go to the state's intermediate appellate court, the North Carolina Court of Appeals; are filed under an expedited timeline; and typically do not include oral arguments, but instead are decided on the briefs.

### **Must volunteer attorneys have appellate experience?**

No. Though appellate experience is preferred, it is not required. Appropriate training or experience is mandatory to handle appeals, including a two-hour CLE program. The program provides a number of resources for volunteer attorneys. After a volunteer enters an appearance, the GAL program's appellate counsel may discuss the specifics of the cases with the volunteer.

**Does the program offer an opportunity for attorneys to gain appellate experience?**

Yes. The program is advertised as providing such an opportunity.

**Is a volunteer attorney supervised after a case is assigned?**

Yes, particularly for attorneys new to the program. A state-employed attorney coordinates appellate representation for this program and supervises volunteers.

**Does the program provide resources for volunteer attorneys?**

Yes. In addition to CLE training, the program has a number of resources available, including an attorney manual, a brief bank containing briefs from past cases, and a DVD on appellate advocacy tips.

**How is the program funded?**

The program is funded by the state of North Carolina. The state pays for transcripts. Juveniles are considered indigent, so they do not have to pay for records. A volunteer attorney may have to cover the cost of printing the brief he or she files, but these costs may be recovered. Costs of printing a brief are usually nominal.

**How is the program promoted?**

Through the Internet, social media, and contact with attorneys.

**Are volunteers recognized for their service?**

Yes. Volunteers are recognized periodically and receive small tokens of appreciation.

**Are there length-of-engagement guidelines or rules?**

Attorneys represent juveniles in the North Carolina Court of Appeals and may also continue with the case in Supreme Court, but if an attorney is not comfortable doing so, the program's counsel will take the case back or sign on as co-counsel.

**Who is the contact person?**

Tawanda Foster  
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# OREGON

## **How was the program started?**

The Oregon Pro Bono Program started with inspiration from the Pro Bono Program in the U.S. Court of Appeals for the Ninth Circuit. The Oregon Supreme Court and Court of Appeals select cases. The Program Committee consists of the program managers, the Appellate Commissioner, designees of the Chief Justice and Chief Judge, a member of the State Bar Appellate Practice Section's Executive Committee, and other individuals that named members invite. They meet yearly to review the program and propose changes as deemed necessary.

## **How are cases chosen?**

A case may be appropriate for acceptance in the program if the court believes that referral of the case to a volunteer counsel would be helpful to the court. Selection of a case for the program does not reflect a determination of the merits of a party's position, but rather indicates that pro bono counsel is considered to be potentially beneficial to the court.

## **How are volunteers chosen?**

Program managers distribute information about the program to all active members of the Oregon State Bar through a yearly email. Attorneys interested in volunteering for the program respond by registering with the program manager. In certain cases, the appellate courts may request participation of counsel from the program as "amicus to the court," rather than as a representative of a party.

## **Do volunteers need to have appellate experience?**

Not necessarily. One of the purposes of the program is to provide less experienced attorneys with appellate opportunities. Law school clinical programs may participate, but are subject to terms and regulations imposed by the program.

## **Do you recognize volunteers for their service, such as by certificates or awards or articles in bar association publications?**

On an annual basis, the Executive Committee of the Appellate Section will acknowledge the pro bono work done by volunteer attorneys.

## **Are there reimbursement programs for attorneys volunteering?**

No, neither the court nor bar managers reimburse volunteer attorneys for expenses.

**Who is the contact person?**

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# TENNESSEE

## **When was the program created?**

2011.

## **How was it started?**

A pilot initiative was established by the Tennessee Bar Association (TBA) and the statewide Tennessee Alliance Legal Services.

## **How are cases chosen?**

Cases are mainly referred from legal services programs or attorneys who have represented clients in the lower courts and are not able to continue with those cases upon appeal.

## **What criteria are used?**

Of particular interest are cases involving matters of first impression or complex legal issues, vindication of substantial constitutional rights, and unsettled questions of law. Judges may refer cases, but that has not happened yet.

## **How are volunteers chosen?**

The TBA keeps a list of volunteer attorneys. Usually the first attorney to respond is selected. Currently, TBA has an active appellate group.

## **Do volunteers need to have appellate experience?**

No. Both young and experienced appellate attorneys are welcome. The program provides an opportunity for senior attorneys with appellate expertise to mentor younger attorneys seeking such experience.

## **On average, how many appeals are handled each year?**

About five cases. The program is being re-launched and promoted this year and is looking to include areas such as administrative appeals and to increase the number of referrals and cases handled.

**Are there reimbursement programs for attorneys volunteering?**

No, however, sometimes TBA is able to find financial assistance for transcripts for the attorneys.

**Who is the contact person?**

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# TEXAS

## **When was the program created?**

The current version of the program went live beginning in 2007.

## **How was it started?**

The appellate courts in Texas have been a driving force behind advancing the mission of fair and efficient administration of justice. State and local bar associations have assisted in that mission through pro bono appellate programs serving qualified applicants throughout the state. The latest iteration of the Texas State Bar Appellate Program and excellent stand-alone programs are the embodiment of efforts of both the appellate bench and bar.

## **What entities are involved in the program?**

The following appellate courts have programs administered through the Texas State Bar Appellate Pro Bono Program: the Texas Supreme Court; the Fifth Circuit Court of Appeals; and the First, Second, Third, and Fourteenth Courts of Appeals. The Dallas Court of Appeals, the state's busiest intermediate appellate court, has its own program, administered through the Dallas Volunteer Attorney Program. Through an ad hoc program administered by the State Bar Appellate Section, volunteer pro bono appellate lawyers can also be placed with any case pending anywhere in the state (whether or not an official pro bono program exists for that particular appellate court).

## **How are cases chosen?**

When a pro se party initiates a civil appeal, the required docketing statement includes a brief description of the pro bono programs and asks whether the party wishes to participate. When a party elects to do so, the Clerk of the Court forwards the docketing statement to the applicable screening committee working with that court. The committee screens referred cases based on a number of discretionary criteria, including financial means, with 200% of Federal Poverty Guidelines as a benchmark. Other factors include the number of appeals pending, the number of available volunteer lawyers, and the issues presented. The committee sends to a database of volunteers an email providing a very brief overview of the case.

When a volunteer indicates an interest in a case, the committee serves as a liaison to match the pro se party with the lawyer. In the vast majority of cases, volunteers are found. However, there is no guarantee that a match will be found. As a general rule, certain committees will presumptively solicit volunteers without substantial screening of the merits, recognizing that non-meritorious cases likely will not generate any

responses from the volunteer pool. The Dallas Volunteer Attorney Program utilizes a similar approach in screening for financial need.

The Supreme Court of Texas has its own Pro Bono Pilot Program. Review in that court proceeds in multiple phases. First, parties file petitions for review, identifying issues to be raised. If the court wants additional information, it will request briefing on the merits from the parties, and if a pro se party is involved, the court will refer the case to its Pro Bono Pilot Program. The program liaison will then seek volunteer lawyers to work with the pro se parties.

### **How are volunteers chosen?**

Attorneys interested in volunteering must submit an application to be considered for the State Bar Appellate Pro Bono Program. The committee then asks volunteer attorneys what their particular areas of interest or experience are so that appropriate matches can be made. The Dallas Volunteer Attorney Program utilizes a similar approach. Many pro bono appellate lawyers are on multiple program lists.

### **Do volunteers need to have appellate experience?**

No. Attorneys do not have to have previous appellate experience. As part of the recruiting effort, there is a tiered program to attract a wide variety of appellate practitioners. One goal is to include as many highly experienced appellate attorneys as possible. Another goal is to include new appellate practitioners who can handle a case with assistance from more experienced practitioners. Appellate lawyers have the option of either taking on a case as lead counsel or mentoring less experienced practitioners. Junior lawyers can gain valuable experience by taking a lead role in representing pro bono clients on appeal, with opportunities to present oral argument.

### **How is the program funded?**

The State Bar Appellate Pro Bono Program is funded by the Appellate Section. In practice, volunteers and/or their firms also cover some of the costs associated with representing pro bono clients. The Dallas Volunteer Attorney Program is a nonprofit entity funded via grants.

### **On average, how many appeals are handled each year?**

Anywhere from 24 to 36 through all channels.

**Have there been any particularly noteworthy cases you would like to highlight?**

Pro bono appellate volunteers have won appellate reversals in difficult cases, including one case for an indigent civil rights claimant and another for an asylum-seeking immigrant.

**How do you promote the program?**

The program is promoted via appellate court websites, docketing statements of participating state appellate courts, brochures, emails, state and local appellate bar association meetings, and one-on-one attorney recruiting.

**Do you recognize volunteers for their service, such as by certificates or awards or articles in bar association publications?**

Volunteers are recognized in meetings, and pro bono hours count towards the State Bar of Texas Pro Bono College, which lauds attorneys who have far exceeded the State Bar's aspirational pro bono goal.

**What obstacles had to be overcome to establish the program?**

Qualifying applicants and gathering their paperwork and information can be time-consuming. The committee has two co-chairs and several city-specific screening teams to tackle the load. The Dallas Volunteer Attorney Program uses its in-house screening personnel and systems.

**What lessons have been learned in implementing the program?**

(1) The courts of appeals, their judges, lawyers, clerks, and staff know best what will work with their systems. (2) They are always willing to help. (3) Applicants need to be able to speak with someone on the program committee at the very early stages of seeking representation. (4) Forms, pamphlets, and communications need to be standardized and available both in hard copy and electronically. (5) The qualification phase should be centralized, so that once an applicant is cleared, the request can go to volunteers via email.

**What advice do you have for other states that wish to start a program?**

Start a dialogue with the court(s) from the outset and study what has worked in other jurisdictions. The Fifth Court of Appeals/Dallas Volunteer Appellate Program is an excellent stand-alone program that could provide a framework for an initial pilot program.

**Is there any oversight after cases are assigned?**

Volunteer attorneys report at case conclusion.

**Are there length-of-engagement guidelines or rules?**

Length of engagement is governed by the arrangements reached between the client and volunteer attorney.

**Are there reimbursement programs for attorneys volunteering?**

No, the volunteer lawyers agree to serve without expectation of compensation for their service or expenses.

**Does Texas have a pro se appeals guide?**

Yes, go to [http://www.tex-app.org/sct\\_probono\\_practice\\_guide.pdf](http://www.tex-app.org/sct_probono_practice_guide.pdf)

**Who are contact persons?**

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Texas Bar Association Appellate Section  
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O. Rey Rodriguez, Esq.  
Pro Bono Committee Co-Chair  
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[orodriguez@nortonrosefulbright.com](mailto:orodriguez@nortonrosefulbright.com)

## VIRGINIA

The Virginia Supreme Court has a volunteer appellate attorney program under which counsel is assigned by the court for certain cases. Through the program, attorneys fall into two groups: experienced appellate advocates and lawyers looking for appellate experience. When cases are chosen, the court assigns one attorney from each group, thus providing a mentoring relationship.

This structure has various advantages. The clients benefit because they receive capable appellate representation. The less experienced lawyers do not have to take the sole responsibility for learning and complying with the nuances of the appellate system, while the experienced lawyers participate in an appeal, but do not have to do all the heavy lifting themselves. The court benefits because it receives a case with both sides professionally briefed, thus making sure that there is not an imbalance in the presentation of those cases, which can skew the results and make bad case law.

Unfortunately, because most civil appeals in Virginia are by petition, most indigent litigants do not get counsel at the petition stage. As a result, only three or four pairs of attorneys per year are invited by the court to represent indigent clients on appeal.

### **Contact person**

Clerk  
Virginia Supreme Court  
Richmond, VA  
(804) 786-2251

## WISCONSIN

The Wisconsin State Bar's Appellate Practice Section coordinates a pro bono appeals program for cases in the state's Court of Appeals and Supreme Court and, occasionally, federal appellate courts.

The program does not take requests for pro bono counsel directly from potential clients, because it lacks the resources to screen for indigence or merit. The courts and various public interest firms identify cases involving important legal issues and screen for indigence. Then they call the pro bono program coordinator for a volunteer willing to represent the indigent party. Sometimes organizations like Legal Action of Wisconsin, the Legal Aid Society, and the ACLU seek a volunteer to write an amicus brief. Historically, most of the appeals have involved civil or quasi-criminal law matters, such as due process rights in prison disciplinary proceedings, family law issues, and collateral attacks on criminal convictions.

Recently, the State Public Defender has begun to refer some direct criminal appeals to the program. It also refers cases for which it lacks authority to appoint counsel. For example, after losing a search-and-seizure case in the Wisconsin Supreme Court, the State Public Defender determined that its client was no longer eligible for representation. The pro bono program then provided counsel to prepare a petition for a writ of certiorari to the U.S. Supreme Court.

The program handles about 10 to 15 appeals per year. Since its inception in 1998, it has provided counsel in more than 200 appeals. In 2009, the program began tracking the hours and expenses donated by volunteer lawyers. From March 2009 through July 2013, lawyers donated more than 7,000 hours of time and more than \$2 million in fees and costs.

The program coordinator has developed a sense of which issues or types of litigation will be attractive to firms. Some large firms seek training opportunities for their associates. Smaller firm lawyers may want an opportunity for their first argument before the Wisconsin Supreme Court. Some attorneys have a passion for certain kinds of issues, such as constitutional law, family law, or ineffective assistance of counsel. Others just want to donate their appellate expertise. The coordinator considers such factors when contacting a lawyer about a case.

The program tries to offer volunteers the resources they need to do a good job. It will connect the volunteer lawyer with an attorney who is knowledgeable in the area of law at issue, provide sample motions or briefs, and organize rehearsal arguments before a panel of retired judges and/or practitioners.

For Wisconsin's pro se appeals guide, go to:

<http://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf>.

**Contact person**

Colleen D. Ball, Esq.  
Milwaukee, WI 53202  
(414) 227-3110  
[ballc@opd.wi.gov](mailto:ballc@opd.wi.gov)

ABA Council of Appellate Lawyers  
Manual on Pro Bono Appeals Programs  
For State Court Appeals

**SELECTED  
PROGRAM MATERIALS**

# CALIFORNIA



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Appellate Courts Pro Bono Pilot Project

The Appellate Courts Committee has partnered with Public Counsel's new Appellate Law Program to provide pro bono assistance to eligible civil litigants in the Second Appellate District.

- Take a Case. Represent an indigent civil litigant in eligible cases as posted on our website.
Answer Walk-In Questions. Staff the Appellate Law clinic for a couple of hours and answer routine questions from walk-ins.
Evaluate A Record. Examine, from an appellate perspective, whether the case presents potentially meritorious issues and make a recommendation to the Appellate Law clinic.
Mentor An Attorney.; Guide an attorney who has taken an appeal pro bono from the Appellate Law clinic but has limited appellate experience.

We will announce new eligible cases requiring pro bono assistance by way of email to members of the Appellate Courts Section.

If you have any questions about the pilot program, contact Lisa Jaskol, Directing Attorney of Public Counsel's Appellate Law Program, at (213) 385-2977 ext. 151 or ljaskol@publiccounsel.org, or Tom Charchut, at (310) 215-7730 or charchut@hbblaw.com.

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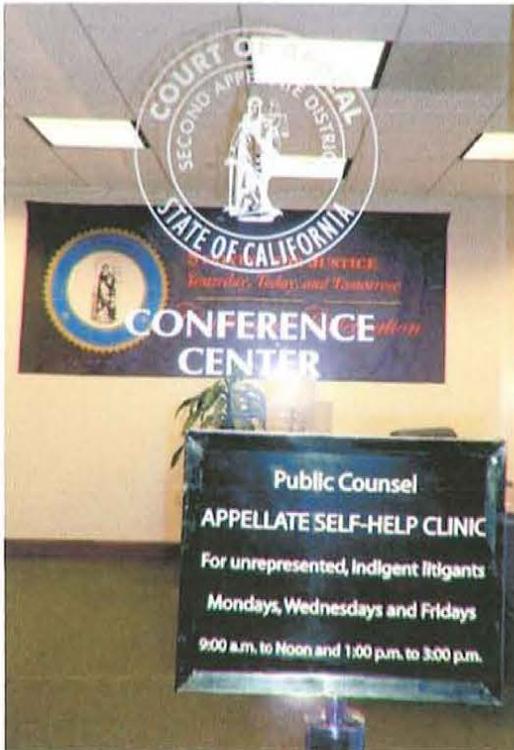
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# APPELLATE SELF-HELP CLINIC

## Court of Appeal, Second Appellate District

### Drop-In Clinic Helps Litigants Navigate the Maze of Court Procedures

For the typical unrepresented civil litigant, the appellate process can be daunting. Filing requirements are exacting. The procedure bears no resemblance to the more familiar trial court routine. The very language can baffle even the sophisticated layperson. Associate Justice Laurie Zelon, in 2005, convened a group of judges, court staff, and bar leaders to discuss what could be done to help these people, an increasingly large percentage of litigants in the 5,000 cases that the Second Appellate District of the Court of Appeal decides each year.



The chief goal was to make access to the court more readily available by demystifying the process, says Joseph A. Lane, the court's clerk and executive officer. But providing assistance to unrepresented litigants could serve the court as well. It could reduce the number of administrative delays caused by pro se error, and it could improve the quality of the record and briefing on appeal.

The result of that 2005 meeting was the first formal program in any state court to provide a drop-in clinic for appellate litigants—a place where, in the words of one user, “they treat you like a human being.”

Launched in 2007, the Appellate Self-Help Clinic is conveniently housed in the court's on-site Settlement and Mediation Center. Open three days a week, the clinic is staffed by two lawyers from Public Counsel, the public-interest law office of the Los Angeles County and Beverly Hills bar associations. In the first two years they served 398 litigants.

The self-help clinic is open to anyone, though the vast majority of users are indigent, states Lisa Jaskol, the chief clinic attorney. Litigants can make appointments, but they're also welcome to drop in anytime. Spanish-language assistance is available with advance notice.

Both attorneys are trained appellate specialists who can assist litigants in meeting the highly technical filing requirements. Typically, the lawyer will explain the difference between trial and appellate proceedings. She will also explain the appellate process and procedure, review the litigant's paperwork, and provide and help fill out Judicial Council forms.



Attorney Lisa Jaskol confers with litigants.

The clinic's attorneys do not provide representation or give legal advice. But for some indigent civil litigants, they offer to recruit pro bono legal representation, using the listserve of the Los Angeles County Bar Association's Appellate Courts Committee.

In the first two years, 101 attorneys did pro bono work for litigants through the clinic. The clinic provides valuable opportunities for junior attorneys to work under the guidance of experienced appellate practitioners.

Clinic policy is set by a committee chaired by Justice Zelon, with members drawn from the Appellate Courts Committee, representatives of Public Counsel, and prominent appellate practitioners.

Startup and upkeep costs to the court have been minimal. The court donates part-time use of a multifunction office; a computer, telephone number, and phone access for the clinic lawyers; and office supplies. A grant from the State Bar's Equal Access Fund partially covers Public Counsel's costs for the program.

Contact:  
Joseph Lane, Clerk/Administrator  
(213) 830-7112 | joseph.lane@jud.ca.gov

“Litigants routinely report that they would have been unable to proceed with their appeals, or to defend against an opposing party's appeal, without the clinic's support.

“I feel like they are working for me,” one litigant said.

“They don't speak down to you,” said another.

“When you walk in nobody knows anything about your case, but they have open arms, they want to help you, and that really feels good,” said a third.

Court staff also are enthusiastic. As one staff member puts it, “After speaking with [the clinic attorney], litigants are more educated about the process, and they're more receptive to what we have to say.”

#### TO REPLICATE THIS PROGRAM:

- *Develop a local working group of individuals from the bar and community to brainstorm a list of resources that can be tapped.*
- *Obtain funding to staff the clinic with an attorney who is not paid by or answerable to the court.*
- *Find space in or near the courthouse to make the clinic as accessible as possible to litigants.*



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## Appellate Law

Public Counsel's Appellate Law Program helps *pro se* litigants better represent themselves in their civil matters and provides *pro bono* representation in selected cases. The Program thereby increases access to justice and improves efficiency in the courts. The Program operates two clinics, one for civil appeals and one for federal district court cases. Both clinics assist *pro se* litigants with a wide variety of civil cases.

### Self-Help Appellate Clinic

A *pro se* civil litigant faces numerous hurdles in the appellate courts. Determining whether a trial court's order is appealable, calculating the time to file a notice of appeal, providing an adequate record to the appellate court, and drafting briefs that clearly discuss the relevant facts, procedural history, and law are difficult tasks for many of these individuals. Public Counsel's Appellate Law Program, in partnership with the Second Appellate District of the California Court of Appeals, operates a self-help clinic to help *pro se* civil litigants in the Second Appellate District accomplish these and other tasks.

The self-help clinic is located at the California Court of Appeal in downtown Los Angeles. A Public Counsel attorney with experience in civil appeals staffs the clinic. Among other things, the clinic provides litigants Judicial Council and Second District rules and forms, sample briefs, simplified practice guides, and detailed explanations of the many rules and procedures involved in the appellate process. The clinic is open Mondays, Wednesdays and Fridays. People seek assistance from the clinic in a wide variety of civil appeals.

### Pro Bono Representation on Appeal

When the Appellate Law Program identifies a *pro se* indigent civil litigant with an appellate matter that is appropriate for *pro bono* representation, the Program works with the Appellate Courts Committee of the Los Angeles County Bar Association to place the appeal with *pro bono* counsel. Matters are appropriate for placement with *pro bono* counsel when a litigant's position on appeal appears to have arguable merit and the litigant and the appellate court would benefit from having a lawyer prepare the litigant's briefs and present oral argument. The Appellate Law Program carefully screens appeals before placing them with *pro bono* counsel and is available to provide support to counsel throughout the appellate process.

### Federal Pro Se Clinic

Federal court also presents numerous challenges to pro se civil litigants. Public Counsel's Proskauer Federal *Pro Se* Clinic assists these litigants in the U.S. District Court for the Central District of California. Located in the downtown Los Angeles federal courthouse, the clinic helps *pro se* civil litigants in federal cases prepare complaints and responsive pleadings, provides written instructions and forms for other common pleadings, answers procedural questions, and explains legal concepts such as jurisdiction, venue, and service of process. The clinic is open on Mondays, Wednesdays and Fridays.

The clinic was made possible by a generous grant to Public Counsel from the law firm Proskauer LLP. In addition, the clinic enjoys strong support from the court's judges and staff.

### ***Pro Bono* Representation in Federal Court**

When the Federal *Pro Se* Clinic identifies a case brought by an indigent pro se civil litigant that is appropriate for pro bono representation, the clinic places the case with *pro bono* counsel. In addition, Public Counsel works with the District Court to find *pro bono* counsel for prisoners whose federal civil rights actions have survived a dispositive motion such as summary judgment.



## APPELLATE LAW PROGRAM

### **Evaluating appeals.**

Public Counsel's Appellate Law Program places appeals with *pro bono* counsel for representation when an indigent appellant in a civil matter can present one or more arguably meritorious issues to the appellate court. To determine whether the appellant can do so, it is necessary to conduct a thorough evaluation of the appeal. Attorneys evaluating an appeal will review the entire record on appeal -- including trial court documents and (where relevant) hearing transcripts -- conduct appropriate legal research, and inform the Appellate Law Program whether, in light of the applicable standard of appellate review, the appellant can present one or more arguably meritorious issues to the appellate court.

"Meritorious" does not mean the appellant will necessarily prevail but rather that the issue warrants serious consideration by the appellate court and may warrant a ruling in the appellant's favor. By contrast, an appellant's argument lacks merit if it would be frivolous as that term has been interpreted under Code of Civil Procedure section 907.

In evaluating the appeal, an attorney is assisting the Appellate Law Program only. The attorney is not forming an attorney-client relationship with the appellant whose appeal the attorney is evaluating. In fact, the appellant will not know the identity or law firm of the attorney evaluating the appeal.

If the attorney evaluating an appeal determines that the appellant can present arguably meritorious issues to the appellate court, the attorney is welcome to handle the appeal as the appellant's *pro bono* appellate counsel. Alternatively, the attorney may return the appeal to the Appellate Law Program, which will place it with other *pro bono* counsel.



## Free Appellate Self-Help Clinic for Low-Income Civil Litigants

You may be eligible to attend a free, self-help clinic for low-income civil litigants if your case is on appeal or if you want to appeal a ruling or judgment entered against you.

Public Counsel, the public interest law office of the Los Angeles County and Beverly Hills Bar Associations, provides a free self-help clinic in the Conference Center of the Court of Appeal, located on the second floor of the Ronald Reagan State Building at **300 South Spring Street** in downtown Los Angeles.

The clinic staff can help by providing information about the many procedures, filings and deadlines appellants and respondents will encounter throughout the appeals process. However, the staff cannot represent you and cannot provide legal advice.

The clinic sees people on a first-come, first-served basis and addresses issues that might arise at any stage of the appeal.

Appeals topics covered include:

- ② Appealability of the trial court's order ("Is my order appealable?")
- ② Record on appeal (what it is)
- ② Designation of record on appeal (notifying the superior court which records to prepare for the Court of Appeal to review)
- ② Civil Case Information Statement
- ② Certificate of Interested Entities or Persons
- ② Motions and Applications (and the difference between the two)
- ② Fee waivers and the costs that are covered when a fee waiver is granted
- ② How to overcome minor mistakes that place your appeal in jeopardy ("curing" defaults)
- ② General guidance on how to structure and write a brief
- ② How to use proper legal and factual citations in briefs and motions
- ② Proofs of service - when they are required, who gets served, and who may serve documents on your behalf
- ② Retaining counsel midway through and the "substitution of attorney" requirement
- ② Oral argument (not a "new trial"); responding to a calendar notice informing you about oral argument; what it means to choose not to participate in oral argument

The clinic is normally open from **9:00 a.m. to 12:00 noon and from 1:00 to 3:00 p.m.** on **Wednesdays and Fridays**. For more information, and to make sure the clinic will be open when you want to come, call Lisa Jaskol during clinic hours at **(213) 830-7234** or at **(213) 385-2977, ext. 151** during non-clinic hours, or email her at [ljaskol@publiccounsel.org](mailto:ljaskol@publiccounsel.org).

Spanish-language assistance available with advance notice. *Tenemos ayuda en español, pero nos tiene que notificar con tiempo.*

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## A NEW PRO BONO FRONTIER: CALIFORNIA'S COURT OF APPEAL

by Fellow Robin Meadow

Although there are never enough pro bono lawyers to fill the need, there have long been many ways for indigent litigants to find legal representation in California's trial courts. But not in California's vast state appellate system – until now.

The experiment is happening in California's Second District, which covers Los Angeles and several other counties. The Court's 32 justices issue some 5,000 opinions annually, making it by far the state's largest and most active appellate district. Fortunately for the subject of this article, it is also home both to a Court of Appeal justice with a career-long commitment to equal access to justice, and to Public Counsel, the country's largest pro bono legal services organization. And now it is home to what is likely the first appellate pro bono program of its kind anywhere.

It began in May 2005, when the Second District's Justice Laurie Zelon convened a small group to brainstorm how to deliver pro bono legal services to unrepresented appellate litigants. In addition to Justice Zelon (who among many other activities has been a long-time member and past chair of the California Commission on Access to Justice), the group included Joseph Lane, the Clerk of the Court; Marilyn Alper, immediate past chair of the Los Angeles County Bar Association's Appellate Courts Committee; Richard Nakamura, the current chair; Dan Grunfeld, then President of Public Counsel; and me.

There was no California state-court precedent for this program. Nor could we use the Ninth Circuit's program as a model, because it involved funding and staffing that were not available to the Second District, as well as a level of court supervision with which the Second District was not comfortable. So we assumed the program would have to be operated largely, if not entirely, by volunteers.

The first task was to try to imagine what the program would look like. What kind of clients would we take? What kind of cases? How would we decide – or should we even try to decide – whether the cases had sufficient merit to warrant the effort to find a pro bono lawyer? And, perhaps most difficult, how would we connect clients and lawyers?



The first two questions were fairly easy, at least in concept. Public Counsel has well-established procedures for determining indigency. We also decided very quickly to limit cases to those involving only a few subjects – family law, housing, benefits, and consumer issues – and involving only one self-represented party.

Merit was a tougher question. Self-represented litigants (*in propria persona*, or *pro per* in California parlance) frequently file meritless appeals. It would be hard to generate enthusiasm if the pro bono lawyer were to open the file and immediately discover that there was no possible basis for the appeal.

We decided to enlist the County Bar's Appellate Courts Committee. Once Public Counsel identified a potential client and case, a member of the Committee would conduct a preliminary review of the case to determine whether there were arguably meritorious issues. The goal would not be to determine the chance of success, but just to screen out obviously frivolous appeals. There would be no attorney-client relationship at this point; the Committee member would work in the background.

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Then, if the case passed this test, Public Counsel would seek a volunteer attorney through its usual channels. Since the volunteer would likely be a junior lawyer with little or no appellate expertise (and probably with little appellate expertise in his or her firm), a Committee member would be available as a mentor.

In sum, Public Counsel would provide pro bono expertise and the Appellate Courts Committee would provide appellate expertise. The Appellate Courts Committee enthusiastically signed on. But where were the clients? This proved to be a more difficult problem.

The initial approach was to have Public Counsel staff reach out to potential clients. The Clerk of the Court would identify candidates via the Civil Case Information Statement that every California appellant must file, and forward the names to Public Counsel. Public Counsel would then call the parties to conduct an indigency screening and to learn basic information about the case.

The effort fell flat. As perhaps we should have realized, potential clients were turned off by getting cold calls from someone they didn't know asking if they needed a lawyer. We needed a better way to connect with them.

The breakthrough came in 2006, when Public Counsel obtained a Partnership Grant from the State Bar of California's Equal Access Fund, administered by the Bar's Legal Services Trust Fund Program. This allowed Public Counsel to dedicate a staff member to the project, who would run a clinic using space in the State Office Building provided by the Court of Appeal. The staff member was another breakthrough: Lisa Jaskol, an experienced appellate lawyer who was previously a partner at Horvitz & Levy. In addition to providing walk-in help, she would screen cases and coordinate volunteers.

The clinic opened in February 2007, with Lisa at the helm. Here is how the program works now:

- When a *pro per* appellant files a notice of appeal, the Clerk's initial mailing to that party includes a notice that describes the program. In addition,

the court's website includes a comprehensive description of the program, with a permanent navigation link to it. (The link appears on a special page of resources for self-represented appellate litigants – see [www.courtinfo.ca.gov/courts/courts/appeal/2ndDistrict/selfhelp.htm](http://www.courtinfo.ca.gov/courts/courts/appeal/2ndDistrict/selfhelp.htm).) Finally, Public Counsel sends letters inviting *pro per* litigants to submit their cases to Public Counsel for screening to determine whether they qualify for placement in the program. One way or another, interested litigants end up at Public Counsel, which screens them for financial eligibility.

- The clinic is open several days a week. As of this writing, there have been 93 clinic sessions and the clinic has assisted 144 qualifying litigants. Most have a pending or potential appeal in the Second District, and most are appellants. A few have matters in the Los Angeles Superior Court's Appellate Division (mostly cases involving less than \$25,000). The appeals involve a wide variety of subjects, without the limitations in the initial version of the program.
- In addition to the litigants who qualified for assistance, the clinic has given referrals to or turned away some 50-60 others, such as people with criminal matters, with incomes over the IOLTA (Interest on Lawyers Trust Accounts) guidelines, or with trial court matters.
- Lisa can often determine from her initial informal screening that there is no possible merit – where, for example, the notice of appeal is late, or the litigant wants to challenge a factual determination based on disputed evidence. But in about 30-40 cases, she has needed to request further information, which the litigants supply about half the time. Lisa either conducts the further screening herself or refers it out to members of the Appellate Courts Committee. The further screening can range from simply reviewing additional record materials to substantive legal research. (One of my associates recently screened a case that required research on a rather exotic question of judgment finality/appealability. Unfortunately, though, later information made clear that there was no possible merit to the appeal.)

- So far, Lisa has placed four cases with pro bono counsel, all with large firms. In addition, at the request of a staff lawyer for another Court of Appeal district, she found pro bono representation solely for a mediation. The mediation was successful, and the experience suggests expanding the program to include mediated cases.
- One reason for Public Counsel's success in marshaling pro bono lawyers is that it provides training in areas that its pro bono lawyers may not be familiar with but want to learn about. That certainly describes appellate law, especially for junior big-firm lawyers who often can't get any appellate experience or training at their firms. Although *pro per* appeals don't generally involve complex issues of appellate practice, pro bono lawyers still need to know the basics. But unlike trial court litigation, the potential pool of trainers is limited. Here, too, we expect the Appellate Courts Committee to provide the trainers.

I took on the first training with one of my associates. We spent about two hours giving a group of big-firm first-years a road map of the appellate process, along with a promise to answer questions that might arise in their pro bono cases. They were interested and eager, and asked good questions. As part of the process, we developed a basic outline that can serve as a guide for future training.

The program differs from the Ninth Circuit's in almost every detail, as one quickly sees from reviewing the Ninth Circuit's handbook (available at the Ninth Circuit's website at [www.ca9.uscourts.gov/ca9/probono.nsf](http://www.ca9.uscourts.gov/ca9/probono.nsf)). Among the important differences:

- The Ninth Circuit's program is staffed and funded by the Court.
- The handbook does not identify any indigency requirement and there does not appear to be any financial screening process. Rather, the program focuses on "only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument." Pro Bono Handbook, at 1. One of the reasons the Court looks for cases that involve

oral argument is to provide an incentive for volunteers. In contrast to the Ninth Circuit, in which oral argument is at the court's discretion, in California's appellate courts oral argument is a matter of right, so every volunteer who completes briefing has the chance to argue.

- The Ninth Circuit program generally kicks in after briefing, when staff personnel review the case to determine whether further briefing or oral argument would be helpful.
- Ninth Circuit pro bono counsel are appointed by order of the Court and can seek reimbursement of out-of-pocket costs from the court.

Another California program bears watching. Under the leadership of Justice Maria P. Rivera and **Fellow Paul Fogel**, the First District, which covers the San Francisco Bay Area, launched a program in April 2007. It differs from the Second District's program in two major respects: There is no staffed clinic, and cases do not enter the program until after the record is filed. Otherwise, the basic sequence of events is essentially the same. The *pro per* litigant is contacted and asked whether he or she might want counsel. If so, Bay Area Legal Aid screens the litigant for financial eligibility, and a volunteer lawyer screens the case for potential merit (on the basis, as in the Second District, that the case need not be a winning one, but must rise above frivolous). Then volunteer counsel steps in.

These are exciting experiments. Beyond serving indigent appellate litigants – who so far have had nowhere to turn for pro bono counsel – they will improve the appellate decision-making process through better briefing. And they will provide unusual opportunities for young lawyers to get a taste of appellate practice while performing an important public service. ♦

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*Fellow Robin Meadow is a partner in the Los Angeles firm of Greines, Martin, Stein & Richland LLP. He is a Past President of the California Academy of Appellate Lawyers.*

# **COLORADO**

## **Appellate Pro Bono Program**

The Appellate Pro Bono Program of the Colorado Bar Association (CBA) is a pilot program that provides pro bono attorneys to represent indigent pro se litigants in civil cases pending before the Colorado Court of Appeals and the Colorado Supreme Court. The program was approved by the CBA's Executive Council, the CBA's Litigation Council, the Appellate Practice Subcommittee, the Governing Board of Metro Volunteer Lawyers (MVL), the Colorado Court of Appeals, and the Colorado Supreme Court.

A five-person task force consisting of Judge Daniel Taubman and Judge David Richman of the Colorado Court of Appeals, and attorneys Christina Gomez, Jane Ebisch, and Tony Viorst developed the program. Judge Gale Miller of the Court of Appeals also assisted in developing the program. When creating the program, the task force gathered information from similar pro bono programs in Austin and Houston, Texas, and worked in close cooperation with the Appellate Practice Subcommittee and the MVL. This document discusses the contours of the program.

## I. Substantive Criteria for Case Selection

Pro se litigants with civil cases pending in the Colorado Court of Appeals are eligible for representation through the program; however, unemployment compensation and prison inmate disciplinary appeals are excluded.

At the supreme court level, pro bono representation is available in civil matters for the filing of petitions for certiorari and responses to petitions for certiorari, and if a certiorari petition is granted, for review on the merits. With regard to a matter before the Colorado Supreme Court, a civil matter for the purposes of this program does not include criminal cases or cases involving post criminal conviction relief, prison discipline, habeas corpus appeals, ballot title appeals or election appeals.

Pro se litigants are encouraged to submit applications for representation, which are reviewed by the screening committee. When reviewing applications, the screening committee considers the following substantive criteria to determine whether a particular case is appropriate for inclusion within the Appellate Pro Bono Program:

- A. Indigency (125% of the federal poverty guidelines, the same criterion used by the MVL);
- B. Issues of first impression;
- C. Complex issues;
- D. Potentially meritorious claims;
- E. Recurring issues that may otherwise evade review;
- F. Issues that have already been briefed pro se and for which the court requests briefing by a pro bono attorney;
- G. Cases concerning the vindication of significant constitutional or statutory rights;
- H. The number of appeals currently in the program; and
- I. The number of available volunteer lawyers.

Although the factor of indigency is a requirement, the remaining factors are discretionary. Also, the program will not accept fee-generating cases, unless the applicant has unsuccessfully made reasonable good faith efforts to obtain contingent fee counsel; but this rule does not preclude acceptance of a case where an attorney fee may be available pursuant to statute, rule, or contract.

## II. Initial Procedures

To inform pro se litigants of the opportunity for pro bono representation, the program employs a variety of approaches. The Court of Appeals now includes a paragraph in the notice sent to litigants after a notice of appeal has been filed, informing them of the program. The Supreme Court will send a similar notice to potentially eligible pro se litigants after they file petitions for certiorari.

This information will advise pro se litigants that they can access the application form via a link on the CBA website. The notice will advise pro se litigants that they may obtain a copy of the application at the clerk's office of either court.

Additionally, these notices caution pro se litigants that if they apply for pro bono representation, they must still adhere to all applicable deadlines for pursuing their appeal, including the filing of appellate briefs.

Finally, the notices strongly recommend that pro se litigants request a pro bono attorney within fourteen days of receiving the notice from the court.

Currently, the Appellate Practice Subcommittee is also exploring other methods to advise pro se litigants of the program before they file a notice of appeal. The Subcommittee believes that the earlier pro se litigants learn of the possibility of obtaining a pro bono attorney, the more time the attorney will have to prepare the opening brief or answer brief, and perhaps be involved with the filing of the notice of appeal or petition for writ of certiorari.

The program will also disseminate information at the district court level. District court chief judges have agreed to post information about the program on judicial district websites. In addition, judges may verbally advise pro se litigants about the program following a trial and attach written information about the program to the final judgment sent to pro se litigants. Finally, in some districts, clerks may distribute a handout about the program to pro se litigants.

In addition, the Court of Appeals provides notice of the program to all pro se litigants to advise them that they may seek to obtain a pro bono lawyer for assistance in filing or responding to a petition for certiorari.

Finally, the program allows judges and justices to refer cases to the program which they feel would benefit from pro bono representation. Chief Judge Davidson of the Court of Appeals has already referred a Court of Appeals case to the program.

### III. Review by the Screening Committee

When a litigant decides to apply for representation, he or she submits an application and affidavit of financial need to the program's screening committee. (See exhibit A.) Once an application is submitted, the five-person pro bono screening committee will review it. Any litigant who seeks a pro bono attorney to help with filing a petition for certiorari in the Colorado Supreme Court must file a Motion for Continuance (see Exhibit B) to obtain automatically an extra 60 days to file the petition.

The screening committee members are elected annually by a meeting of the Subcommittee and may serve multiple terms. Each year, one member of the committee serves as chair, and is responsible for performing the administrative functions of the committee including maintaining a list of volunteers and assigning initial review of applications to individual committee members.

Additionally, the committee chair is responsible for ensuring the recusal of any committee members in the event of a conflict of interest.

The committee member assigned to an initial review of an application shall review the application form, the court docket, any briefs or motions filed to date, and selected pleadings from the trial court or the Court of Appeals. The committee member may call the applicant and, if applicable, the applicant's prior counsel, to obtain additional information about the potential representation. Based upon this initial review, the assigned committee member will recommend whether to accept or reject a case, or seek further information relating to the application.

When an application is accepted, the committee then reviews the list of volunteer attorneys and selects potential volunteers for the case based upon attorneys' stated areas of expertise, prior selection for other pro bono cases, and conflicts of interest. Volunteer attorneys may be members of the Appellate Practice Subcommittee, other attorneys with significant appellate experience, or attorneys without significant appellate experience

who work with an experienced mentor. The Volunteer Attorney Sign-up Form is attached as Exhibit C.

Once a volunteer attorney agrees to accept the representation, the committee sends a Notice of Acceptance informing the applicant about his or her selection for participation in the program. The applicant then has fourteen days to accept or decline the representation. For additional information regarding the screening committee, see Exhibit D.

In addition, a voluntary program administrator will be responsible for processing cases and transmitting the information to the screening committee for review. The administrator will manage finances related to the preparation of transcripts, attorney fees, and other financial matters. Finally, the administrator will maintain statistics about the pro bono cases, including hours spent on the cases, the types of cases, results in the cases, and feedback from attorneys.

#### IV. Alliance with MVL

The appellate pro bono program will maintain a strong alliance with MVL. This alliance results in several advantages, particularly

the availability of malpractice insurance for participating attorneys. In addition, because MVL is a recognized pro bono program, participating attorneys may have their time spent on appellate pro bono cases counted toward satisfaction of the Colorado Supreme Court's Pro Bono Recognition Program and considered for continuing legal education credit pursuant to C.R.C.P. 260.8.

#### V. Collaboration with Trial Lawyers and Law Students

Lawyers with little or no appellate experience, as well as law students at the University of Colorado and the University of Denver Sturm College of Law, may participate in the program. In particular, the University of Colorado has indicated that students can participate through the school's externship and public service programs, and the Sturm College of Law allows students to participate through its required Useful Public Service program.

In such circumstances, lawyers and law students will work under the mentorship of an experienced appellate practitioner, thereby gaining valuable practical experience. Mentors may be Subcommittee members or other experienced appellate attorneys who wish to participate in a mentor capacity. The Subcommittee

believes that such collaboration will provide valuable practical experience to trial lawyers and law students while facilitating the availability of pro bono appellate representation. Experienced appellate practitioners may participate in the program directly or as mentors even if they do not belong to the Subcommittee.

#### VI. Funding and Attorney Fees

Participating attorneys may seek reimbursement for costs incurred during their participation. Funding for reimbursement is derived from funding provided by the Litigation Council, as well as from other funds received by the program.

While C.A.R. 10 provides a mechanism for pursuing appeals in civil cases without trial transcripts, the Subcommittee believes that preparation of appellate briefs may be easier when trial transcripts are obtained. This is particularly so because appellate pro bono lawyers often will not be familiar with the trial proceedings. Regardless, costs incurred by participating attorneys are often minimal, since litigants will be able to proceed *in forma pauperis* in the Court of Appeals and the Supreme Court, and thus, do not have to pay filing fees.

Finally, the Subcommittee recommends that, where available, appellate program attorneys seek and obtain attorney fees, and that attorneys receiving such fees donate them to the Appellate Pro Bono Program.<sup>1</sup> Any attorney fees obtained by the program will be used to defray costs incurred by participating attorneys, including costs for preparation of transcripts, which are not provided free to indigent litigants in civil cases. Similarly, when costs are advanced by the program, a successful applicant should seek costs on appeal and then reimburse the program.

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<sup>1</sup> It is permissible for a pro bono attorney to receive an award of attorney fees. See *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991).

**APPELLATE PRO BONO PROGRAM  
INFORMATION AND APPLICATION FORM  
AND AFFIDAVIT OF FINANCIAL NEED**

The Colorado Bar Association's (CBA) Appellate Pro Bono Program may help you obtain a lawyer to assist with your appeal in the Colorado Court of Appeals and the Colorado Supreme Court. If you cannot afford a lawyer you may qualify for this program.

The program applies only to civil cases. In the Court of Appeals, it does **not** apply to unemployment, prison discipline, or criminal cases. In the Colorado Supreme Court, a civil matter for the purposes of this program does not include criminal cases or cases involving post criminal conviction relief, prison discipline, habeas corpus appeals, ballot title appeals or election appeals.

Please complete this application as soon as possible. If you are in the Court of Appeals, you must submit this application no later than 14 days after the appeal information sheet is sent to you by the Court of Appeals (sent after you or the other side has filed a Notice of Appeal). If you are in the Supreme Court, you must submit this application no later than 14 days after the date the Court of Appeals renders its decision. You must also complete and file with the Supreme Court a Motion for Extension of Time using the attached form, which will automatically give you an additional 60 days to file a petition for certiorari. Return the completed application to:

Colorado Bar Association  
Appellate Pro Bono Program  
1900 Grant Street, 9th Floor  
Denver, CO 80203

The program committee may contact you, and any lawyers who may have worked on your case. These conversations are confidential and will be used only for the selection process. The committee may also discuss your case with its volunteer lawyers.

The committee chooses cases based on your income and the importance of your legal issues. To qualify for the program, your income must be below 125% of federal poverty guidelines.

If the program accepts your case, we will contact you within 45 days. We will then provide you with the name and telephone number of the lawyer who is willing to take your case.

For more information about the program, please visit the CBA website: [www.cobar.org](http://www.cobar.org).

**NOTE: Your case may not be accepted by the Committee. All court deadlines still apply and must be followed. This includes the deadlines for filing a Notice of Appeal and submitting briefs. If your case involves a petition to the Supreme Court for writ of certiorari, you must file a motion for an extension of time with the Supreme Court using the attached form.**

### **APPELLATE PRO BONO PROGRAM APPLICATION**

#### **Applicant information**

Name \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_

Fax \_\_\_\_\_

E-mail \_\_\_\_\_

Are you listed as an individual in the case? If not, name the business or organization that is listed in the case and briefly describe your relationship with that business or organization.

\_\_\_\_\_  
\_\_\_\_\_

Did a lawyer represent you in the trial court? If so, provide the lawyer's name and contact information.

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**Case information**

Case number \_\_\_\_\_

Name of trial court \_\_\_\_\_

Trial court case number \_\_\_\_\_

Are you the party who filed the appeal?  
\_\_\_\_\_

What party or parties are adverse to you (on the other side) in the case? Are those parties represented by an attorney? If so, who is their attorney?

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Type of case (domestic matter, employment discrimination, personal injury, etc.)

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Briefly describe your case.

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Briefly describe the issues you want to raise in your appeal. Did you raise these issues in the trial court or in the administrative agency?

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Please attach a copy of the decision in your case from the district court, the Court of Appeals, or from an administrative agency.

**Financial information**

Were you granted *in forma pauperis* status or had your filing fees waived in the trial court?

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**Please submit this form, along with a completed copy of the attached Affidavit of Financial Need and copies of the Notice of Appeal (if available) and the district court's final judgment, to:**

Colorado Bar Association  
Appellate Pro Bono Program  
1900 Grant Street, 9th Floor  
Denver, CO 80203

<input type="checkbox"/> County Court <input type="checkbox"/> District Court <input type="checkbox"/> Denver Juvenile Court <input type="checkbox"/> Denver Probate Court _____ County, Colorado Court Address: _____ Plaintiff/Petitioner: _____ v. Defendant/Respondent: _____	<b>▲ COURT USE ONLY ▲</b> Case Number: _____ Courtroom: _____
<b>MOTION TO: <input type="checkbox"/> FILE WITHOUT PAYMENT OF FILING FEE <input type="checkbox"/> APPOINT AND PAY INTERPRETER COSTS AND SUPPORTING FINANCIAL AFFIDAVIT</b>	

I, \_\_\_\_\_ respectfully move the Court for an order to waive the following filing fee(s):  
 complaint    petition    answer    response    motion to modify    other: \_\_\_\_\_ and/or  to appoint and pay for an interpreter for the following language \_\_\_\_\_ pursuant to CJD 06-03 and as grounds state that I am without funds, have no adequate funds available, and have a meritorious claim.

**All items must be fully completed. Print or type neatly. If an item does not apply, please write "N/A"**

Name of Applicant			Other Responsible Party (Spouse, Parent, Other Persons in Household)		
Last Name	First Name	MI	Last Name	First Name	MI
Street Address (Include Apt. # if applicable) _____			Street Address (Include Apt. # if applicable) _____		
City _____ State _____ Zip Code _____			City _____ State _____ Zip Code _____		
<input type="checkbox"/> Own <input type="checkbox"/> Rent Home Phone #: _____			<input type="checkbox"/> Own <input type="checkbox"/> Rent Home Phone #: _____		
Social Security #	Driver's Lic. # & State	Date of Birth	Social Security #	Driver's Lic. # & State	Date of Birth
Most Recent Employer: _____			Most Recent Employer: _____		
Work Address: _____			Work Address: _____		
Work Phone #: (    ) _____			Work Phone #: (    ) _____		
Dates Employed: _____			Dates Employed: _____		
Hours/Week: _____ Pay Rate: \$ _____			Hours/Week: _____ Pay Rate: \$ _____		
<input type="checkbox"/> Monthly <input type="checkbox"/> Weekly <input type="checkbox"/> Bi-weekly <input type="checkbox"/> Other: _____			<input type="checkbox"/> Monthly <input type="checkbox"/> Weekly <input type="checkbox"/> Bi-weekly <input type="checkbox"/> Other: _____		
<b>Marital Status:</b> <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Separated <input type="checkbox"/> Widowed <b>Number in Household:</b> (including yourself) _____ _____ Identify Name, Age, and Relationship:					
Gross Monthly Income (See Information on page 2)			Monthly Expenses (See Information on Page 2)		
Self (wages, salary, commission)	\$		Rent or Mortgage	\$	
Spouse/Other Household Members	\$		Groceries	\$	
Parents (if same household)	\$		Utilities	\$	
Unemployment Benefits	\$		Clothing	\$	
Social Security/Retirement Funds	\$		Maintenance/Alimony and/or Child Support	\$	
Maintenance/Alimony	\$		Medical/Dental	\$	
Other Income (identify)	\$		Other Expenses (identify)	\$	
Other Income (identify)	\$		Other Expenses (identify)	\$	
<b>Total Income</b>	\$		<b>Total Expenses</b>	\$	
<b>Cash on Hand</b> (Cash you are carrying or which is stored at home, etc.)			<b>Credit Cards:</b> (Show type and balance owed)		
Checking Account Balance	\$		Name/Address of Bank		
Savings Account Balance	\$		Name/Address of Bank:		
Stocks, Bonds, or other Investments Held Balance	\$		Type of Investment, Name/Location of Company/Corporation		
Vehicles Owned (Autos, boats, recreational vehicles, etc.) - Estimate Value	\$		Identify Year _____ Model _____ License Plate _____ Identify Year _____ Model _____ License Plate _____		
House(s) or other Property - Estimate Value	\$		Amount owed, Year Purchased		
<b>IF ADDITIONAL SPACE IS NEEDED TO PROVIDE COMPLETE INFORMATION, ATTACH A SEPARATE PAGE.</b>					

I swear under penalty of perjury that all information provided is true and complete. In addition, I authorize the Court to make any necessary contacts to verify the information.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

# MOTION TO FILE WITHOUT PAYMENT AND SUPPORTING FINANCIAL AFFIDAVIT

## General Information

It is important that you accurately complete all sections of this form as appropriate based on your personal circumstances. If a section does not apply, please write N/A.

**A. Gross Monthly Income.** Includes income from all members of the household who contribute monetarily to the common support of the household.

♦ **Income categories to include:**

Wages, including tips, salaries, commissions, payments received as an independent contractor for labor or services, bonuses, dividends, severance pay, pensions, retirement benefits, royalties, interest/investment earnings, trust income, annuities, capital gains, unemployment benefits, Social Security Disability (SSD), Social Security Supplemental Income (SSI), Workman's Compensation Benefits, and alimony.

**Note:** Income from roommates should not be considered if such income is not commingled in accounts or otherwise combined with the applicant's income in a fashion which would allow the applicant proprietary rights to the roommate's income.

♦ **Income categories do not include:**

TANF payments, food stamps, subsidized housing assistance, veteran's benefits earned from a disability, child support payments, or other public assistance programs.

**B. Liquid Assets.** Includes cash on hand or in accounts, stocks bonds, certificates of deposit, equity, and personal property or investments which could readily be converted into cash without jeopardizing the applicant's ability to maintain home and employment.

**C. Expenses.** Nonessential items such as cable television, club memberships, entertainment, dining out, alcohol, cigarettes, etc., **shall not** be included. Allowable expense categories are listed on JDF 205.

Supreme Court 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	▲ COURT USE ONLY ▲
Colorado Court of Appeals Opinion by Judges: _____ Case No: _____  or District Court for _____ County Judge: _____ Case No: _____	
<b>Petitioner(s):</b>  v. (Substitute appropriate party designations and names)  <b>Respondent(s):</b>	
Party Without Attorney (Name and Address):  Phone Number: _____ E-mail: _____	Supreme Court Case Number: _____
<b>MOTION FOR EXTENSION OF TIME</b>	

\_\_\_\_\_, the Petitioner herein, respectfully requests this Court to grant an extension of time from \_\_\_\_\_ (due date of Petition for Writ of Certiorari) to \_\_\_\_\_ (date that is 60 days from the due date of the Petition for Writ of Certiorari) to file the Petition for Writ of Certiorari.

**As grounds for this Motion, the Petitioner states as follows:**

1. A complete application with the Colorado Appellate Pro Bono Program has been filed requesting a free attorney to represent me in my case to the Colorado Supreme Court.
2. The decision of the Colorado Bar Association (CBA) to obtain a lawyer to assist with my case may not be available by the date that the Petition for Writ of Certiorari is otherwise due.
3. No previous extensions of time for filing the Petition for Writ of Certiorari have been requested.

WHEREFORE, I respectfully request this Court to grant an extension of time to \_\_\_\_\_ (date) within which to file the Petition for Writ of Certiorari).

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Petitioner

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, State, Zip Code

\_\_\_\_\_  
(Area Code) Telephone Number (home)

\_\_\_\_\_  
(Area Code) Telephone Number (work)

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**CERTIFICATE OF MAILING**

**(You must complete this Certificate of Mailing as proof that you have mailed a copy of this document to counsel for the opposing party or pro se opposing party in the case.)**

I certify that on \_\_\_\_\_(date) a true and accurate copy of this *Motion for Extension of Time* was served on the other party(ies) by placing it in the United States mail, postage pre-paid and properly addressed to the following:

To:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature of Petitioner

**CBA APPELLATE PRO BONO PROGRAM  
ATTORNEY SIGN-UP FORM**

If you are an attorney licensed in the State of Colorado and are interested in signing up to participate as a pro bono attorney in the CBA Appellate Pro Bono Program, please complete this form and submit it to:

Colorado Bar Association  
Appellate Pro Bono Program  
1900 Grant Street, 9th Floor  
Denver, CO 80203

You can learn more about the Pro Bono Program by reviewing the program information on the CBA website at [www.cobar.org](http://www.cobar.org).

Name: \_\_\_\_\_

Firm/Employer: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

List any areas of practice in which you would be willing to take a pro bono case:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Approximate number of appeals you would be willing to accept per year: \_\_\_\_\_

The Pro Bono Committee may in some cases pair inexperienced attorneys with experienced appellate practitioners to serve as mentors on a pro bono appeal. To help facilitate this mentoring program, please check the appropriate box.

- I am interested in being paired with a mentor on a pro bono appeal.
- I have a mentor who can assist me within my own firm.
- I am interested in serving as a mentor to less experienced attorneys at other firms in handling pro bono appeals.
- I am not interested in participating in the mentoring program. I would prefer to handle pro bono appeals on my own or to mentor attorneys within my own firm.

Briefly describe your previous experience in handling appeals, within Colorado and in any other jurisdictions.

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Please provide any additional information you believe may be helpful to the Pro Bono Committee in matching you with a pro bono appeal and/or mentor.

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## **CBA APPELLATE PRO BONO PROGRAM SCREENING COMMITTEE PROCEDURES**

### Committee make-up

The Pro Bono Committee is comprised of five persons serving one-year terms. Members are selected annually by a meeting of the Appellate Subcommittee of the Colorado Bar Association (CBA), and members can serve multiple terms.

Each year, one committee member shall serve as the committee chair. The chair is responsible for (1) coordinating with the Clerk of the Court of Appeals, the CBA, and Metro Volunteer Lawyers to receive applications for participation in the program, (2) ensuring that each application is assigned to a committee member for an initial review, (3) maintaining a list of volunteers, and (4) performing other functions as needed to administer the program.

### Creation of volunteer list

The Pro Bono Committee shall create a form for attorney volunteers, including contact information, areas of interest/expertise, the number of cases the attorney is willing to take per year, and any other pertinent information. Blank forms will be circulated to all members of the Appellate Subcommittee of the CBA. They will also be made available on the Court of Appeals and Supreme Court websites (along with information about the program) and any other outlets the committee deems appropriate.

### Committee procedures

The committee may assign the review of applications by whatever manner it chooses (*e.g.*, rotating for each application, rotating weeks, or assigning based on subject matter). However, the Chair must ensure that a committee member who has a potential conflict of interest on a case (*e.g.*, if the committee member's firm represents an adverse party) does not review that application for consideration in the program and does not vote on the consideration of that application.

The committee member assigned to an initial review of an application shall review the application form, the docket, any briefs or motions filed to date, and selected pleadings from the trial court. The committee member may call the applicant and, if applicable, the applicant's prior counsel, to obtain additional information about the potential representation. Based upon this initial review, the assigned committee member shall provide to the committee an initial recommendation as to whether to accept, reject, or seek further information relating to the application.

The committee members shall meet on a bi-monthly basis (or more frequently, if necessary) to discuss all pending applications. Meetings may be conducted in person, by telephone, or by e-mail. The assigned committee member for each application shall provide a summary of the application and his or her initial recommendation. The committee members shall then discuss and vote on each pending application. Members may vote to (1) accept the application (pending the committee's ability to match the applicant with a volunteer attorney), (2) decline the application, (3) seek guidance from another attorney on the particular subject matter and issues involved in the appeal, or (4) seek additional information from the applicant or the applicant's prior counsel. A majority vote prevails.

If the committee votes to obtain additional guidance or information, the assigned committee member shall follow up on those items and bring the matter to a new vote on or before the next committee meeting.

If the committee elects to reject the application, it will send a letter to the applicant notifying the applicant of that determination.

If the committee accepts an application, the committee shall review the list of volunteer attorneys and select potential volunteers for the case, based upon attorneys' stated areas of expertise, prior selection for another pro bono case, and lack of any obvious conflicts of interest. The assigned committee member shall contact such potential volunteers in an attempt to match the application with a volunteer attorney. The committee member may provide potential

volunteers with any information obtained during the member's initial review of the matter. Potential volunteer attorneys shall be given at least 14 days (unless the matter must be assigned more quickly due to impending case deadlines) to review these materials, obtain and review any other relevant materials, conduct any further interviews or investigation, and decide whether to accept the representation.

Procedures for accepted applications

If the Pro Bono Committee accepts an application, and a volunteer attorney agrees to accept the representation, the committee will send a Notice of Acceptance informing the applicant about his, her or its selection for participation in the program. The letter will include the volunteer attorney's contact information and a notice that the applicant has 14 days to decline the representation. The volunteer attorney will be advised to follow up with a separate letter to the client outlining the terms of the representation. If the client does not decline the representation within 14 days following issuance of the Notice of Acceptance, the volunteer attorney shall file an entry of appearance in the Court of Appeals. The Pro Bono Committee and the assigned volunteer attorney shall also notify and coordinate with Metro Volunteer Lawyers when a case is accepted into the program.



Appellate Pro Bono Program  
1900 Grant Street, 9th Floor  
Denver, CO 80203

June 14, 2011

*Via E-mail and U.S. Mail*

Re: Representation through the CBA Appellate Pro Bono Program

Dear

We are pleased to inform you that your application for assistance with the CBA Appellate Pro Bono Program has been accepted and your case has been matched with volunteer attorneys.

The volunteer attorneys will assist you with the Colorado Court of Appeals' proceedings in Case No. . The representation through the CBA Appellate Pro Bono Program will end when the Court of Appeals issues a final decision in this case and does not include any proceedings in the trial court, either during or following the appeal. However, you may reapply for pro bono assistance with any later proceedings in the Colorado Supreme Court. In that event, priority will be given to the attorneys who have been handling your case, if both you and the attorneys agree.

You will not be responsible for paying attorney's fees for the representation, but you may be responsible for costs. Your volunteer attorneys can provide more information on these issues.

Your volunteer attorneys should be contacting you shortly, or you may contact them at your convenience. Their contact information is:

If you do not wish to be represented by these attorneys, you must send a written objection to the placement within fourteen days of this letter to the following address:

Appellate Pro Bono Program  
1900 Grant Street, 9th Floor  
Denver, CO 80203

If you submit such an objection, the pro bono committee will attempt to match you with a different attorney, but we cannot guarantee that we will be able to do so. Also, if your volunteer attorneys are unable to continue to represent you in this case for any reason, we will try to find a replacement but cannot guarantee that we will be able to do so.

Thank you for your interest in the CBA Appellate Pro Bono Program, and we wish you luck as you proceed with your case.

Very truly yours,



CBA Appellate Pro Bono Program

cc: (via email)  
(via email)

5136553\_1.DOC

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80202	COPIES MAILED TO COUNSEL OF RECORD
	AND <u>pro se / CBA</u>
Plaintiff-Appellant:	ON <u>2-8-13</u>
v.	BY <u>OK</u>
Defendants-Appellees:	Court of Appeals Case
ORDER OF COURT	

The Court, upon its own motion, enters the following ORDER:

Having reviewed the notice of appeal, the record, and the briefs of the parties, the Court authorizes the appellant to apply for pro bono representation through the Colorado Bar Association's Appellate Pro Bono Program.

The Court recognizes that appellant is self-represented, and that the assistance of an attorney may be helpful to appellant to address the issues presented in his

appeal. The Court also recognizes that appellant has requested *appointment of* counsel, but is not entitled to an appointment pursuant to any statute or court rule. Accordingly, the Court provides to appellant an application for the Colorado Bar Association's Appellate Pro Bono Program. If appellant wishes to apply for a pro bono attorney, such application should be filed directly with the CBA within 21 days of the date of this Order, and a copy of the application sent to this Court. Appellant will be required to meet the financial qualifications established by the Program.

If appellant applies for a pro bono attorney and is accepted for the pro bono program, this Court will issue an order for supplemental briefs on specific issues in a separate order.

If appellant does not wish to seek pro bono counsel, he should notify the court within 21 days of this Order. If no application is made or the application is not accepted for a pro bono lawyer, the Court will issue an opinion in due course based on the briefs already submitted.

BY THE COURT

Taubman, J.  
Hawthorne, J.

\*Graham, J., dissents and would proceed without authorizing the appellant to apply for pro bono representation.

Encl: Application for pro bono program  
Copy: Colorado Bar Association

284 P.3d 898 (2012)

**Robert D. GANDY, Plaintiff-Appellant,**  
v.  
**COLORADO DEPARTMENT OF  
CORRECTIONS; and Executive Director  
of the Colorado Department of  
Corrections, Defendants-Appellees.**

No. 10CA1238.

**Colorado Court of Appeals, Div. A.**

June 21, 2012.

899\*899 Davis Graham & Stubbs LLP,  
Kyle W. Brenton, Denver, Colorado, for  
Plaintiff-Appellant.

John W. Suthers, Attorney General, James  
X. Quinn, Senior Assistant Attorney  
General, Kathryn A. Starnella, Assistant  
Attorney General, Denver, Colorado, for  
Defendants-Appellees.

Opinion by Judge CARPARELLI.

¶ 1 Plaintiff, Robert D. Gandy, a Canadian citizen serving a life sentence, applied to the Colorado Department of Corrections (DOC) to be transferred to the Canadian penal system to serve the remainder of his sentence. DOC denied the application and Gandy sued, alleging, among other things, that the basis of DOC's denial was contrary to a federal treaty. The district court ruled that Gandy failed to state a claim for which relief could be granted, and dismissed the suit under C.R.C.P. 12(b)(5). Gandy now appeals the district court's dismissal. We conclude that DOC impermissibly applied its administrative regulation in contravention of the applicable federal treaty.

¶ 2 Accordingly, we vacate the district court's order granting DOC's motion to dismiss and remand the case to the district

court. On remand, the court must resolve any pending matters consistent with our ruling that DOC improperly applied the Regulation contrary to the Treaty. Upon reconsideration of Gandy's application, DOC may not deny the application on the erroneous basis that the Regulation precludes Canadian offenders convicted with a life sentence from participating in the Treaty.

## **I. The Treaty and the Regulation**

### **A. The Treaty**

¶ 3 In 1978, the United States and Canada entered into the Transfer of Offenders Treaty Between the United States of America and Canada on the Execution of Penal Sentences, U.S.-Can., Mar. 2, 1977, 30 U.S.T. 6263 (the Treaty).<sup>111</sup> The Treaty authorizes the transfer of offenders between the countries. The preamble of the Treaty states that its purpose is "to enable Offenders, with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society."

¶ 4 Under the Treaty, the offender must request, and receive, a transfer from the 900\*900country in which he or she is incarcerated. Treaty art. III, § 3. If the offender is a state prisoner, he or she must receive approval from both state and federal authorities. *Id.* art. III, § 5. If the receiving country agrees, the offender is then transferred to the receiving country. *Id.* art. III, §§ 4, 10. After a transfer is complete, the receiving country is responsible for the cost of incarceration and may not challenge, set aside, or otherwise modify the terms of the offender's sentence. *Id.* art. IV, § 4 & art. V.

¶ 5 To be eligible for transfer under the Treaty, the offender must meet certain

eligibility requirements. The Treaty provides:

7. No Offender shall be transferred unless:

- (a) he is under a sentence of imprisonment for life; or
- (b) the sentence he is serving states a definite termination date, or the authorities authorized to fix such a date have so acted; or
- (c) he is subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; or
- (d) he is subject to indefinite confinement as a dangerous or habitual offender.

*Id.* art. III, § 7.

¶ 6 Colorado implements federal treaties that provide for offender transfers through section 24-60-2301, C.R.S.2011, which provides in relevant part:

If a treaty in effect between the United States and a foreign country provides for the transfer or exchange of convicted offenders to the country of which they are citizens or nationals, the governor may, on behalf of the state and subject to the terms of the treaty, authorize the executive director of the department of corrections to consent to the transfer or exchange of offenders and take any other action necessary to initiate the participation of this state in the treaty.

¶ 7 The governor delegated to DOC the authority "to approve the transfer of eligible foreign national offenders, pursuant to the conditions of current treaties which provide for such transfer, and the approval of the Department of Justice and the affected foreign country." DOC Admin. Reg. 550-05(IV)(B).

## **B. The Regulation**

¶ 8 DOC promulgated Administrative Regulation 550-05 (the Regulation) to facilitate international transfers of offenders. The Regulation states that it is the policy of DOC "to return convicted foreign national offenders to their country of origin consistent with the interests of the [S]tate of Colorado, the United States Department of Justice, and the individual offender." Reg. 550-05(I). The Regulation also says that its purpose is to enable "eligible offenders to transfer to their country of citizenship and thereby reduce the custody and maintenance expenses to the [S]tate of Colorado." Reg. 550-05(II)(B).

¶ 9 The Regulation lists several criteria regarding the determination of transfer requests. At issue here is DOC's application of the statement that "[a]n offender may not be eligible if convicted with a life sentence." Reg. 550-05(IV)(C)(7).

## **II. Procedural History**

¶ 10 When DOC disapproved Gandy's requests to be transferred to the Canadian penal system, he filed suit under C.R.C.P. 106(a)(2), first in 2002 and again in 2007, alleging, in pertinent part, that DOC's rejection of his transfer requests did not comply with the controlling treaties, statute, and regulations.

¶ 11 The 2007 complaint asked the court to require DOC to fairly evaluate requests for transfers under the Treaty, and to stop using unauthorized criteria when considering requests for transfer. The district court dismissed these claims in September 2007.

### **A. 2008 Appeal**

¶ 12 On appeal in 2008, Gandy asserted that DOC had the authority to consent to transfer requests, but did not have authority to deny them. A division of this court rejected the argument as an implausible reading of the statute, and ruled that DOC had the authority to either grant or deny transfers. *Gandy v. Colo. Dep't of Corr.*, (Colo.App. No. 901\*901 07CA2381, 2008 WL 5009564, Nov. 26, 2008) (not published pursuant to C.A.R. 35(f)) (*Gandy I*).

¶ 13 In the alternative, Gandy asserted that, having issued Regulation 550-05, "DOC has an unlawful practice of denying [transfers under the Treaty] without applying any of the criteria of the regulation." *Gandy I*. The division observed that Gandy was seeking mandamus relief and that mandamus cannot issue without proof that the respondent has a clear duty to perform the act. *Id.* (citing *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo.1983)). The division also observed that Gandy's complaint said he was not seeking an order directing DOC to grant his transfer request, but, rather, an order directing DOC to consider his request under the applicable regulations. *Id.*

¶ 14 The division concluded that the record before it did not contain any documents "indicating that DOC considered [Gandy's] transfer application under the governing regulation, or any evidence setting forth why the transfer was denied." It, therefore, remanded the case to the district court with instructions to direct DOC to consider Gandy's transfer application "in light of the factors set forth in Regulation 550-05, or demonstrate to the District Court that it has already done so." *Id.*

¶ 15 The division held that DOC was required to consider Gandy's application under the applicable regulations, and affirmed the district court judgment "insofar

as it denied a writ of mandamus directing [Gandy] to be transferred." *Id.*

## **B. On Remand**

¶ 16 On remand, the district court ordered briefing regarding whether DOC had properly considered Gandy's transfer application. Gandy argued that the Regulation was not a lawful basis to deny his application because the Regulation directly conflicts with the Treaty. DOC did not respond to Gandy's legal argument. Instead, DOC presented evidence that Gandy's transfer request had been evaluated and denied because Gandy was serving a life sentence, which, it asserted, rendered him ineligible for transfer under Regulation 550-05(IV)(C)(7). DOC's supporting documentation shows that it denied Gandy's transfer request solely because he "is serving a life sentence from Denver County, case # 90CR1491" and Regulation 550-05(IV)(C)(7) "precludes inmates [serving] a life sentence from participating in this program."

¶ 17 In April 2010, the district court again dismissed Gandy's complaint for failure to state a claim under C.R.C.P. 12(b)(5). The court found that DOC proved that it had considered and rejected Gandy's transfer request.

¶ 18 The court concluded that DOC had the authority under Regulation 550-05(IV)(C)(7) to deny Gandy's transfer request because he is serving a life sentence. Reviewing the Treaty, which Gandy submitted, the court held that the Treaty did not "grant [Gandy] a right to transfer as [Gandy] has urged" and that the Treaty "grants Colorado (specifically, the DOC as the delegee of the governor of Colorado) discretion to grant or deny transfer requests." The court held that the Regulation

was not unconstitutionally vague and that DOC had the authority to promulgate it. The court did not address the alleged conflict between the Treaty and the Regulation regarding whether offenders serving life sentences are eligible for transfer.

### C. 2010 Appeal

¶ 19 Gandy appealed and submitted a pro se brief in which he argued, among other things, that the Regulation abrogates the Treaty and violates the Supremacy Clause when applied to Canadian nationals. We authorized Gandy to apply for appointment of pro bono counsel through the Colorado Bar Association's Pro Bono Appellate Program. After Gandy applied for and received pro bono counsel, we ordered the parties to file supplemental briefs addressing:

Whether DOC Administrative Regulation 550-05(IV)(C)(7), 1996-2010, unlawfully abrogates a portion of The Transfer of Offenders Treaty Between the United States of America and Canada on the Execution of Penal Sentences, U.S.-Can., Mar. 2, 1977, T.I.A.S. 9552 (entered into force July 902\*902 19, 1978) (the bilateral treaty) and the United States Constitution? Specifically, does the regulation, which states "[a]n offender may not be eligible if convicted with a life sentence," abrogate Art. III(7)(a) of the bilateral treaty, which states that, as relevant here, "[n]o offender shall be transferred unless ... he is under a sentence of imprisonment for life"?

### III. Standard of Review

#### A. Dismissal Under C.R.C.P. 12(b)(5)

¶ 20 We review de novo a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim and apply the same standards as the district court. *Denver Post Corp. v. Ritter*, 255 P.3d

1083, 1088 (Colo.2011). Therefore, we accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Id.* However, we are not required to accept as true legal conclusions that are couched as factual allegations. *Id.*

¶ 21 We view with disfavor C.R.C.P. 12(b)(5) motions to dismiss. *Id.* Therefore, we will uphold the grant of a C.R.C.P. 12(b)(5) motion to dismiss only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Id.*

#### B. Supremacy Clause

¶ 22 We review de novo whether the Regulation conflicts with the Treaty and thereby violates the Supremacy Clause of the United States Constitution. *See, e.g., In re Marriage of Anderson*, 252 P.3d 490, 493 (Colo.App.2010) (reviewing whether dissolution decree provision conflicted with the Social Security Act in violation of the Supremacy Clause).

¶ 23 The Supremacy Clause of the United States Constitution provides that all treaties made under the authority of the United States shall be the supreme law of the land:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

¶ 24 When a state statute or regulation conflicts with a valid federal law, that statute or regulation is preempted. *Sapp v. El Paso County Dep't of Human Services*, 181 P.3d 1179, 1184 (Colo.App.2008); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) (holding that a treaty binds the states under the Supremacy Clause and that the states must recognize the force of the treaty when adjudicating the rights of litigants).

¶ 25 The underlying rationale of the preemption doctrine is that the Supremacy Clause invalidates state laws that interfere with, or are contrary to, the laws of Congress. *Sapp*, 181 P.3d at 1184. One type of preemption, conflict preemption, voids a state statute or regulation that actually conflicts with a valid federal law. *Id.* A conflict exists when compliance with both federal and state laws is a physical impossibility or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*

#### IV. Analysis and Conclusions

¶ 26 It would be impossible for DOC to comply with the Treaty and to apply the Regulation to render an offender ineligible for transfer. Under the Treaty, offenders serving life sentences *are eligible* for transfer. Treaty art. III, § 7(a). Thus, applying Regulation 550-05(IV)(C)(7) to render Canadian offenders serving life sentences *ineligible* for transfer conflicts with the Treaty and is an obstacle to the accomplishment and execution of its full purposes. See *Sapp*, 181 P.3d at 1184.

¶ 27 Accordingly, we conclude that, under the Supremacy Clause, the Treaty preempts DOC from applying the Regulation to render Canadian offenders serving life sentences

ineligible for transfer. We also conclude that Gandy stated a claim for which relief can be granted. Accordingly, the district court erred when it ruled otherwise and dismissed Gandy's claim on that basis.

#### 903\*903 A. Application of the Regulation Under the Treaty

¶ 28 The Regulation, which is titled "Transfer of Foreign National Offenders to Treaty Nations," was implemented "to return convicted foreign national offenders to their country of origin." Reg. 550-05(I). Regulation 550-05(III)(C) defines "Treaty Nation" as a "country that has entered into a treaty with the United States on the execution of penal sentences." Fifty-nine nations have signed transfer treaties with the United States. *Immigration Law & Crimes* § 8:25 (2011).

¶ 29 DOC has the authority "to approve the transfer of eligible foreign national offenders, *pursuant to the conditions of current treaties which provide for such transfer*, and the approval of the Department of Justice and the affected foreign country." Reg. 550-05(IV)(B) (emphasis added); see also § 24-60-2301 ("the governor may, on behalf of the state and subject to the terms of the treaty, authorize" DOC to consent to the transfer of offenders). Thus, DOC must exercise its authority to approve or deny the transfer of eligible foreign national offenders in conformity with the conditions of applicable treaties.

¶ 30 The issue here is whether DOC can apply the Regulation to conclude that a Canadian offender is *ineligible* for transfer under the Treaty "if convicted with a life sentence."

¶ 31 Regulation 550-05(IV)(C) establishes nine "Eligibility Criteria for Transfer

Consideration." Under Regulation 550-05(IV)(C)(1), the offender "*must be* a citizen of the treaty nation" to which he or she seeks to transfer, and "*must meet* any additional qualification criteria which treaty nations *may* require." (Emphasis added.) The Regulation also provides that "[a]n offender *may* not be eligible if convicted with a life sentence." Reg. 550-05(IV)(C)(7) (emphasis added).

¶ 32 According to *Webster's Third New International Dictionary* 1396 (3d ed. 1986), the word "may" sometimes expresses permission or lack of permission, and sometimes indicates possibility or probability. When indicating possibility, it is sometimes used where "might" could also be used. *Id.*

¶ 33 Giving the phrase "may not be eligible for transfer" its plain meaning and construing the rule as a whole to give harmonious effect to all provisions, we conclude that Regulation 550-05(IV)(C)(7) advises DOC officials that an offender might not be eligible for transfer under the applicable treaty if convicted with a life sentence. *See Int'l Paper Co.*, 126 P.3d at 226. Applied in that manner, the Regulation recognizes and alerts decision-makers to the possibility that the applicable treaty may render an offender ineligible for transfer if he or she is serving a life sentence. When the applicable treaty makes offenders serving life sentences ineligible, DOC decision-makers may not transfer such an offender. However, when, as here, a treaty make offenders serving life sentences eligible, DOC decision-makers may transfer the offender.

¶ 34 We next turn to Gandy's contention that, under the Supremacy Clause, DOC's application of the Regulation to him is unlawful.

## **B. DOC's Application of the Regulation Violated the Treaty**

¶ 35 We asked both parties to address whether the Regulation, which provides an offender may not be eligible if convicted with a life sentence, abrogates Art. III(7)(a) of the Treaty, which states that no offender shall be transferred unless he or she is serving a life sentence.

¶ 36 Under the Treaty, a life sentence explicitly renders a Canadian offender eligible to participate in the Treaty. Treaty art. III, § 7. However, in response to inquiries from federal and Canadian authorities, DOC's only stated reason for denying Gandy's transfer application was that Regulation 550-05 "precludes inmates convicted of a life sentence from participating in [the Treaty]."

¶ 37 Thus, although the Treaty explicitly renders Gandy eligible to participate in the Treaty because he is serving a life sentence, DOC applied its Regulation to render Gandy ineligible based on that very criterion. These two eligibility criteria are antithetical.

904\*904 ¶ 38 Under the Supremacy Clause, DOC may not apply Regulation 550-05(IV)(C)(7) in a manner that abrogates the agreement of the United States and Canada that offenders serving life sentences are eligible for transfer under the Treaty. *See Sanchez-Llamas*, 548 U.S. at 346, 126 S.Ct. 2669; *Sapp*, 181 P.3d at 1184.

¶ 39 Accordingly, we conclude DOC's application of the Regulation violates the Supremacy Clause.

## **C. April 2010 Order**

¶ 40 The district court granted DOC's motion to dismiss based solely on DOC's evidence that it had considered and rejected Gandy's transfer requests under Regulation 550-05 because he is serving a life sentence. The dismissal on this basis cannot stand.

¶ 41 Accordingly, we vacate the district court's order granting DOC's motion to dismiss and remand the case to the district court. On remand, the court must resolve any pending matters consistent with our ruling that DOC improperly applied the Regulation contrary to the Treaty. Upon reconsideration of Gandy's application, DOC may not deny the application on the erroneous basis that the Regulation precludes Canadian offenders convicted with a life sentence from participating in the Treaty.

¶ 42 The order is vacated, and the case is remanded for further proceedings as directed by this opinion.

ROMÁN and PLANK<sup>[\*]</sup>, JJ., concur.

[1] We reject DOC's argument, raised for the first time in its supplemental answer brief on appeal, that the Council of Europe: Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, T.I.A.S. No. 10,824 (opened for signature on Mar. 21, 1983), applies to Gandy's transfer request.

[\*] Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S.2011.

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### **In and Around the Bar The SideBar**

#### **Colorado's New Pro Bono Program for Civil Appeals**

by Katayoun A. Donnelly, Geoff Kingsporn

#### **About the Authors**

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On June 27, 2011, the Colorado Supreme Court issued its opinion in *In re the Parental Responsibilities of L.S.*,<sup>1</sup> a significant case interpreting the federal Parental Kidnapping Prevention Act. *In re L.S.* also is notable because it is the first Supreme Court case handled by an attorney appointed under the Colorado Bar Association's (CBA) new Appellate *Pro Bono* Program, which has been operating since July 1, 2010.

#### **Origins of the Appellate *Pro Bono* Program**

The idea for an Appellate *Pro Bono* Program initially was brought to the CBA Litigation Section's Appellate Practice Subcommittee by Colorado Court of Appeals Judges Daniel Taubman and David Richman. The Subcommittee formed a task force comprising Judge Taubman and Judge Richman, and attorneys Jane Ebisch, Christina Gomez, and Tony Viorst. When developing Colorado's Appellate *Pro Bono* Program, the task force gathered information from similar *pro bono* programs in Austin and Houston, Texas, as well as from the CBA Appellate Practice Subcommittee and the Denver Bar Association's Metro Volunteer Lawyers (MVL) *pro bono* program.

#### **Selecting Cases for the Program**

Most indigent *pro se* litigants with civil cases pending in the Colorado Court of Appeals or the Colorado Supreme Court are eligible for representation through the Program.<sup>2</sup> At the Supreme

Court level, *pro bono* representation is available for filing petitions; for *certiorari* for review on the merits if a *certiorari* petition is granted; and for original actions under C.A.R. 21 (to determine whether a trial court exceeded its jurisdiction or seriously abused its discretion).

The Program's application form is available on the CBA website.<sup>3</sup> Applications are reviewed by the Program's screening committee, which currently comprises Christina Gomez (Chair), Blain Myhre, Brandi Pummell, Shannon Stevenson, and Tony Viorst. Jane Ebisch performs the administrative functions of the committee.

When reviewing applications, the screening committee considers the following substantive criteria to determine whether a particular case is appropriate for the Program:

- indigency (125% of the federal poverty guidelines, the same criterion used by MVL)
- issues of first impression
- complex issues
- potentially meritorious claims
- recurring issues that may otherwise evade review
- issues that already have been briefed *pro se* and for which the court requests briefing by a *pro bono* attorney
- cases concerning the vindication of significant constitutional or statutory rights
- the number of appeals currently in the program
- the number of available volunteer lawyers.

The only required factor for all cases is applicant indigency; the remaining factors are discretionary. Also, though the Program will not accept fee-generating cases, this does not preclude acceptance of a case where an award of attorney fees may be available pursuant to statute, rule, or contract. Attorneys are encouraged to donate to the Program any recovered fees.

As of July 2011, the Program's screening committee had received and reviewed twenty-seven applications. Ten were accepted.

## How Appellate Counsel is Chosen

The Program maintains a list of attorneys who have indicated a willingness to serve as *pro bono* appellate counsel. The screening committee attempts to match approved applicants with the volunteers based on the attorneys' areas of expertise, prior selection for other *pro bono* cases, and conflicts of interest. There are currently more than forty attorneys on the Program's roster of volunteers.

## Summary of Selected Cases

In addition to *In re L.S.*, which Tony Viorst handled from petition of *certiorari* through its conclusion,<sup>4</sup> the Program has successfully concluded several other appeals. The Colorado Supreme Court granted a writ of *certiorari* in *In the Interest of Child B.B.O.*<sup>5</sup> The Court's decision in this case will determine whether, pursuant to CRS § 14-10-123(1), the consent of both biological parents is required for a psychological parent to have standing to maintain a

custodial relationship. Katy Ellis, on behalf of her client, argued that reading such a requirement into the statute would defeat "the purpose of the statutory language that acknowledges the importance of psychological parents to minor children."

In *In the Matter of the Petition of S.D.H.*,<sup>6</sup> Glen Goldman and his colleagues argued that the district court erred when it terminated their client's parental rights and allowed the child's stepfather to adopt him. They asserted that the district court should have granted their client's C.R.C.P. 60(b)(2) motion for relief, arguing that the representations of the mother and stepfather regarding the biological father's alleged abandonment of the child and their concealment of a favorable order from a different court was fraudulent. The Colorado Court of Appeals agreed, reversing the district court's judgment and remanding the case to determine "whether mother and stepfather's affidavits and pertinent assertions were accurate and, if not, whether the inaccuracies constituted fraud or misrepresentation warranting reliefs under C.R.C.P. 60(b)(2)."

In *Boettler v. Nelson*,<sup>7</sup> Jane Ebisch was successful, in part, in an appeal to the Colorado Court of Appeals concerning a parenting time order issued by a magistrate in a Fremont County case. The appellate court reversed the lower court, holding that the court should have ordered the father to submit to a psychological evaluation and should have applied the best interests standard when determining parenting time.

## **Becoming Involved in the Program**

Any attorney licensed in Colorado may participate in the Appellate *Pro Bono* Program by completing the Program's attorney sign-up form. The form is available online through the CBA and MLV websites.<sup>8</sup>

Trial lawyers with little or no appellate experience, as well as law students, may participate in the Program. Students at the University of Colorado Law School can participate through the school's externship and public service programs, and students at the University of Denver Sturm College of Law can participate through its required Useful Public Service Program. Trial lawyers and law students will be paired by the committee with experienced appellate practitioners who have volunteered to act as mentors for *pro bono* appeals.

Among the many advantages of the Program's alliance with MVL is the availability of malpractice insurance for participating attorneys. In addition, because MVL is a recognized *pro bono* program, participating attorneys may have their time spent on appellate *pro bono* cases counted toward satisfaction of the Colorado Supreme Court's *Pro Bono* Recognition Program and considered for continuing legal education credit, pursuant to C.R.C.P. 260.8.

## **Spread the Word**

The Appellate *Pro Bono* Program is a worthy professional opportunity for Colorado's lawyers and litigants. Colorado attorneys

are encouraged to become involved in the Program and to spread the word of its existence to colleagues and clients.

#### Notes

1. *In re the Parental Responsibilities of L.S.* (No. 09SC989, June 27, 2011).
2. Some types of cases are excluded from the Appellate *Pro Bono* Program. The Colorado Court of Appeals excludes unemployment compensation and prison inmate disciplinary appeals; the Supreme Court excludes post-criminal conviction relief, prison discipline, *habeas corpus* appeals, ballot title appeals, and election appeals.
3. The application form for the Appellate *Pro Bono* Program is available at [www.cobar.org/repository/Access%20to%20Justice/AppellateProBono/CBAAppProBonoProg\\_PublicInfoApp.pdf](http://www.cobar.org/repository/Access%20to%20Justice/AppellateProBono/CBAAppProBonoProg_PublicInfoApp.pdf). More information about the Program is available at [www.cobar.org/index.cfm/ID/21607](http://www.cobar.org/index.cfm/ID/21607).
4. See Fender, "Poor litigants get legal help before state's highest courts," *The Denver Post* (July 5, 2011), available at [www.denverpost.com/search/ci\\_18408139](http://www.denverpost.com/search/ci_18408139).
5. *In the Interest of B.B.O.: Olds v. Berry* (No. 10SC623, April 18, 2011).
6. *In the Matter of the Petition of S.D.H., for the Adoption of J.C.B., and Concerning W.T.T* (No. 10CA1332, April 14, 2011).
7. *Boettler v. Nelson, and Concerning Fremont County Department of Human Services* (No. 09CA2751, Sept. 30, 2011).
8. See [www.cobar.org/index.cfm/ID/21607](http://www.cobar.org/index.cfm/ID/21607) and [www.metrovolunteerlawyers.org/RTF1.cfm?pagename=Governance](http://www.metrovolunteerlawyers.org/RTF1.cfm?pagename=Governance).

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### What is the Indiana Appellate Pro Bono Project?

The Project is a collaboration of the Indiana Pro Bono Commission and the Indiana State Bar Association Appellate Practice Section's Pro Bono Subcommittee. The Project helps low-income people find a pro bono (free) lawyer to represent them on appeal in civil cases.

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After you apply the Indiana Pro Bono Commission will review your application for income eligibility. If you are eligible, the ISBA Appellate Practice Section's pro bono committee will review your application and attempt to find a lawyer able to take your case. The Project cannot guarantee that it can find a pro bono attorney to take your case, so you should not stop looking for other counsel to represent you in this proceeding. There is no right to counsel in civil cases. If you have a criminal case, you may contact the public defender's office.

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The Indiana Pro Bono Commission website has a directory of pro bono and legal aid providers by county on [this website](#). If you want to proceed "pro se" (without a lawyer), there are forms, rules, and other resources online:

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## Appellate Pro Bono Program

In 2002, the MSBA Appellate Practice section developed an Appellate Pro Bono Program in cooperation with the Minnesota Court of Appeals to address the increase in pro se litigation and develop a way to address this trend in the appellate courts. Appeals from denials of unemployment compensation was identified as a category of cases involving a significant number of pro se appellants who could benefit from attorney assistance in the appellate process. The program not only assists pro se litigants in need of representation, but also provides an opportunity for attorneys to fulfill their pro bono obligation and further their professional development.

The development and implementation of this important program is detailed in the article by Tom Boyd titled "Minnesota's Pro Bono Appellate Program: A Simple Approach that Achieves Important Objectives" reproduced here with the permission of the William H. Bowen School of Law, University of Arkansas at Little Rock and the author, Tom Boyd. The original article appeared in the Fall 2004 edition of The Journal of Appellate Practice and Process (6 J. App. Prac. and Process 295).

Those who have participated in Appellate Pro Bono Program have found the experience very rewarding, both professionally and personally. Training is provided to interested attorneys; please see the seminar materials titled "Pro Bono Representation in Unemployment Compensation Appeals."

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from the Minnesota State Bar Association

**The MSBA's Appellate Practice Section Presents**

**"Representing Pro Bono Clients in Unemployment Insurance Appeals"**

The Appellate Practice Section of the Minnesota State Bar Association is holding a CLE for attorneys and law students interested in participating in its unemployment insurance pro bono program. The program will include an overview of Minnesota's unemployment insurance laws, a session on practice tips from experienced UI attorneys, updates on legislation and case law, and a panel session with judges from the Minnesota Court of Appeals, followed by a question and answer session.

The Appellate Practice Session will provide a free pizza lunch.

**Speakers:**

**Lee Nelson**, MN Department of Employment and Economic Development

**Amy Lawler**, MN Department of Employment and Economic Development

**Tom Boyd**, Winthrop & Weinstine, PA

**Paul Banker**, Lindquist & Vennum

**Peter Knapp**, William Mitchell College of Law

**Chief Judge Matthew Johnson**, MN Court of Appeals

**Judge Natalie Hudson**, MN Court of Appeals

**Judge Kevin Ross**, MN Court of Appeals

**Judge Terri Stoneburner**, MN Court of Appeals

**3 hours of Standard CLE credits approved**  
(event code: 171671)

**Details:**

**Date:** Friday, October 5, 2012

**Time:** 8:30 a.m. to 1:00 p.m.

**Location:** Briggs & Morgan  
2200 IDS Center, 80 S. 8th Street  
Minneapolis, MN 55402

**Cost:**

**All Attendees: Free**

**Teleconferencing is not available.**

**Date:**

**October 5, 2012**

**Deadline to Register:**

**October 3, 2012**

**Register (Choose One):**

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## Pro Bono Unemployment Compensation Appeals Program

### Who We Are

This program provides volunteer attorneys to help people who are appealing a decision to deny their unemployment benefits. Clients are only eligible if they have already commenced an appeal in the Minnesota Court of Appeals.

### General Contact Information

Address

**Pro Bono Unemployment Compensation Appeals Program**  
Winthrop & Weinstein P.A., Suite 3500, 224 South 6th St. ([map](#))  
Minneapolis, MN 55402

Phone

(612) 604-6505

Email

[TBoyd@winthrop.com](mailto:TBoyd@winthrop.com)

### Choose a legal issue to learn more about the services provided:

[Unemployment Benefits](#)

[Unemployment Benefits](#)



## Pro Bono Unemployment Compensation Appeals Program

### Who We Are

This program provides volunteer attorneys to help people who are appealing a decision to deny their unemployment benefits. Clients are only eligible if they have already commenced an appeal in the Minnesota Court of Appeals.

### How to Get Help

You can contact this organization by:

Contact Type

Phone

Phone Number

(612) 604-6505

Hours

Monday

Normal business hours.

Tuesday

Normal business hours.

Wednesday

Normal business hours.

Thursday

Normal business hours.

Friday

Normal business hours.

### Who We Serve

Area(s)

Statewide

Income Guidelines

<http://www.lawhelpmn.org/organization/pro-bono-unemployment-compensation-appeals-p...> 10/6/2013

Clients are only eligible if they have commenced an appeal in the Minnesota Court of Appeals

Is this organization accessible by wheelchair?

YES

Does this organization provide access for the hearing impaired?

YES

## Type of Help

This group provides the following types of services based on your legal needs and its resources:

- Full Legal Representation

## General Contact Information

Address

**Pro Bono Unemployment Compensation Appeals Program**  
Winthrop & Weinstein P.A., Suite 3500, 224 South 6th St. ([map](#))  
Minneapolis, MN 55402

Phone

(612) 604-6505

Email

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THE JOURNAL OF  
APPELLATE PRACTICE  
AND PROCESS  
DEVELOPMENTS  
AND PRACTICE NOTES

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MINNESOTA'S PRO BONO APPELLATE PROGRAM: A  
SIMPLE APPROACH THAT ACHIEVES IMPORTANT  
OBJECTIVES

Thomas H. Boyd\*

The proliferation of pro se litigation strains both the resources and the operation of the nation's state and federal judicial systems. At the same time, the increasing number of unrepresented litigants offers a wealth of opportunities for lawyers to satisfy their professional and ethical obligations to render pro bono legal services. A prime example of this dynamic can be found in the development of pro bono appellate programs that provide needed legal services to pro se appellants, assist the appellate courts, satisfy ethical obligations, and advance professional development.

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\* Shareholder, Winthrop & Weinstine, P.A., Minneapolis, Minnesota. B.A., M.A., and J.D., University of Iowa. Mr. Boyd is Chair of the Pro Bono Committee of the Appellate Practice Section of the Minnesota State Bar Association; Pro Se Coordinator of the Minnesota Chapter of the Federal Bar Association; and Co-Chair of the Pro Se-Pro Bono Committee of the Council of Appellate Lawyers of the American Bar Association. Mr. Boyd thanks Matthew D. Spohn and Professor Colleen M. Barger for their invaluable assistance with this article.

The Appellate Practice Section of the Minnesota State Bar Association ("MSBA") recently developed an appellate pro bono program in cooperation with the Minnesota Court of Appeals. The program is aimed at developing, implementing, and analyzing procedures and materials utilized in providing pro bono appellate legal services to pro se parties in unemployment compensation appeals.<sup>1</sup> While neither perfect nor comprehensive, the program illustrates a fairly simple yet effective method for introducing volunteer lawyers to pro se parties who seek legal representation in their appeals. This Article describes the development and implementation of this appellate pro bono program to provide courts and bar associations a prototype for developing or improving their own appellate pro bono programs.

The Article is organized into five sections. First, it outlines the dynamics injected by pro se parties in civil litigation and the manner in which effective pro bono programs can simultaneously assist litigants as well as improve the administration of justice. Second, the Article describes how the MSBA's Appellate Practice Section went about developing a pro bono appellate program to provide representation in pro se appeals filed in the Minnesota Court of Appeals. Third, the Article explains how Minnesota's program was actually implemented and operated. Fourth, it briefly reports on the cases in which pro bono counsel were introduced to, and agreed to appear on behalf of, pro se appellants as part of the pilot program phase of this program. Finally, the Article addresses the future direction and development of this program.

#### I. THE DYNAMICS OF PRO SE LITIGATION AND POTENTIAL FOR PRO BONO OPPORTUNITIES

Federal and state courts throughout the country have experienced dramatic increases in pro se litigation.<sup>2</sup> The

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1. Barbara L. Jones, *Pilot Program Helps Workers Get Unemployment Benefits*, 7 Minn. Law. 1, 19 (Aug. 11, 2003).

2. See generally *Final Report of the Joint Task Force on Pro Se Litigation*, submitted to Conference of Chief Justices and Conference of State Court Administrators (July 29, 2002) [hereinafter *Joint Task Force on Pro Se Litigation*] (copy on file with Journal of Appellate Practice and Process); *A National Conference on Pro Se Litigation: A Report*

challenge posed by the swelling ranks of self-represented litigants is now recognized as one of the highest priorities for the courts.<sup>3</sup> The increase in pro se litigants in the American justice system shows no signs of subsiding, and appellate courts have not been spared from this growing trend.<sup>4</sup>

The increase in pro se litigation offers a complementary increase in opportunities for lawyers to render pro bono legal services. The American Bar Association has formally encouraged lawyers to provide legal services to those who cannot afford it since adopting the original Canons of Ethics nearly a century ago,<sup>5</sup> and it continues to promote pro bono work in the provisions of the Rules of Professional Conduct.<sup>6</sup> In Minnesota, for example, the Supreme Court imposes an aspirational goal for each lawyer "to render at least 50 hours of pro bono publico legal services per year."<sup>7</sup>

The substantial increase of pro se litigation, particularly in appellate proceedings, presents a prime opportunity for attorneys to provide significant assistance to parties and courts alike, while meeting their professional and ethical obligations, by providing much needed pro bono legal services.

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*and Update* (Am. Judicature Socy. 2001); Conference of State Court Administrators, *Position Paper on Self-Represented Litigation* (Aug. 2000) (copy on file with Journal of Appellate Practice and Process); Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (Am. Judicature Socy. 1998).

3. *Joint Task Force on Pro Se Litigation*, *supra* n. 2, at 3.

4. See e.g. *Courts of Appeals Facilitate Handling of Pro Se Cases*, Third Branch (July 1995) (available at <http://www.uscourts.gov/ttb/jul/ttb/prose.htm>); 2002 Annual Report of Administrative Office of the U.S. Courts 115-118, tbl. B-9, *U.S. Courts of Appeals—Pro Se Appeals Commenced and Terminated, by Circuit During the 12-Month Period Ending September 30, 2002*.

5. See Patrick R. Burns, *Pro Bono: It's Good and It's Good For You!* <http://www.courts.state.mn.us/lprb/fe041999> (originally published in *Minnesota Lawyer*, Apr. 19, 1999) (accessed Sept. 19, 2003). Canon 12 provided in part:

A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration . . . In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

*Id.* (quoting Canons of Ethics canon 12 (American Bar Assn. 1908)).

6. *Id.*

7. Minn. R. Prof. Conduct 6.1.

*A. Challenges Posed by Pro Se Parties in the Appellate Process*

Parties engage in pro se litigation for a variety of reasons. Some individuals simply prefer to represent themselves without assistance of counsel. Perhaps they do not like lawyers, or they believe they can represent themselves as well as or better than an attorney could. However, many parties wish to have an attorney but are unable to afford counsel. Regardless of their motivation, pro se litigants inject a host of serious issues and challenges for both the courts and other parties who are represented by counsel.<sup>8</sup>

First, self-represented litigants impose additional burdens and demands on court staff and resources compared to attorney-represented litigants.<sup>9</sup> Specifically, they require assistance in understanding and following appropriate procedures,<sup>10</sup> and they need greater assistance in correcting mistakes caused by their lack of legal training and experience.<sup>11</sup> Moreover, interaction and communication between court staff and pro se litigants may also raise ethical and legal concerns because “[a]t times their requests for assistance [from court staff] may cross the gray line between legal information and legal advice.”<sup>12</sup>

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8. The Conference of Chief Justices and the Conference of State Court Administrators recently addressed the dramatic and serious impact that growing pro se litigation has on the justice system:

A number of social, economic and political factors—especially the rising cost of legal representation relative to inflation, decreases in funding for legal services for low-income people, and increased desire on the part of litigants to understand and to actively participate in their personal legal affairs—are believed to be at the root of the increase. Regardless of the underlying causes, however, *the trend toward self-representation reflects a significant deviation from a fundamental assumption by the courts—namely, that litigants are represented by licensed attorneys who are trained in applicable law and court rules.* The influx of large numbers of litigants who may not be informed about law and court procedures poses significant implications for the administration of justice—especially, demands on court staff and resources and ethical dilemmas about how to compensate for self-represented litigants’ lack of knowledge without jeopardizing judicial requirements of neutrality and objectivity.

*Joint Task Force on Pro Se Litigation, supra* n. 2, at 3 (footnote omitted) (emphasis added).

9. *Id.* at 3-4.

10. *Id.* at 3.

11. *Id.*

12. *Id.* at 3 & n. 5 (noting concerns about the unauthorized practice of law and citing John M. Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five*

Second, counsel face challenges when dealing with pro se litigants whose interests are adverse to their own clients. Of course, express professional rules of conduct set out the manner in which an attorney shall deal with unrepresented parties.<sup>13</sup> However, these rules only curtail the manner in which an attorney may communicate with an unrepresented party; they do not explicitly address how an attorney should proceed so as not to take undue or unfair advantage of a pro se litigant. The Joint Task Force on Pro Se Litigation ("Task Force") observes that

[m]any lawyers dislike participating in court proceedings when the opposing party is self-represented, as they often find it awkward to represent their client's interests without appearing to take unfair advantage of the self-represented litigant's relative lack of knowledge and experience and risking the animosity of the trial judge.<sup>14</sup>

Third, pro se litigation "challenge[s] the neutral role of judges,"<sup>15</sup> given that the judicial canons impose competing and sometimes conflicting obligations on courts vis-à-vis pro se litigants. On one hand, judges must maintain impartiality toward all parties.<sup>16</sup> On the other hand, judges must "accord to every person who has a legal interest in a proceeding, or person's lawyer, the right to be heard according to law."<sup>17</sup> When confronted with pro se litigation, says the Task Force, "[m]any judges find it difficult to reconcile the requirement to provide self-represented litigants with an opportunity for a fair hearing with the requirement to remain impartial"<sup>18</sup> due to the need to lead pro se parties through the necessary procedures. Thus, "[a]n uninformed or unprepared pro se litigant can place an

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*Years*, 84 *Judicature* 198 (Jan.-Feb. 2001); John M. Greacen, *No Legal Advice from Court Personnel! What Does That Mean?* 34 *Judges' J.* 10 (Winter 1995).

13. See Minn. R. Prof. Conduct 4.3.

14. *Joint Task Force on Pro Se Litigation*, *supra* n. 2, at 4.

15. *Report of the Minnesota Conference of Chief Judges, Committee on the Treatment of Litigants and Pro Se Litigation*, at 7 (Apr. 1996) (copy on file with Journal of Appellate Practice and Process).

16. Minn. Code of Judicial Conduct canon 3(A)(5).

17. *Id.* at 3(A)(7).

18. *Joint Task Force on Pro Se Litigation*, *supra* n. 2, at 4 (citing Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *Family Ct. Rev.* 36, 40 (2000)).

uncomfortable tension on the judicial search for impartial justice.”<sup>19</sup>

Finally, the presence of pro se litigants presents practical challenges for counsel and judges alike in terms of effective communications and other logistical considerations, particularly where the self-represented are viewed as annoyances “that clog court dockets and consume unnecessary amounts of court time and attention.”<sup>20</sup> For example, due to their lack of a legal education and experience, pro se litigants may focus on facts and issues that, while important to them personally, are not relevant or that interfere with or compromise the development of the evidentiary record and the resolution of the true factual and legal issues. Due to their lack of legal education, training, and experience, pro se litigants may have difficulty in effectively communicating through written submissions. In those circumstances, judges and court staff must expend greater resources in researching and deciding pro se cases due to the limited assistance that the pro se parties themselves can provide.

In summary, while individuals have the right to represent themselves in legal proceedings, the nation’s laws and justice system are based on an adversarial system in which all parties are assumed to be represented by competent counsel. When parties appear pro se, this assumption and the corresponding balance of procedures and rules are thrown off, jeopardizing fairness and equity in the final result.

*B. Programs Developed in Response to Pro Se Parties  
in Appellate Proceedings*

Among the responses of the bench and bar to the increase in self-represented litigants are the developments of self-help centers, one-on-one assistance programs, promotion of unbundled legal services, technological innovations, and collaborative programs.<sup>21</sup> While these programs primarily focus on pro se litigation at the trial court level, many methods and programs have been developed to address the increase of pro se

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19. *Report of the Minnesota Conference of Chief Judges*, *supra* n. 15, at 7.

20. *Joint Task Force on Pro Se Litigation*, *supra* n. 2, at 4.

21. *Id.* at 5-9.

litigants in appellate proceedings, varying in terms of their focus and their complexity.

The first point of contact between pro se parties and the justice system is the clerk's office. Many appellate courts have endeavored to sensitize the clerk of court's staff to the needs of pro se litigants. For example, the Missouri Court of Appeals, Western District, provides pro se appellants with detailed procedural information.<sup>22</sup> The attorneys and administrative personnel who staff the clerk's offices for the New York Court of Appeals also provide extensive assistance to pro se litigants and direct those parties to relevant resources, including outlines of the court's civil and criminal jurisdiction and information on the court's website.<sup>23</sup>

While staff personnel endeavor to be helpful to pro se appellants, these activities are tempered by concerns that court employees should not provide legal advice. For example, while the Ohio First District Court of Appeals assists pro se litigants by providing them with various forms, many of the pro se litigants have problems completing the forms and making other submissions, consequently seeking assistance from the clerk's office.<sup>24</sup> Indeed, as a result of these types of concerns, the Council of Chief Justices for the State of Texas has expressly barred the clerks' staffs of the Texas Court of Appeals from advising pro se litigants or providing pro bono representation, even if their cases are pending in courts outside of their jurisdiction.<sup>25</sup>

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22. E-mail from Terence Lord, Clerk of the Court, to Thomas H. Boyd (Nov. 15, 2002) (on file with Journal of Appellate Practice and Process).

23. Ltr. from Marjorie S. McCoy, Deputy Clerk, N.Y., to Thomas H. Boyd (Nov. 20, 2000) (on file with Journal of Appellate Practice and Process). The Clerk's Office for the New York Supreme Court, Appellate Divisions, provides similar assistance to pro se appellate litigants. *See e.g.* Ltr. from Catherine O'Hagan Wolfe, Clerk of the Court, N.Y. App. Div. 1st Dept., to Thomas H. Boyd (Jan. 22, 2003) (on file with Journal of Appellate Practice and Process); Ltr. from James Edward Pelzer, Clerk of the Court, N.Y. App. Div. 2d Dept., to Thomas H. Boyd (Nov. 19, 2002) (on file with Journal of Appellate Practice and Process).

24. E-mail from Tom Rottinghaus, Administrator, Ohio App. 1st Dist., to Thomas H. Boyd (Nov. 20, 2002) (on file with Journal of Appellate Practice and Process) ("Dealing with the pro se litigant is a major concern since the employees of the Court can not provide legal advice. We try to assist the litigants in any way we can by explaining the rules; however, when it comes to preparing a brief, there is little we can do.")

25. Ltr. from Linda Rogers, Clerk of the Court, Tex. App. 6th Dist., to Thomas H. Boyd (Nov. 13, 2002) (on file with Journal of Appellate Practice and Process).

Recognizing the limits on staff time as well as these ethical concerns, several courts and bar organizations have prepared written materials to assist pro se parties. For example, the Supreme Court of Delaware, the Wisconsin Supreme Court, and the Georgia Court of Appeals have developed "Citizen Guides" that describe the judicial system and the court's procedures, answer frequently asked questions, and provide forms and checklists for use by pro se parties.<sup>26</sup> Other courts place responses to frequently asked questions on their websites.<sup>27</sup>

Some bar associations and appellate courts have developed fairly extensive written materials to assist pro se litigants, such as the Illinois Appellate Lawyers Association's extensive and updated *Guide to Civil Appellate Procedure for Pro Se Litigant*;<sup>28</sup> the Missouri Court of Appeals, Eastern District's *The ABC's of Appellate Practice*;<sup>29</sup> and, most recently, the Appellate Practice Section of the Florida Bar's *The Pro Se Appellate Handbook*.<sup>30</sup>

The federal judiciary's traditional practice of appointing counsel to represent indigent criminal defendants on appeal has resulted in the development of some pro bono programs for civil appellants. Specifically, while the federal courts of appeal have procedures for facilitating representation through the Criminal Justice Act ("CJA"), some of these courts have gone a step further to develop programs to provide pro bono representation

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26. See e.g. ltr. from Cathy L. Howard, Clerk of the Court, Del., to Thomas H. Boyd (Nov. 14, 2002) (on file with Journal of Appellate Practice and Process); ltr. from William L. Martin, III, Administrator/Clerk, Ga. App., to Thomas H. Boyd (Nov. 12, 2002) (on file with Journal of Appellate Practice and Process); ltr. from Cornelia G. Clark, Clerk of Supreme Court, Wis., to Thomas H. Boyd (Nov. 15, 2002) (on file with Journal of Appellate Practice and Process).

27. E-mail by Marcia Mangel, Clerk of Court, Ohio, to Thomas H. Boyd (Nov. 13, 2002) (on file with Journal of Appellate Practice and Process); ltr. from Kenneth A. Richstad, Clerk, S.C. App., to Thomas H. Boyd (Nov. 13, 2002) (on file with Journal of Appellate Practice and Process).

28. Ltr. from Steven M. Ravid, Clerk, Ill. App. 1st Dist., to Thomas H. Boyd (Nov. 19, 2002) (on file with Journal of Appellate Practice and Process); ltr. from Robert J. Mangan, Clerk of the Court, Ill. App. 2d Dist., to Thomas H. Boyd (Nov. 14, 2002) (on file with Journal of Appellate Practice and Process).

29. Ravid, *supra* n. 28.

30. Dorothy F. Easley, *The Appellate Practice Section Moves to Alleviate Explosive Appellate Nightmare; Publishing the Pro Se Appellate Handbook*, 11 Record (newsletter of Fla. Bar App. Prac. Sec.) 1 (Spring 2003) (available at <http://www.flabarappellate.org/pdf/app-0403.pdf>).

to pro se litigants in civil appellate proceedings. The United States Court of Appeals for the Seventh Circuit operates an appointed counsel program that is coordinated through the Counsel to the Circuit Executive.<sup>31</sup> While this program focuses primarily on the representation of indigent litigants in criminal appeals under the CJA, the program is also used when the court determines that assistance of pro bono counsel would aid the court in prisoner civil rights cases or other civil appeals.<sup>32</sup>

The longest standing and most developed approach to pro se litigation in federal civil appellate proceedings is the Ninth Circuit's Pro Bono Program, established by judicial conference resolution in 1993.<sup>33</sup> The Ninth Circuit concluded that "complex non-frivolous pro se appeals would be greatly assisted in many cases by the appointment of pro bono counsel for the litigant" and the court therefore undertook to establish "a comprehensive Pro Se Project to provide for the appointment of pro bono counsel in complex civil appeals while a party is proceeding pro se."<sup>34</sup> Under this program, pro se appeals are reviewed by the court's pro bono coordinator, under the supervision of a staff attorney, to determine whether counsel should be appointed.<sup>35</sup> An attorney in each district of the circuit coordinates and maintains panels of private volunteer attorneys for the program.<sup>36</sup> The court's pro bono coordinator uses these district coordinators to recruit volunteers for the program and locate counsel for appointment in eligible cases.<sup>37</sup> Cooperating with law school clinics located within the Ninth Circuit, the program also facilitates participation by qualified law students.<sup>38</sup>

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31. *Seventh Circuit Court of Appeals' Appointed Counsel Program*, De Novo (newsletter of Wis. Bar App. Prac. Sec.) at 3 (Spring 2003) (available at <http://www.wisbar.org/sections/appelprac/news/2003sprapp.pdf>).

32. *Id.*

33. See 9th Cir., *Pro Bono Program 1* (on file with Journal of Appellate Practice and Process); 1993 9th Cir. Jud. Conf. Resolution No. 3, *Encourage Ninth Circuit Attorneys to Participate in the Pro Se Representation Project* (submitted by Ninth Circuit Lawyer Representatives Coordinating Committee and Ninth Circuit Senior Advisory Board) (on file with Journal of Appellate Practice and Process).

34. 1993 9th Cir. Jud. Conf. Resolution No. 3, *supra* n. 33.

35. 9th Cir., *Pro Bono Program*, *supra* n. 33, at 2.

36. *Id.* at 1.

37. *Id.*

38. *Id.* at 6.

Some state appellate courts, like the federal appellate courts, have also developed formal pro bono programs. The New Mexico Court of Appeals has one of the most highly developed programs among state appellate courts, one which came about as a result of an extensive study focusing on how that court was dealing with pro se appellants.<sup>39</sup> Staff attorneys and judges drafted forms for docketing statements for criminal cases, general civil cases, and domestic relations cases; a certiorari petition form for administrative appeals; notice of appeal forms; applications for free process and service of process; and a pamphlet responding to frequently asked questions, available in all of the district court clerks' offices.<sup>40</sup> The court commissioned an instructional CD to explain how appeals proceed in the court of appeals and to provide interactive instructions for filling out the forms.<sup>41</sup> In addition, the court compiled a list of attorneys agreeable to representing pro se litigants for free or for a reduced fee where the court has determined those litigants would benefit from and welcome such assistance.<sup>42</sup> Finally, the court initiated a program where senior staff attorneys are "on call" to take questions from pro se litigants.<sup>43</sup>

In some states, the courts and state bar associations have collaborated in very effective pro bono appellate programs through which the bar coordinates a pool of volunteer lawyers to provide pro bono representation where the court has deemed pro se parties need legal counsel. The New Hampshire Supreme Court and the New Hampshire Bar Association have two pro bono programs, each of which refers income-eligible parties to volunteer lawyers.<sup>44</sup> The Appellate Practice Section of the Wisconsin State Bar enlists volunteer attorneys who regularly accept appointments to represent pro se litigants in cases

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39. Ltr. from Bridget Gavahan, N.M. App. Senior Staff Attorney and Chair, N.M. Appellate Courts' Pro Se Committee, to Thomas H. Boyd (Nov. 13, 2002) (on file with Journal of Appellate Practice and Process).

40. *Id.*

41. *Id.* at 2.

42. *Id.*

43. *Id.*

44. Ltr. from Stephanie A. Bray, Wiggin & Nourie, P.A., to Thomas H. Boyd (Dec. 8, 2003) (on file with Journal of Appellate Practice and Process).

identified by the state's appellate courts as raising significant legal issues.<sup>45</sup>

## II. DEVELOPMENT OF MINNESOTA'S PRO BONO APPELLATE PROGRAM

The Minnesota courts have spent considerable time examining the challenges posed by the increase in pro se litigation and developing constructive methods for addressing this emerging trend.<sup>46</sup> Recognizing that “[p]ro se litigation is on the rise in Minnesota,” the court leadership has concluded that “[t]he need to deal more effectively with this increase is one of the top leadership goals of the Conference of Chief Judges.”<sup>47</sup> Declaring that “[f]ull legal representation for all litigants should be encouraged wherever possible,” the Minnesota judiciary determined that the “Minnesota state court system should join in a partnership with bar associations and the legal profession to increase the number of attorneys providing pro bono representation.”<sup>48</sup> As a result, considerable progress has been made in assisting pro se litigants at the trial court level.<sup>49</sup> However, until recently, no formalized approach made pro bono legal services available to pro se litigants in state civil appellate proceedings.<sup>50</sup>

Shortly after its formation in 2001, the Appellate Practice Section of the Minnesota State Bar Association determined that one of its objectives was to promote pro bono appellate legal services. As a starting point, the Appellate Practice Section developed a list of attorneys willing to provide pro bono legal

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45. Robert R. Henak, “Do Good”: *APS Pro Bono Appeals Program*, De Novo (newsletter of Wis. Bar App. Prac. Sec.) 6 (Summer 2004) (available at <http://www.wisbar.org/sections/appelprac/news/2004summer.pdf>).

46. See generally *Report of the Minnesota Conference of Chief Judges*, supra n. 15; *Report of the Committee on the Role of Judges in Pro Bono Activity* (Dec. 1994).

47. *Report of the Minnesota Conference of Chief Judges*, supra n. 15, at 4.

48. Hon. John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 Wm. Mitchell L. Rev. 297, 299 (1998) (citations omitted).

49. See e.g. *id.* at 307-312.

50. It should be noted that pro bono assistance has been provided by volunteer attorneys through the Appellate Office of the State Public Defender in criminal appeals on an ad hoc basis. Interview with Teddie Gaitis and Larry Hammerling (Nov. 6, 2003).

services in civil appeals.<sup>51</sup> The Section then began to identify potential sources of pro bono appellate opportunities.

Upon developing a list of approximately thirty interested attorneys, the Section's representatives met with the Chief Judge of the Minnesota Court of Appeals, the Honorable Edward Toussaint, Jr. The Minnesota Court of Appeals disposes of more than 2,000 cases per year,<sup>52</sup> and it must issue an opinion within ninety days of hearing oral argument in a given case.<sup>53</sup> Accordingly, the court moves a lot of cases along at a fairly brisk pace and only rarely interrupts the processing of any particular case. The Section sought to explore whether Minnesota's intermediate appellate court had any interest in developing a pro bono program to assist parties who would otherwise be proceeding pro se in civil appeals.

Following a general discussion on the subject and a positive reaction from Chief Judge Toussaint, the Section put together a "brainstorming" meeting of interested parties that included Chief Judge Toussaint, representatives of the Section, representatives of the clerk's office, court library, public defender's offices, staff attorneys, and other interested individuals.<sup>54</sup> This meeting was highly productive in identifying and addressing several threshold issues (discussed below) as well as developing the concept of a pilot program to evaluate procedures, develop materials, and otherwise gather information regarding the operation of a pro bono appellate program.

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51. The Appellate Practice Section developed the list by seeking volunteers through communications with its members on its listserv, as well as through announcements at section meetings and programs. Interested attorneys were directed to contact the chair of the pro bono subcommittee who, in turn, was responsible for compiling a list of names and contact information of the individual volunteers.

52. Minnesota State Courts 2002-2003 Annual Report at 15 (available at [http://www.courts.state.mn.us/documents/CIO/annualreports/2003/mjb\\_annual\\_report\\_2003.pdf](http://www.courts.state.mn.us/documents/CIO/annualreports/2003/mjb_annual_report_2003.pdf)).

53. Minn. Stat. § 480A.08, subdiv. 3(a) (Westlaw current through 2004 Reg. Sess.).

54. In addition to Chief Judge Toussaint, the meeting was also attended by Frederick K. Grittner, Clerk of Appellate Courts; Anne L. Wyneken, Staff Attorney with the Minnesota Court of Appeals; Barbara Golden, with the Minnesota Law Library; Jill Frieders, a family law attorney from Rochester; Mary Drummer, Chair of the MSBA's Family Law Section; Larry Hammerling, of the Minnesota Public Defender's Office; Michael Schechter, Chair of the MSBA's Appellate Practice Section ("Section" or "Appellate Practice Section"); Patrick Burns, who is on the board of Volunteer Lawyers Network ("VLN"); and Thomas H. Boyd, Chair of the Section's Pro Bono Subcommittee.

*A. Determining Sponsorship of and Responsibility  
for the Pro Bono Program*

Among the most significant and defining of the threshold issues in developing a pro bono appellate program was the extent to which the Minnesota Court of Appeals would be involved in the program. The court's commitment to the prompt processing of all cases, as well as its limitations on staff resources, posed practical restrictions on the extent to which it could participate in arranging for counsel to represent pro se litigants.<sup>55</sup> Even if these practical obstacles did not exist, administering a program to appoint pro bono counsel would require the development of criteria to identify appropriate cases and procedures for introducing volunteer lawyers into those cases.<sup>56</sup>

Given these challenges, it became apparent that, at least initially, Minnesota's program would have to be operated by an outside sponsor who could identify volunteer lawyers and introduce them to pro se litigants. Under such an arrangement, the court would be advised and updated as to the activities of the sponsoring organization, and it could draw upon the panel of volunteer lawyers developed by that organization in the event it chose to appoint counsel in any given case. Ultimate responsibility for operating the program, however, would reside outside the court system.

The Appellate Practice Section was the obvious choice to serve as the sponsoring organization because it had already assembled a list of lawyers willing to take on pro bono appellate matters and had already put together a subcommittee of volunteer attorneys to assist in the development and operation of a pro bono appellate program.

*B. Developing a Method for Identifying and Screening Cases*

As the sponsoring organization, the Appellate Practice Section had to develop appropriate methods and procedures for

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55. The group's discussions on this and other issues are summarized in a July 2, 2002, memorandum by Thomas H. Boyd, "Minnesota Court of Appeal [sic] Pro Bono Panel/July 1, 2002 Meeting" (on file with Journal of Appellate Practice and Process).

56. *Id.*

identifying appropriate cases and eligible pro se litigants. While one option would have been for the Section to review and screen all cases filed with the Minnesota Court of Appeals by pro se litigants, requiring the development of screening criteria and procedures, such an approach would also require substantial time and resources. A less demanding and more realistic alternative for the busy volunteer members of the Section, however, was a program in which the pro se litigants would “self select.” After being informed of the availability of pro bono assistance, interested pro se litigants could apply to the Section for assistance. This approach avoids the need for an ongoing review of all pro se appellate matters, and the self-selection procedure automatically excludes those pro se litigants who simply do not wish to have professional legal representation.<sup>57</sup>

*C. Considerations in Determining Eligibility for  
Pro Bono Appellate Services*

Having opted for the self-selection approach, the Appellate Practice Section then had to determine who would be eligible to receive information concerning this program. There were legitimate concerns that volunteer legal services be made available only to pro se litigants of limited financial means who could not hire counsel on a traditional pay-as-you-go basis.<sup>58</sup> The Section had to either develop a process for evaluating financial need or identify categories of cases where the financial need of a party is already established or can reasonably be presumed.

Furthermore, the program was not intended to put pro bono legal services in competition with the private bar, where representation might be available through the private bar on a contingent fee basis. Instead, the pro bono program would be aimed at making voluntary legal services available to individuals who were not able to afford such services *and* to whom such services were not otherwise available.<sup>59</sup> At the same time, the

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<sup>57.</sup> *Id.*

<sup>58.</sup> *Id.*

<sup>59.</sup> *Id.*

Section felt that the pro bono program should not exclude individuals who, due to their limited financial means, are eligible to receive representation through existing public law or legal services organizations. On the contrary, it was felt that the pro bono program could provide supplemental resources for the representation of a greater number of underprivileged or impoverished litigants.

An additional concern involved the extent to which the subject matter of the case or type of cases might involve highly charged social and political issues. There were legitimate concerns that providing pro bono legal services to litigants in controversial cases might create dissent among the supporters and members of the bar, the public, or the court.

Finally, it was important to offer voluntary legal services in areas of the law or types of cases where pro se parties regularly appear and in which representation by counsel would be welcomed and prove beneficial to the parties and the court alike.

#### *D. Selecting Unemployment Compensation Cases for the Pilot Program*

Eventually, the Appellate Practice Section developed a plan to conduct a pilot program involving appeals from denials of unemployment compensation benefits. Unemployment cases had been on the rise as a result of the difficult economy.<sup>60</sup> In the past five years, the Minnesota Court of Appeals has averaged approximately 127 unemployment cases per year, or 5.9 percent of its docket,<sup>61</sup> and in all likelihood, the number of appeals from unemployment compensation cases will increase as the number of unemployment compensation claims increases.<sup>62</sup>

The Court of Appeals had previously identified this category of cases as involving a significant number of pro se

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60. Jones, *supra* n. 1, at 19.

61. *Id.*

62. The number of claims filed by Minnesotans has substantially increased during each of the past three years. See the statistics at the Minnesota Department of Employment and Economic Development's website at <http://www.deed.state.mn.us/lmi/> (accessed Nov. 14, 2004). See also Marshall H. Tanick & Brian R. Dockendorf, *Is There Gold in Those Hills? Shifting Contours of Unemployment Compensation Law*, 60 *Bench & Bar* 17, 18 (Nov. 2003) (discussion of increase in unemployment compensation claims and corresponding appeals).

appellants<sup>63</sup> who could benefit from attorney assistance in the appellate process<sup>64</sup> and in framing and briefing the relevant issues on appeal.<sup>65</sup> In fact, the clerk's office had already prepared a packet of written materials aimed at assisting pro se litigants in conducting appeals from the denial of unemployment compensation benefits.<sup>66</sup> These packets provided a natural vehicle for communicating the program to interested pro se litigants through the "self-select" approach, and the clerk's office was willing to place a written description of the pro bono appellate program in the existing packets.

In addition, this was an area in which the pro se parties were assumed to be in financial need, as evidenced by Minnesota law waiving filing fees,<sup>67</sup> transcript costs,<sup>68</sup> and cost bonds<sup>69</sup> in unemployment compensation appeals. Thus, the Section could assume that these pro se litigants were in financial need; it would not have to conduct independent evaluations of individual situations in order to determine eligibility.

Nor was this area of law one in which the volunteer attorneys would be competing with the private bar. These cases involve the payment of relatively modest benefits. While these benefits are essential to the welfare of the applicants, they do not typically justify the engagement of counsel at a standard hourly rate or under a contingent fee arrangement. Further, there is no statutory right to recover attorneys' fees under Minnesota's unemployment compensation laws. Thus, pro bono legal services are the only realistic prospect of securing representation for those pro se litigants who have appealed the denial of unemployment compensation benefits.

Moreover, Minnesota's unemployment compensation laws present a fairly straightforward area of the law that can be mastered without a great deal of difficulty. The unemployment

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63. Under Minnesota law, parties who seek appellate review of the final administrative denial of unemployment compensation benefits are actually referred to as "relators." However, they will be referred to as "appellants" for purposes of this Article.

64. Boyd Memorandum, *supra* n. 55.

65. Jones, *supra* n. 1, at 19.

66. Facsimile transmittal from Frederick K. Grittner to Thomas H. Boyd (Oct. 3, 2002) (enclosing pro se packet materials) (on file with Journal of Appellate Practice and Process).

67. Minn. Civ. App. P. R. 103.01, subdiv. 3(g).

68. Minn. Stat. § 268.105, subdiv. 7(c) (Westlaw current through 2004 Reg. Sess.).

69. Minn. Civ. App. P. R. 107.02(g).

compensation laws are fully codified in a single chapter of the Minnesota Statutes, and the case law focuses on the application of a few basic principles. In short, attorneys could pick up and handle these types of cases effectively even if they had no prior experience with unemployment compensation benefits law.<sup>70</sup>

It should be noted that the unemployment compensation benefit program is administered by the Minnesota Department of Employment and Economic Development ("Department"), which has its own attorneys who litigate these benefit claims through appeal. Early on in the development of the pilot program, the Section contacted counsel for the Department to make them aware of the program and reassure the Department that neither MSBA nor the Minnesota Court of Appeals intended to "target" the Department or pursue some type of controversial agenda by implementing this program. The Department's counsel were actually quite appreciative to have pro bono counsel involved and were extremely helpful with and supportive of the program.<sup>71</sup>

Finally, Chief Judge Toussaint indicated that the Court of Appeals would agree to hear oral argument in these cases where a volunteer attorney had agreed to represent the pro se appellant.<sup>72</sup> Typically, pro se appeals are submitted on the briefs without oral argument. Thus, the fact that the court was willing to provide oral argument made these cases much more appealing from the standpoint of professional development and personal satisfaction.

### III. MINNESOTA'S UNEMPLOYMENT COMPENSATION APPEALS PILOT PROGRAM

#### *A. Communicating the Program to Pro Se Parties*

The clerk's office agreed to include a written description of the pilot program, along with sponsor and contact information,

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70. Boyd Memorandum, *supra* n. 55.

71. The Department's counsel has included Lee B. Nelson and his colleagues, Philip B. Bryne, M. Kate Chaffee, Linda Holmes, and Katrina I. Smith.

72. Boyd Memorandum, *supra* n. 55.

in the packets of information that it otherwise made available to pro se parties appealing adverse unemployment compensation determinations. Communicating the program in this way offered a much simpler, more efficient, and less expensive means than if the Appellate Practice Section had had to comb through the new case filings to identify and then communicate the program to eligible pro se parties.

The Section developed three descriptions of the program, each aimed at a different audience in order to achieve specific objectives:

- a master description to clarify for the court and the bar this program's objectives, sponsor, and practical details.<sup>73</sup>
- a narrative flow chart for volunteer lawyers describing, step by step, the program's mechanical workings.<sup>74</sup>
- a more general description of the program for pro se parties, intended to communicate information to lay people.<sup>75</sup>

The information provided to pro se litigants had to accurately summarize the program and procedures, yet be understandable to a non-lawyer. It had to provide interested pro se parties with contact information in order to obtain clarification or further information concerning the program.

#### *B. Introducing Volunteer Attorneys to Interested Pro Se Parties*

Included with the description of the pilot program in the clerk's office packet was an application form. It was then up to the individual party, should he or she desire pro bono legal representation, to promptly fill out and submit the application form to the Program Coordinator.<sup>76</sup> Once the appeal had been commenced and a request was received, the Appellate Practice Section then became responsible for finding a volunteer attorney to meet and confer with the pro se appellant.

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73. See *infra* app. A.

74. See *infra* app. B.

75. See *infra* app. C.

76. See *infra* app. D.

The Section concluded that, for a number of reasons, volunteer attorneys should not be expected to provide pro se litigants with meaningful consultation and opinions as to whether or not to file an appeal. First, the timeframes for initiating an appeal are more compressed in these types of cases. In contrast to a sixty-day time period that generally applies to most civil appeals under Minnesota law, an appeal from a decision by the Representative of the Commissioner must be commenced within thirty days. The Section did not want to discourage volunteer participation by presenting them with short-term deadlines and prospects for tardy filings of petitions for writ of certiorari or faulty service of such writs.

Second, an attorney who was not involved in the administrative proceedings would need some time to review the record in order to conduct a reasonable analysis and provide meaningful opinions and recommendations. In many cases, it is essential to review the hearing transcript in order to get a full understanding of the record. However, in most cases, the transcript is not prepared and available for review until after an appeal has been commenced.

Third, the Section did not want to create a situation in which the availability of volunteer lawyers would have the effect of increasing the number of appeals. The Section did not see its role as increasing the Court of Appeals' caseload, but instead sought to facilitate the more effective and efficient submission of cases that would otherwise be filed.

Finally, the Section determined that pro se parties who receive a meaningful review of their cases *after* their appeals have been filed are no worse off for having filed the appeals in order to have been eligible to confer with a volunteer lawyer about the merits. There are no out-of-pocket costs, as pro se parties are not required to pay a court filing fee or post a cost bond. Further, if pro se parties ultimately decide to withdraw their appeals, they are neither taxed any costs nor otherwise out of pocket for any amount, nor are they likely to suffer any other type of sanction.

*C. Form Engagement and Declination Letters*

The Appellate Practice Section was particularly concerned about documenting the status and scope of any engagement by the volunteer attorneys. Accordingly, the Section developed form letters for attorneys to use in either accepting or declining pro bono engagements once they had met with the clients and reviewed the cases. These letters, like the program description included in the pro se packet of materials, were written with the aim of communicating with a layperson.

The engagement letter is intended to confirm that the legal services will be provided free of charge.<sup>77</sup> It is further intended to explicitly limit the scope of the engagement to include only the unemployment compensation matter. This limitation is important because the client's termination from his or her employment may have resulted in other potential claims, such as wrongful termination, discrimination, defamation, and, in the case of union employees, violation of labor agreements. The letter is intended to clarify that, by accepting the representation in the unemployment compensation appeal, the volunteer attorney has not agreed to take on representation of other matters as well.

The Section also prepared a standard Notice of Appearance for use by attorneys who decided to take the case.<sup>78</sup> This form contains an express request for oral argument.

In contrast to situations in which the Court screens a case and determines that it has merit and would benefit from the appointment of counsel, pro se litigants in the pilot program are given the opportunity to meet with a volunteer lawyer before that lawyer evaluates the merits of the case. The Section therefore designed the program's procedures to avoid situations in which attorneys might agree to take a case and put in an appearance before actually having the opportunity to evaluate the merits of that case.

Toward this end, the Section incorporates a two-step process for responding to requests for pro bono assistance. Upon

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77. See *infra* app. E.

78. See *infra* app. H.

receiving a request, the Section identifies a volunteer lawyer willing to meet with the pro se party and review the case. After this initial meeting and review take place, the volunteer attorney and prospective client decide whether it will be appropriate to establish a professional engagement and for the attorney to enter a formal appearance in the proceedings.

The Section developed two types of letters for use in declining an engagement. Neither letter expresses any opinion concerning the merits of a party's particular case. However, they offer the volunteer lawyer the option of simply declining to take the case<sup>79</sup> or, alternatively, recommending that another attorney review the case.<sup>80</sup>

*D. Substantive Legal Aids and Primers on  
Unemployment Compensation Law*

The Appellate Practice Section recognized that many of the program's volunteers had little or no prior experience with unemployment compensation cases. Accordingly, the Section undertook to prepare outlines and assemble written materials on this topic to assist lawyers who agreed to take these cases. These materials include two outlines: "Unemployment Compensation in Minnesota," providing a general overview of the law; and "Unemployment Compensation before the Minnesota Court of Appeals," focusing specifically on the Minnesota Court of Appeals's review of agency decisions to either grant or deny unemployment compensation benefits.<sup>81</sup>

By coincidence, the Minnesota Legal Services Coalition was planning a continuing legal education program on unemployment compensation law at approximately the same time the Section was developing the pilot program, and the Section participated in planning this program. As a result, this training was made available free of charge to attorneys who had volunteered for the pro bono volunteer list. Likewise, these attorneys had access to the written materials developed for this

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79. See *infra* app. F.

80. See *infra* app. G.

81. Both outlines were authored by Anton J. Moch of Winthrop & Weinstine, P.A., and are on file with the author.

program, including several primers on unemployment compensation law and appellate practice and procedure.

#### IV. RESULTS OF MINNESOTA'S PILOT PROGRAM

The Appellate Practice Section's pro bono appellate pilot program officially commenced in November 2002, when the clerk's office included a description of the program in the packets of materials distributed to twenty-five consecutive pro se litigants. Of the twenty-five individuals who received these packets, eight contacted the Program Coordinator to request a volunteer attorney. All eight pro se litigants met with volunteer attorneys to review and consult on their respective cases. From this group, five eventually engaged counsel and were represented through the remainder of their appeal by an attorney.

The court affirmed the Commissioner's Representative in one of these cases.<sup>82</sup> Another of these initial cases was settled and, therefore, required no decision by the court.<sup>83</sup> In three cases, the court reversed the decision by the Representative of the Commissioner and either awarded or reinstated benefits to the relator.<sup>84</sup>

In *Judeh v. Lexmark International Inc.*, the former employee challenged the administrative finding that he had intentionally submitted false claims for commission payments.<sup>85</sup> With the assistance of counsel, the relator was able to secure a reversal of the agency determination by demonstrating that the evidence of the record "fail[ed] to show that relator engaged in conduct that evinced intent to defraud or to ignore his employer's interests."<sup>86</sup>

In *Thompson v. Dolphin Clerical Group*, the relator had been denied unemployment compensation benefits because she had allegedly failed without good cause to accept an offer of

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82. *Zivalich v. Unique Concepts Promotions, Inc.*, 2003 WL 21961391 (Minn. App. Aug. 19, 2003).

83. *Bertram v. Sheriffs Youth Program*, No. C1-02-2087.

84. *Hayes v. K-Mart Corp.*, 665 N.W.2d 550 (Minn. App. 2003), review denied (Sept. 24, 2003); *Judeh v. Lexmark Intl. Inc.*, 2003 WL 21961379 (Minn. App. Aug. 19, 2003); *Thompson v. Dolphin Clerical Group*, 2003 WL 21500175 (Minn. App. July 1, 2003).

85. *Judeh*, 2003 WL 21961379 at \*1-2.

86. *Id.* at \*3.

suitable employment.<sup>87</sup> However, with the assistance of counsel, the relator was able to obtain a reversal and reinstatement of her right to receive benefits by demonstrating that the offer she received, when “[v]iewed in its totality, . . . did not constitute suitable employment and, therefore, [her] rejection d[id] not disqualify her from benefits.”<sup>88</sup>

In *Hayes v. K-Mart Corp.*, the Minnesota Court of Appeals actually addressed what it characterized as “a matter of first impression in Minnesota,” involving the question of “[w]hether a breach of promise to grant a raise gives an employee good cause to quit” so as to retain eligibility to receive unemployment compensation benefits.<sup>89</sup> With the assistance of counsel, the relator was able to obtain a reversal and reinstatement of her right to receive benefits by establishing that her employer’s failure to grant a promised pay raise “violated her employment agreement and gave her good cause to quit.”<sup>90</sup>

#### V. FUTURE OF MINNESOTA’S PRO BONO APPELLATE PROGRAM

With the commencement of the pilot program, awareness of the Appellate Practice Section’s pro bono appellate program began to spread informally by word-of-mouth. As a result, the Program Coordinator has received a steady number of requests from other pro se parties seeking pro bono representation in their unemployment compensation appeals. Interest in the bar has likewise grown steadily, as the panel of volunteers has now increased to more than fifty lawyers. To date, the Section has succeeded in finding a volunteer attorney for nearly every pro se party requesting representation on appeal.

Based on this success, the Section has decided to continue and expand its pro bono program. In doing so, the Section has been able to build on the lessons learned through the pilot program and focus these pro bono appellate resources in even more positive and constructive ways.

In the future, the Section plans to work to coordinate partnerships with local legal services organizations such as

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87. *Thompson*, 2003 WL 21500175 at \*1.

88. *Id.* at \*2.

89. *Hayes*, 665 N.W.2d at 553.

90. *Id.* at 553-54.

Southern Minnesota Regional Legal Services (“SMRLS”)<sup>91</sup> and Volunteer Lawyers Network (“VLN”).<sup>92</sup> As in most states, these legal services organizations have experienced severe funding cuts which, in turn, have resulted in the reduction of their staffs and other resources. The Section hopes to alleviate some of the strain by providing volunteer lawyers to VLN and SMRLS to take on unemployment compensation appeals as well as other types of civil appeals that these organizations may determine to be suitable for pro bono assistance.

Additionally, the Section is seeking to develop a similar relationship with the Appellate Office of the State Public Defender for handling criminal appeals. The Public Defender has coordinated some pro bono work in the past on an ad hoc basis.<sup>93</sup> Like VLN and SMRLS, the Public Defender has recently suffered substantial decreases in funding. The Section proposes to work with the Public Defender to budget a quota of cases that can be handled by volunteer lawyers on a pro bono basis so as to alleviate at least some of the workload of the staff attorneys.

Finally, the Section will continue to maintain its list of volunteer attorneys and its methods for facilitating the introduction of those attorneys to pro se appellants so as to respond to any particular cases that either the Minnesota Court of Appeals or the Minnesota Supreme Court may identify as

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91. Originally founded in 1909 as the Free Legal Aid Bureau of Associated Charities of St. Paul, SMRLS is the oldest legal aid program in the state and provides free legal representation and advice to low-income residents of thirty-three counties in Southern Minnesota and to migrant farmworkers throughout Minnesota and North Dakota. SMRLS has offices in St. Paul, Mankato, Winona, Albert Lea, Worthington, Prior Lake, Rochester and Fargo, North Dakota. It also has outreach offices at the American Indian/Eastside Office in St. Paul at the United Cambodian Association. SMRLS serves an estimated 260,000 low-income persons in its service area who experience an estimated 100,000 legal problems each year.

92. VLN was established as the Legal Advice Clinics in 1966 with the mission of advising and representing economically disadvantaged people with legal problems, through volunteer attorneys and without charge to the clients. Today, VLN is the primary pro bono legal service provider in Hennepin County, serving the largest poverty population in Minnesota. Over time, VLN has expanded beyond its original core of legal advice clinics to provide legal services through a variety of programs, including telephone advice panels, outreach programs at homeless shelters, schools and community centers, statewide programs such as the bankruptcy screening and federal pro se projects, and Legal Access Point—a joint effort with the Hennepin County Bar Association and the District Court to provide legal assistance to pro se clients at the court.

93. See *supra* n. 50.

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suitable for appointment of qualified and experienced appellate counsel to represent the pro se appellant.

## CONCLUSION

The pro bono pilot program, while quite limited in scope, has been extremely successful from a number of different standpoints. First, the pilot program has allowed the Appellate Practice Section and the Minnesota Court of Appeals to develop a set of guidelines and procedures to operate a program through which pro bono appellate legal services may be offered to needy pro se appellants. Second, this pilot program has allowed the Section and the court to test these guidelines and procedures so as to evaluate how well they operate and identify ways to improve this type of program. Finally, the results on the merits in the cases where pro bono counsel were involved demonstrate the substantive benefit that can be derived from introducing volunteer attorneys to pro se appellants.

## APPENDIX A—DESCRIPTION OF PRO BONO PILOT PROGRAM

APPELLATE PRACTICE SECTION  
PRO BONO PILOT PROGRAM

*Program Sponsor* • The Appellate Practice Section of the Minnesota State Bar Association is sponsoring a pilot program through which volunteer attorneys may provide pro bono assistance to appellants in unemployment compensation appeals that are filed with the Minnesota Court of Appeals. The pilot program is organized through the MSBA the Appellate Practice Section, and is *not* operated or sponsored by the Minnesota Court of Appeals and *does not* involve the appointment of counsel by the Court.

*Program Objectives* • Toward this end, the pilot program is intended to (1) create opportunities for attorneys to render pro bono appellate legal services, (2) gather useful information and data, and (3) develop practices and procedures that may eventually be expanded to include pro bono opportunities with other types of appeals. Based upon the experiences and data collected from these cases, the Appellate Practice Section will develop proposals to expand the program into other areas of the law and/or address other needs. The ultimate goal of the pilot program is to enhance the Court's ability to dispense justice, promote the development of the law, and help individuals present their cases effectively for review.

*Scope of Program* • The pilot program has been limited to appeals relating to unemployment compensation benefits for several reasons. First, these types of cases typically involve a high number of pro se appellants. Second, there is a critical mass of such appeals sufficient to supply potential pro bono opportunities without overwhelming the currently available resources. Third, these cases involve a fairly straight-forward area of the law with the application of a statutory framework and developed case law. Fourth, these appeals generally involve a single appellant and the respondent's interests are represented by an attorney from the Minnesota Department of Economic Security.

*Eligibility* • All appellants who appeal from the denial of unemployment compensation benefits to the Minnesota Court of Appeals are eligible to participate in the pilot program. It is assumed that appellants in these types of appeals are of limited financial means. Indeed, the filing fee is waived under the appellate rules. Minn. Civ. App. R. 103.01, subd. 3(g). Accordingly, participants in this pilot program will not be required to establish financial eligibility. However, such eligibility requirements will

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likely have to be considered and implemented as part of future pro bono programs involving other types of appeals.

**Volunteer Panel** • The Appellate Practice Section has undertaken to develop and maintain a panel of volunteer attorneys who are willing to represent parties in appellate proceedings on a pro bono basis.

**Notification of Program** • Appellants who initiate appeals from decisions by the Commissioner of Economic Security denying their unemployment compensation benefits are provided a standardized packet of materials by the Clerk of the Appellate Courts. The Clerk will insert among these materials a written description of the pilot program along with an application form. If any of these individuals wishes to participate in the program, he or she will be advised by the written materials to fill out the form and submit both the form and a copy of their petition for writ of certiorari within five (5) business days of initiating their appeal to the Program Coordinator.

**Program Coordinator** • The Program Coordinator will be responsible for facilitating and monitoring the assignment of volunteer attorneys to interested appellants.

**Assignment Process** • Upon receiving an appellant's submission, the Program Coordinator will notify the members of the volunteer attorney panel of the appellant's case by e-mail and request prompt response by any panel members who are interested and able to assist with the applicant's case. The information contained in the e-mail will include the identities of appellant and respondent to facilitate conflict checks, as well as the appellant's descriptions of the Commissioner's decision and the issues in the appeal. The case will be assigned to the first panel member who can take the case.

**Initial Review and Consultation** • The volunteer attorney assigned to the case will contact the appellant and arrange to promptly meet with the appellant to review the appellant's case. If possible, this meeting should take place within five (5) business days after the attorney receives the assignment. The volunteer attorney should request the appellant to bring all of the documentation relating to the appeal and any of the underlying proceedings to this initial meeting.

**Post-Consultation and Review Procedures** • Upon meeting with the appellant, the matter may proceed in one of the following three ways:

(1) If, after consultation, the attorney does not believe the appellant has a meritorious appeal, then the attorney should so advise the appellant and decline to represent the appellant in the appellate proceedings. The attorney should promptly confirm the decision to decline representation by letter to the

appellant immediately following the meeting, and this letter should be copied to the Program Coordinator.

(2) If, after consultation, the attorney determines the appeal is meritorious and the appellant and the attorney mutually agree on the engagement of that attorney, then the attorney will undertake to represent the appellant in the appellate proceedings. The volunteer attorney should promptly confirm the engagement by letter to the appellant immediately following the meeting, and this letter should be copied to the Program Coordinator. Additionally, the attorney should immediately file a Notice of Appearance with the Clerk of the Appellate Courts.

(3) If, after consultation, the volunteer attorney determines the appeal has merit but, for whatever reason, the appellant and the volunteer attorney who reviewed the case do not agree on the engagement of that attorney, then the attorney shall immediately confirm this by letter to the appellant, and the letter should be copied to the Program Coordinator. The Program Coordinator will then notify the other members of the volunteer attorneys panel of the case by e-mail and request a volunteer to represent the appellant in the appellate proceedings. The case will be assigned to the first panel member to respond to the e-mail. The attorney who is then assigned to handle the appeal will be expected to transmit a formal engagement letter to the appellant with a copy to the Program Coordinator, and file a Notice of Appearance with the Clerk of Appellate Courts.

*Oral Argument* • The Court has agreed to grant oral argument in all cases in which pro bono counsel has been engaged.

*Post-Assignment Feedback* • Once the appeal is completed, the attorney assigned to the appeal will notify the appellant by letter that the engagement has been completed, and a copy of the letter should be sent to the Program Coordinator. The Program Coordinator will then request both the appellant and the volunteer attorney assigned to the case to complete a written questionnaire to obtain their respective feedback concerning the pilot program. The Program Coordinator will retain these questionnaires for review and future use.

APPENDIX B—PROCEDURES FOR ASSIGNING VOLUNTEER  
ATTORNEYS IN PRO BONO PILOT PROGRAM

**STEP NO. 1:** Pro se Appellant files Notice of Appeal to initiate appellate proceedings.

**STEP NO. 2:** Clerk's Office provides Appellant with packet of information that includes a description of the pilot program and an application form.

**STEP NO. 3a:** Appellant decides not to participate in the pilot program. PROCESS ENDS.

**STEP NO. 3b:** Appellant decides to participate in the pilot program and transmits a completed application form and the Notice of Appeal to the Program Coordinator.

**NOTE:** The Appellate Practice Section requests the Clerk's Office to provide the Program Coordinator with a complete list of all the cases in which pro se appellants are provided with the materials describing the pilot program to compare the number and percent of appellants who opt to participate in the pilot program with the overall number of appellants who are provided with the information regarding the pilot program.

**STEP NO. 4:** Program Coordinator puts information from the Appellant's application form in an e-mail that is transmitted via LISTSERV® to all panel members.

**STEP NO. 5:** Interested panel members run conflict checks to determine whether they are in a position to volunteer for possible assignment.

**STEP NO. 6:** All interested attorneys e-mail their response to the Program Coordinator.

**STEP NO. 7:** Program Coordinator assigns the case to the Attorney and confirms assignment with that Attorney by e-mail.

**STEP NO. 8:** Program Coordinator faxes the Appellant's form and Notice of Appeal to the Attorney assigned to the case.

**STEP NO. 9:** Attorney contacts the Appellant within five (5) business days and schedules a meeting to review the case with the Appellant.

**STEP NO. 10:** Attorney meets with Appellant, reviews the matter, and provides Appellant with an assessment of the merits.

**STEP NO. 11a:** Attorney declines the engagement and confirms this decision in a letter to the Appellant (with a copy to the Program Coordinator). PROCESS ENDS.

**STEP NO. 11b:** Attorney concludes that the appeal is meritorious, but is not in a position to take the case, and therefore transmits a letter advising

the Program Coordinator to reassign the case (with a copy to the Appellant).  
REPEAT STEPS 4 THROUGH 11.

**STEP NO. 11c:** Attorney accepts the case and transmits an engagement letter to the Appellant with a copy of the engagement to the Program Coordinator.

**STEP NO. 12:** Attorney files a Notice of Appearance with a copy to Program Coordinator.

**STEP NO. 13:** Attorney notifies Program Coordinator by letter when the appeal has been concluded.

**STEP NO. 14:** Program Coordinator transmits questionnaire to Appellant and Attorney to obtain feedback regarding the pro bono assignment.

APPENDIX C—NOTICE OF UNEMPLOYMENT COMPENSATION  
APPEAL PROGRAMNOTICE OF UNEMPLOYMENT COMPENSATION APPEAL  
PROGRAM SPONSORED BY MSBA'S APPELLATE PRACTICE  
SECTION

The Appellate Practice Section of the Minnesota State Bar Association has started a program for appellants in unemployment compensation appeals filed with the Minnesota Court of Appeals.

A panel of lawyers is offering free help to individuals without lawyers who have appealed from unemployment compensation determinations made by the Commissioner of Economic Security. Lawyers from this panel will meet with you *after* you filed your Petition for Writ of Certiorari with the Minnesota Court of Appeals. At that point, the lawyer will discuss the merits of your appeal and the possibility of free legal help.

If you would like to have your case reviewed, please send a completed copy of the attached form along with a copy of your Petition for Writ of Certiorari to *Program Coordinator, Unemployment Compensation Appeal Program, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, Minnesota 55101* no later than three (3) business days from the date of filing your Petition for Writ of Certiorari.

Once you send in this form and a copy of your Petition, your case will be reviewed by a lawyer who will give you a general opinion on the merits of your claim and offer advice on how to proceed. A lawyer may be assigned to represent you, but there is no guarantee. If a lawyer does represent you, it might not be the same lawyer who reviewed your case.

You are responsible for serving the conformed Writ of Certiorari issued by the Clerk, and the deadlines for getting a transcript, filing briefs and appendices, and performing all other obligations *will not* be suspended or changed if you participate in this program.

This program is *not* sponsored by the Court. Please *do not* contact the Minnesota Court of Appeals about this program. Call or e-mail the Program Coordinator listed above with any questions at 651-290-8505 or [tboyd@winthrop.com](mailto:tboyd@winthrop.com).

APPENDIX D—APPLICATION FORM FOR PRO BONO PILOT PROGRAM

MSBA APPELLATE PRACTICE SECTION  
PRO BONO PILOT PROGRAM

**Information About Employee Who Has Appealed:**

Employee's Name: \_\_\_\_\_

Employee's Address: \_\_\_\_\_

Employee's Telephone Number: \_\_\_\_\_

Employee's Fax Number: \_\_\_\_\_

Employee's E-mail Address: \_\_\_\_\_

**Short Description of Commissioner of Economic Security's Decision:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Information About Former Employer:**

Employer's Name: \_\_\_\_\_

Employer's Address: \_\_\_\_\_

Employer's Attorney: \_\_\_\_\_

**Short Description of the Claims and Issues Raised in Notice of Appeal:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## MINNESOTA'S PRO BONO APPELLATE PROGRAM

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## APPENDIX E—ENGAGEMENT LETTER [FORM]

[Date]

[Name]

[Address]

[City/State/Zip]

Re:[Case Name and Docket Number]

Dear [Name]:

I have agreed to represent you in your unemployment appeal as part of the pro bono pilot program organized by the Appellate Practice Section of the Minnesota State Bar Association. My help is free, but you will need to pay for any other costs in your case, such as the cost of getting a court transcript.

I may stop representing you if I decide that your case does not have a reasonable chance of success or if you do not cooperate with me in working on the case.

If you agree to these terms, please sign and return a copy of this letter.

I look forward to working with you in this matter.

Sincerely,

[Attorney Name]

## APPENDIX F—DECLINING ENGAGEMENT LETTER [FORM]

[Date]

[Name]

[Address]

[City/State/Zip]

Re:[Case Name and Docket Number]

Dear [Name]:

I am sorry to say that, for the reasons I discussed in our meeting, I have decided not to represent you in your unemployment compensation appeal.

Please remember that the deadlines and requirements in your appeal have not changed and you need to comply with these requirements.

I wish you the best of luck with your case.

Sincerely,

[Attorney Name]

## MINNESOTA'S PRO BONO APPELLATE PROGRAM

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## APPENDIX G—REFERRAL LETTER [FORM]

[Date]

[Name]

[Address]

[City/State/Zip]

Re:[Case Name and Docket Number]

Dear [Name]:

For the reasons I discussed in our meeting, I have decided not to represent you in your unemployment compensation appeal.

Although I and my firm cannot represent you, I think it is still worth you trying to get a lawyer. I encourage you to contact the Program Coordinator, at 651-290-8505 or tboyd@winthrop.com if you are still interested in free legal help.

In the meantime, please remember that the deadlines and requirements in your appeal have not changed and you need to comply with these requirements.

I wish you the best of luck with your case.

Sincerely,

[Attorney Name]

APPENDIX H—NOTICE OF APPEARANCE [FORM]

STATE OF MINNESOTA  
IN COURT OF APPEALS

_____	)	
Employee/Relator,	)	<b>NOTICE OF APPEARANCE</b>
	)	
v.	)	Department of Employment and
	)	Economic Development
_____	)	No.
Employer/Respondent,	)	
and Department of Employment	)	
and Economic Development,	)	
Respondent.	)	

PLEASE TAKE NOTICE that \_\_\_\_\_, Esq. of \_\_\_\_\_ hereby appears as attorney for \_\_\_\_\_, Employee/Relator in the above-captioned matter. This appearance is entered under the MSBA Appellate Practice Section’s Pro bono Pilot Program.

Employee/Relator requests Oral Argument at the location provided for in Rule 134.09, subd. 2, and further requests to submit formal briefs under Rule 128.02.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
[Attorney]  
[Address]  
[City/State/Zip]  
Attorney for Employee/Relator



# MONTANA

## The Montana Appellate Pro Bono Program

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## **1. Overview**

By Order dated May 22, 2012, the Montana Supreme Court established an Appellate Pro Bono Program (APBP or Program), which became effective July 1, 2012. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator (Coordinator) and the Court's Pro Se Law Clerk (PSLC).

The Program is designed to offer the assistance of appellate counsel to "qualified litigants." A "qualified litigant" is a self-represented litigant: (1) who meets the financial criteria established by the Montana Legal Services Association (MLSA)<sup>1</sup>, and (2) whose case, while under review by the Supreme Court, requires supplemental briefing or oral argument.

Once the Court requests supplemental briefing or oral argument, the PSLC and the Coordinator begin the process of matching a qualified pro bono attorney with a participating self-represented litigant. The parties to the appeal are notified of the Court's request and if the self-represented party wishes to participate in the Program, the MLSA determines if he or she meets the necessary financial criteria. Upon satisfaction of the financial criteria, the qualified litigant is provided a volunteer attorney to assist him or her in continuing the appeal before the Supreme Court.

If there are multiple parties to the appeal that are qualified litigants, the Coordinator will offer each of them an opportunity to participate in the Program and be assigned pro bono counsel. Additionally, except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

## **2. Recruiting Volunteer Attorneys**

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<sup>1</sup> Montana Legal Services Association or MLSA is a 501(c)(3) nonprofit organization providing legal information, advice and other services free of charge to low-income Montanans.

The Coordinator will engage in on-going recruitment efforts to enlist pro bono appellate lawyers who are willing to take on the cases that have been selected for participation in the APBP. When an attorney accepts a case through the Program, the attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. The Coordinator will make every effort to recruit attorneys from varied and wide-ranging areas of the law as well as seasoned attorneys to mentor younger lawyers and law students to assist the volunteer attorneys who are participating in the Program.

Recruited volunteer attorneys must complete and submit the APBP Attorney Registration Form, attached as **Exhibit A**. The detailed information derived from the registration and application forms allows matching attorney with appropriate cases.

### **3. Placing the Case with Pro Bono Counsel**

#### **a. Case Qualifications for Participation in Program**

The criteria for participation in the APBP are: (1) after initial briefing, the Court determines there are one or more issues in which the Court could benefit from additional briefing and possibly oral argument; and (2) the self-represented litigant is financially eligible. Financial eligibility occurs when the MLSA confirms that the self-represented party would qualify, or be eligible, for use of MLSA's services.

#### **b. Case Selection and Referral Process**

##### **i. Referral of individual cases**

Once the Court has identified a case for participation in the Program, the Court will direct the PSLC to notify the self-represented party in writing, **Exhibit B**. The following information should be provided:

- The case has been initially selected for participation in the Program.

- Participation in the APBP is purely voluntary and is contingent upon financial eligibility, which requires the litigant to submit a MLSA application and obtain a Certificate of Eligibility. The letter shall include specific instructions for submitting and returning the MLSA application.
- It is possible that placement of the case with a volunteer lawyer will include posting minimal, publicly available facts about the case through the Internet, exclusively for the purpose of placing the case.
- The self-represented litigant may decline to participate in the APBP by indicating so on the Application and returning the completed Request to Decide the Appeal form to the PSLC.

The PSLC will include with the notification letter: (1) an APBP “Application for Appointment of Pro Bono Counsel,” **Exhibit C**, (2) a MLSA Application for Assistance, **Exhibit D**, and (3) a “Request to Decide the Appeal,” **Exhibit E**. As indicated above, the “Request to Decide the Appeal” is for the litigant’s use when declining participation.

**ii. Self-represented party acceptance or rejection**

If the self-represented litigant is interested in participating in the Program, the litigant must complete and return the APBP litigant application and the MLSA Application for Assistance within fourteen (14) of the date of the letter. The PSLC will notify them of acceptance into the Program.

The self-represented litigant may decline to participate in the APBP by indicating so on the Application and returning the completed Application and Request to Decide the Appeal forms to the PSLC.

**iii. Determination of financial eligibility**

The self-represented litigant must complete the MLSA Application for Assistance, **Exhibit D**. This form may be completed and submitted electronically. Alternatively, the self-represented litigant may complete the hard copy of the form included in his or her information packet from the PSLC and return it to MLSA by mail. Boxes 3 and 7 of the Application need

not be completed by the self-represented litigant. In Box 8, the litigant need only request that MLSA determine financial eligibility for the APBP. After MLSA determines financial eligibility, MLSA will notify the PSLC who will, in turn, notify the self-represented litigant and the Coordinator. If the litigant meets the financial qualification requirements, the Coordinator will begin selection of counsel.

#### **iv. Putting pro bono counsel in place**

The Coordinator will review the applications and select an attorney for placement of the case. A mentor or law student may also be selected. To facilitate efficient case and client control, the mentor shall not be included in any formal appointment papers. When a self-represented party becomes a qualified litigant, the Coordinator will disseminate a “Request for APBP Attorney Volunteer,” **Exhibit F**, to the existing pool of volunteer attorneys. Limited case-specific information, prepared by the PSLC, including party names, issues presented, urgency of proceedings, and other information the Court determines necessary to appropriately place the case will be provided to the attorney pool.

Attorneys interested in pursuing placement on the case will respond by completing a brief online or hard copy form entitled “APBP Volunteer Attorney Notice of Case Interest,” **Exhibit G**. The Notice will confirm the lack of conflicts and will indicate the desired role in the appeal, i.e., lead attorney, mentor, etc. A law student wishing to participate in the case as well may complete the form.

When a volunteer attorney has been selected, the Coordinator will notify the attorney in writing using the Attorney Referral Letter at **Exhibit H**, instructing the selected attorney to contact the self-represented litigant. The letter to counsel will include contact information for

the new client as well as a copy of the client's Application for Appointment of Pro Bono Counsel and a sample Engagement Letter, attached as **Exhibit I**.

After the selected attorney has had the opportunity to meet with the litigant and/or file a notice of appearance in the case, counsel shall return an "Attorney Confirmation of Acceptance of APBP case," **Exhibit J**, to the Coordinator. The Coordinator will provide a copy to MLSA, which triggers provision of malpractice insurance through MLSA.

If an objection is made to the selection of a volunteer attorney, if financial eligibility cannot be confirmed, or if a volunteer match cannot be made for any reason, the Coordinator will notify the PSLC, who will in turn notify the Court. The PSLC will also notify the self-represented litigant by letter that placement of the case was unsuccessful. This allows the case to continue from that point forward as a self-represented litigant case.

#### **4. Post-Placement Procedures**

##### **a. Notice of Appearance**

After consulting with the client and obtaining necessary documentation relating to the representation, the selected attorney should file a Notice of Appearance, **Exhibit K**, with the Court. The Notice should indicate the appointment is under the APBP.

##### **b. Obtaining the Record**

To expedite access to the District Court record, and avoid costs associated with printing and postage, the Coordinator will facilitate volunteer attorney's access to the record directly from the District Court, electronically when possible.

##### **c. Extensions of Time**

The Court will Issue a Scheduling Order setting forth the dates when supplemental briefs are due. Any requests for extension of time must be submitted to the Clerk of the Supreme Court via motion in substantial compliance with the Montana Rules of Appellate Procedure.

**d. Oral Arguments**

There is no guarantee that any participating case will be invited to present an oral argument to the Court; however, should volunteer counsel request oral argument, the Court will consider the preferences of counsel as well as the nature of the case to determine whether oral argument is necessary or appropriate. If the Court chooses to hear oral argument, it will issue an Order scheduling the argument and specifying the time allowed to each party in accordance with its Internal Operating Rules.

**5. Continuing Role of Coordinator and Pro Se Law Clerk**

The Coordinator will maintain contact with the volunteer attorneys for administrative purposes. The Coordinator will assist in directing the volunteer attorney to practice resources and information to facilitate a positive pro bono experience and serve as the point of contact between the volunteer attorneys and the Court.

The PSLC will serve as contact for the litigant should an issue arise with the volunteer attorney. The PSLC will monitor the case progress via C-Track, or other similar Court-sanctioned program. The PSLC and Coordinator will confer as necessary.

**6. Substitution of Pro Bono Counsel**

Although it is anticipated that an APBP-selected attorney will handle accepted pro bono appeal cases until completion, it is recognized there are times when an attorney who accepts representation must withdraw due to circumstances beyond the attorney's control. In these situations, the Engagement Letter will govern this process and the volunteer attorney shall advise

the Coordinator. If the Court deems it appropriate to permit withdrawal, the Coordinator will attempt to place the client with a new volunteer attorney. Placement is not guaranteed and the circumstances necessitating the withdrawal of previously assigned volunteer counsel may be considered by the Coordinator and the PSLC when determining reassignment.

**EXHIBIT A**  
**Montana Appellate Pro Bono Program (APBP)**  
**Attorney Registration Form**

Attorney Full Name: \_\_\_\_\_

Attorney Montana Bar No.: \_\_\_\_\_ [OR] I am a \_\_\_\_ year student at the UM School of Law

Employer: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_, MT Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

**Check One:**

- I regularly check and respond to my e-mail
- I do not regularly check my e-mail and prefer not to receive correspondence or requests by this method.

**Indicate your participation preferences by checking all applicable boxes below and listing any areas of practice in which you would be willing to take or mentor an appellate pro bono case:**

- I prefer to serve as a mentor only
- I am willing to take a case or mentor another attorney
- I prefer only to take a case
- I am a law student
- I may be interested in being paired with an experienced mentor or a junior attorney
- I have a mentor who can assist me within my own firm

**Areas of Practice:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Briefly describe your previous appeals experience within Montana and any other jurisdictions:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Please provide any additional information you feel would be helpful in matching you with a pro bono client and/or mentor:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## **Montana Appellate Pro Bono Program (APBP)**

### **Attorney Participation Information and Form**

By Order dated May 22, 2012, the Montana Supreme Court established an Appellate Pro Bono Program (APBP). The APBP is designed to provide the assistance of appellate counsel to qualified litigants in cases in which the Court has determined that supplemental briefing would be beneficial to the Court. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Pro Se Law Clerk. The APBP became effective July 1, 2012.

Only selected self-represented litigants who meet Montana Legal Services Association's (MLSA) financial criteria are eligible to receive pro bono legal services from the APBP volunteer attorneys. Upon MLSA's acceptance and the attorney's confirmation of representation, the volunteer attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. The Program offers an opportunity to volunteer as the appellate attorney, a mentor to the lead attorney, or as a law student willing to assist in the appeal under the supervision of the lead attorney.

Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

If you are an attorney licensed in the State of Montana and are **interested in participating as a volunteer attorney in the Appellate Pro Bono Program (APBP)**, please complete the online Attorney Registration Form by following the link below or visiting the State Bar of Montana website and downloading, printing and mailing or e-mailing your Registration Form to the following:

Patricia Fain  
Statewide Pro Bono Coordinator  
P.O. Box 21304  
Billings, MT 59104-2103  
Email to [pfain@mt.gov](mailto:pfain@mt.gov)

[Register for the APBP Online](#)

For more information about the program, visit the State Bar of Montana website and click on the Appellate Pro Bono Program link.

Registration information SCT/plf

**EXHIBIT B**  
**Participant/Client Letter**

Date

Name

Address

Re: Montana Supreme Court Cause Number: DA-\_\_\_\_\_

Dear \_\_\_\_\_ :

The above appeal was fully briefed and has been submitted to this Court for a decision. You have represented yourself in filing the briefs and perhaps motions and other documents. Five of the seven justices have reviewed the briefs and determined that supplemental briefing would be beneficial to the Court in deciding this case.

The Court has an Appellate Pro Bono Program (APBP) through which counsel may be appointed to represent eligible litigants to prepare and file supplemental briefs and if the case is classified for oral argument, to argue the case before the Court. Enclosed is an information packet that includes the Application for Appointment of Pro Bono Counsel. You must complete the application in order to apply for appointment of a pro bono attorney.

Also enclosed is an Application for Financial Qualification from the Montana Legal Services Association (MLSA). It contains instructions for accessing this form electronically. You must complete this form and submit it electronically or, alternatively, you may complete the enclosed hard copy and return it to MLSA by mail. **It must be returned within 10 days of the date of this letter.** MLSA will review the Application for Financial Qualification, and you will be advised if you qualify and are eligible for the APBP. By completing and signing the Application for Financial Qualification, you agree to the MLSA reviewing the application and making a determination whether you are eligible to participate in the APBP.

Please complete the Application for Appointment of Pro Bono Counsel and mail it to the Court's Pro Se Law Clerk within 10 days to the following:

Sally Johnson  
Pro Se Law Clerk  
Montana Supreme Court  
215 N. Sanders, Room 414  
Helena, Montana 59620

You may submit the completed Application for Appointment of Pro Bono Counsel personally by delivering it to staff in the office of the Clerk of Supreme Court, 215 N. Sanders, Room 323 here in Helena, who will ensure their delivery.

The PSLC will inform you if you qualify for the APBP. You will be contacted directly by the pro bono counsel who has agreed to represent you in preparing and submitting supplemental briefing.

The attorneys and law students who have generously volunteered to be appointed as pro bono counsel receive no compensation, but you will be responsible for any costs incurred such as the copying and binding of the supplemental briefs. If you qualify for the APBP, the Court will issue an Order setting a supplemental briefing schedule. After the supplemental briefs from all parties are filed, the case will be reviewed and classified by the Court. Your pro bono counsel will be notified whether the case is classified for oral argument. If oral argument is ordered, your pro bono counsel will present the argument which you may attend at your own expense.

If you choose not to participate in the APBP program, please sign the Request to Decide the Appeal, and the Court will decide this appeal without supplemental briefing. **This form must be submitted to the Court's Pro se Law Clerk at the above address within 10 days of date of this letter.**

If you have questions, you may call or e-mail me, and I will attempt to answer them and assist you in participating in this program.

Sincerely,

Sally Johnson  
Pro Se Law Clerk  
Phone: 406 444-1412  
e-mail: [sjohnson2@mt.gov](mailto:sjohnson2@mt.gov)

**EXHIBIT C**  
**APPLICATION FOR APPOINTMENT OF PRO BONO COUNSEL**  
**IN A CIVIL APPEAL**

I, \_\_\_\_\_, am representing myself as  
the appellant or appellee in Cause No. \_\_\_\_\_,

\_\_\_\_\_  
*[caption of appeal]*

This case is fully submitted to the Supreme Court and ready for a decision.

I have been informed by the Supreme Court that I may be eligible for the appointment of counsel under the Appellate Pro Bono Program (APBP). In the event that I qualify financially for pro bono appellate representation, counsel will be appointed to represent me in this appeal.

I **DECLINE** to participate in the APBP. (Skip to signature and complete and sign the enclosed **Request to Decide Appeal** and return to the address below.)

I **AGREE** to appointment of pro bono counsel through APBP. I have provided my contact information and have read and initialized each statement below:

My Full Name: \_\_\_\_\_

Street Address: \_\_\_\_\_

City, State, Zip Code: \_\_\_\_\_

Telephone: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

Email: \_\_\_\_\_

After reading each of the following provisions, please signify your agreement by putting your initials in the blank line at the left.

\_\_\_\_ I understand this representation will consist of filing additional briefs relating to the issues the Court identifies and oral argument in the event the Court classifies this case for oral argument.

\_\_\_ I understand that my appointed pro bono counsel has agreed to act as a volunteer, without any compensation and that the Court has waived its fees.

\_\_\_ I understand that I am responsible for any additional costs incurred.

\_\_\_ I agree to provide timely, accurate financial information to determine my eligibility under Montana Legal Services Association (MLSA) guidelines.

\_\_\_ I agree to communicate and cooperate with my pro bono counsel until the case is finally disposed of by the Montana Supreme Court.

\_\_\_ I understand that the appointment of pro bono counsel will then be terminated and my pro bono counsel shall have no further responsibilities to me or my cause.

\_\_\_ I understand that once pro bono counsel is appointed to represent me in this appeal and has filed a Notice of Appearance, I may not file any documents in this appeal and only counsel will be allowed to file briefs, other documents, or present oral argument, if applicable, in this appeal.

\_\_\_ I understand the Clerk of the Supreme Court will return any document I might attempt to file directly, and the Court will not consider these documents in deciding this case.

\_\_\_ I understand the brief or briefs I filed prior to the appointment of pro bono counsel will be considered in deciding this appeal, together with the supplemental briefs.

\_\_\_ I agree to complete the Financial Qualification form and submit it to Montana Legal Services Association as instructed on the Form.

\_\_\_ I agree to sign a letter of engagement provided by my pro bono counsel.

\_\_\_ I understand all of these provisions of the APBP.

DATED this \_\_\_ day of \_\_\_\_\_, 20\_\_\_.

\_\_\_\_\_  
*[Signature]*



## Montana Legal Services Association Application for Assistance

### HOW TO APPLY FOR HELP:

1. You can call MLSA's HelpLine at:

**1-800-666-6899**

The HelpLine is answered Monday – Friday from 7:30 am to 6:00 pm. Sometimes you may have a hard time getting through on the phones. We want to hear from you, so please keep trying. The fastest way to apply is by calling the HelpLine.

OR

2. You can submit an application online. To submit an application online you need to go to our website, <http://www.mtlsa.org>, click on the “**Get an Application**” link located under the “**Quick Links**” area on the left of the homepage and, on the following page, click on the “fill out online and submit online” link to begin the online application process.

OR

3. You can complete this form to apply for our help. To submit this paper application you can:

Mail or fax this form to the Montana Legal Services Association (MLSA).

#### **Our mailing address is:**

Montana Legal Services Association  
616 Helena Avenue, Suite 100  
Helena, MT 59601

#### **Our fax number is:**

(406) 442-9817

4. We will contact you. Please call MLSA at the number below, if you do not hear from us within 3 days.
5. If you need help filling out this application, or if you want to apply over the phone, please call the Montana Legal Services Association's HelpLine Number at 1-800-866-6899.



Montana Legal Services Association  
Application for Assistance

Complete the application to the best of your ability. All the information you provide in this application is strictly confidential.

**1. What type of problem do you need help with?**

- |  |   |  |                                      |
|--|---|--|--------------------------------------|
| <input type="checkbox"/> Garnishment           | <input type="checkbox"/> Eviction                   | <input type="checkbox"/> Custody             | <input type="checkbox"/> Medicaid    |
| <input type="checkbox"/> Collection Lawsuit    | <input type="checkbox"/> Housing Subsidy/Voucher    | <input type="checkbox"/> Divorce             | <input type="checkbox"/> TANF        |
| <input type="checkbox"/> Collection Harassment | <input type="checkbox"/> Return of Security Deposit | <input type="checkbox"/> Order of Protection | <input type="checkbox"/> Food Stamps |
| <input type="checkbox"/> Repossession          | <input type="checkbox"/> Mobile Home Issues         | <input type="checkbox"/> Other _____         | <input type="checkbox"/> Employment  |
| <input type="checkbox"/> Foreclosure           |   |  |                                      |

**2. Applicant Information:**

First name: \_\_\_\_\_ Middle initial(s): \_\_\_\_\_

Last name: \_\_\_\_\_

Other names you have gone by: \_\_\_\_\_

SSN: XXX – XX - \_\_\_\_ \_ (last 4 digits only)

Date of Birth: \_\_\_\_\_ Age: \_\_\_\_\_

Sex:  Male  Female Email Address (optional): \_\_\_\_\_

*If case involves domestic violence, please provide MLSA with safe contact information:*

Street address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP Code: \_\_\_\_\_

Best phone number to reach you at (MLSA will try to call you, it is important that you provide MLSA with a reliable number to reach you):

Area code: \_\_\_\_\_ Number: \_\_\_\_\_ Type of phone: \_\_\_\_\_

Another phone number to reach you at:

Area code: \_\_\_\_\_ Number: \_\_\_\_\_ Type of phone: \_\_\_\_\_

Please indicate best time to call you back: \_\_\_\_\_

Is it safe to contact you using the phone number(s) / address above?  Yes  No

Do you need an Interpreter?  Yes  No

If you answered "Yes", what language? \_\_\_\_\_



**5. Household Income Information:** Please list all sources of income where applicable.

Type of Income	You	Other Party
Employment		
Food Stamps (SNAP)		
SSI		
Soc. Sec. Disability		
Soc. Sec. Retirement		
Child Support		
TANF (Welfare)		
Veteran's Benefits		
Unemployment		
Worker's Compensation		
Other:		
Other:		

**6. Asset Information:**

If "Yes", please list the item, what it is worth, and how much you owe on it if anything.

Item	Do you have?	Amount in account?	
Checking	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Savings	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Item	Do you have?	How much did you pay for it?	How much do you owe on it?
Car 1	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Car 2	<input type="checkbox"/> Yes <input type="checkbox"/> No		
House 1	<input type="checkbox"/> Yes <input type="checkbox"/> No		
House 2	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Stocks, bonds, CDs	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		

**7. Hearings and Deadlines:**

- Have you been served with court documents?      Yes      No

If yes, what date were you served with papers? \_\_\_\_\_

- Are there any deadlines that you know of?      Yes      No

If yes, what is the deadline? \_\_\_\_\_

- Is there a hearing scheduled?      Yes      No

If yes, what is the date and time of the hearing? \_\_\_\_\_

Please **ATTACH** copies of critical documents containing important dates.

**8. Specific Problem:**

Please tell us what problem you need help with:

What do you want Montana Legal Services Association to do for you?

**9: Feedback:**

Is there any feedback you would like to leave regarding this application? Did any terms, words or questions not make sense to you? Let us know so we can improve the process in the future.

**EXHIBIT E**  
**REQUEST TO DECIDE THE APPEAL**

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA \_\_\_\_\_  
\_\_\_\_\_

Plaintiff and Appellee,

v.

REQUEST TO DECIDE  
THE APPEAL

Defendant and Appellant.  
\_\_\_\_\_

I acknowledge that I have been provided with an Appellate Pro Bono (APBP) information packet and informed by Supreme Court staff that I may be eligible for appointment of a pro bono counsel to provide supplemental briefing to the Court in this appeal. I have reviewed the packet and I choose not to participate in the APBP and request that this appeal be decided based upon the record and the briefs on file with the Court.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[signature]

Certificate of Service

I hereby certify that I have filed a true and accurate copy of the foregoing Request to Decide the Appeal with the Clerk of the Montana Supreme Court and that



**EXHIBIT F**  
**REQUEST FOR APBP ATTORNEY VOLUNTEER and CASE MEMORANDUM**

You are among a pool of attorneys who registered to volunteer for the Montana Appellate Pro Bono Program (APBP) sponsored by the Montana Supreme Court. We are seeking an attorney to assist with the case outlined in the attached Memorandum. If you require further information about the case, contact information for the Court's Pro Se Law Clerk can be found on the Memorandum.

If after conducting necessary conflict checks you wish to accept the appointment of this case, please complete the *Attorney Notice of Case Interest* online by following the link on the State Bar of Montana website at [www.mtstatebar.org](http://www.mtstatebar.org) or by completing the attached hard copy and mailing or e-mailing NO LATER THAN [DATE] to:

Patricia Fain  
Statewide Pro Bono Coordinator  
406/794-6693  
[Pfain@mt.gov](mailto:Pfain@mt.gov)

**Memorandum of Appellate  
Pro Bono Case**

To: Interested volunteer attorney

From: Sally Johnson, Pro Se Law Clerk  
Montana Supreme Court  
Phone: 406 444-1412  
e-mail: sjohnson2@mt.gov

Re: Cause No. 12- \_\_\_\_\_  
\_\_\_\_\_ v. \_\_\_\_\_

Date:

Summary of issues for supplemental briefing (*The Court will entertain briefing only regarding the issues described below*):

Case summary:

A copy of judgment/findings of fact and conclusions of law from which this appeal is taken is attached.

Copies of critical documents that are attached:

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

**EXHIBIT G**

**APBA Volunteer Attorney Notice of Case Interest**

Today's Date: \_\_\_\_\_

Attorney Name: \_\_\_\_\_

Case Caption: \_\_\_\_\_

APBP Client Participant: \_\_\_\_\_

I have performed the requisite conflict check and I do not believe that a conflict of interest exists regarding my possible representation in this matter. If after consultation with the client and/or lead attorney I discover a potential or actual conflict of interest, I will notify the Coordinator immediately.

I believe I currently have sufficient time to pursue or assist with this action.

I have reviewed the information provided by the Appellate Pro Bono Program regarding the above case and I am willing to provide the following services:

- Represent the above APBP participant as the lead attorney
- Serve as a mentor to the lead attorney for the above case
- Serve as a volunteer attorney to assist the lead attorney for the above case
- I am a law student and am willing to assist the lead attorney for the above case

I have read the APBP Overview and am willing to provide my pro bono services according to its provisions.

I understand more than one attorney may indicate interest in this case and selection is on a rotating basis and by random selection presuming equal experience and interest in the case type.

LEAD ATTORNEY VOLUNTEERS PLEASE MARK ALL THAT APPLY:

- I would be willing to provide oral arguments if the court requests.
- I would like to be paired with a mentor
- I would like the assistance of a junior attorney or a law student

\_\_\_\_\_  
Attorney Signature

\_\_\_\_\_  
Today's Date:

**EXHIBIT H – ATTORNEY REFERRAL LETTER**

[STATEWIDE PRO BONO COORDINATOR LETTERHEAD]

[DATE]

ATTORNEY NAME

ATTORNEY ADDRESS

Re: Representation of [CLIENT NAME]  
[CASE/CAUSE NUMBER]  
Client Address:  
Client Phone:  
Client E-mail:

Dear [ATTORNEY],

Thank you for responding to our request for pro bono representation through the Appellate Pro Bono Program (APBP). You have been selected to represent participant [PARTICIPANT/CLIENT] with [HIS/HER] appeal before the Montana Supreme Court. We ask that you contact the client at your earliest convenience.

The request for your pro bono commitment to this client through the APBP is limited to supplemental briefing and possible oral arguments, scheduled at the Court's discretion. Enclosed is a sample Engagement Letter you may wish to use or modify for your own purposes. You may use your firm's form engagement letter, but consider including language that clearly outlines the scope/limitations of your representation in this case if it does not already provide for the same. You may find more information about the best practices relating to limitations in scope of representation by visiting the Montana State Law Library website ([www.courts.mt.gov/library](http://www.courts.mt.gov/library)) and following the Limited Scope Representation link found on the main page.

Also enclosed is the APBP Opening Form. You should complete the Opening Form and return to the address on the form after you have met with the client and confirmed representation. The return of the Opening Form ensures coverage of malpractice insurance (primary or secondary) through Montana Legal Services Association (MLSA).

[OPTION 1] You indicated you wished to be paired with a mentor. [MENTOR NAME] has agreed to serve as your mentor on this case. [ATTORNEY NAME] can be reached at [CONTACT INFORMATION].

[OPTION 2] You indicated you would like the assistance of a junior attorney during your work on this case. [JUNIOR ATTORNEY] has agreed to assist you with this case. [JUNIOR ATTORNEY] can be reached at [CONTACT INFORMATION].

[OPTION 3] You indicated you wished to be paired with a law student during your work on this case. [LAW STUDENT] has agreed to assist you with this case. [LAW STUDENT] can be reached at [CONTACT INFORMATION].

I have requested an electronic copy of the district court file from the Clerk of Court. I can provide the file to you electronically or print a copy if you prefer. You will also be communicating with Sally Johnson, the Court's Pro Se Law Clerk, regarding this case. Sally can be reached at 406/444-1412 or [sjohnson2@mt.gov](mailto:sjohnson2@mt.gov). You should contact Sally if you have questions about filings, deadlines or issues directly related to the administration of the case with the Court.

If you encounter any problems with client cooperation or financial eligibility, or if I can be of any assistance, please do not hesitate to contact me immediately. Thank you [ATTORNEY] for offering your invaluable services. For your consideration, I remain

Very truly yours,

**EXHIBIT I**  
**Pro Bono Engagement Letter**

Date: \_\_\_\_\_

Client's Name  
Organization/Company (if applicable)  
Address  
City, State, Zip

Re: Montana Supreme Court Cause No. \_\_\_\_\_  
\_\_\_\_\_ v. \_\_\_\_\_

Dear \_\_\_\_\_:

I have been appointed as pro bono counsel under the Montana Supreme Court's Appellate Pro Bono Program (APBP) to represent you in the above-referenced appeal. My appointment is limited and includes only this appeal before the Montana Supreme Court. This letter confirms the terms of my engagement and clarifies the nature and extent of the professional services I will provide. If you find the arrangement acceptable, please sign and return one copy of this letter to me at your earliest convenience.

1. *Identification of the Parties.* This agreement is made between

\_\_\_\_\_ ("Client")  
and \_\_\_\_\_ ("Volunteer/Firm").

2. *General Nature of Assistance.* The Client was referred to Volunteer through the Montana Supreme Court's Appellate Pro Bono Program (APBP). The scope of representation is outlined as follows:

\_\_\_\_\_

The projected timetable for completing the appeal is: \_\_\_\_\_. Client and Volunteer may agree at a later time to extend representation to another matter. Any such extension will be the subject of a separate written agreement between the parties.

3. *Fees.* Volunteer agrees to undertake this representation on a pro bono basis, which means that the Volunteer will not charge professional fees in connection with this matter. However, Client agrees to assume responsibility for all agreed upon out-of-pocket expenses incurred during the project. The following fees/expenses are anticipated: \_\_\_\_\_.

4. *Client Responsibilities.* The Client agrees to cooperate fully with the Volunteer by:

- a. providing complete information or documents that volunteer deems useful or necessary for the representation during the project;
- b. assisting volunteer in obtaining information and documents from any other sources which volunteer deems useful or necessary for the representation during the project;
- c. promptly notifying the Volunteer of any changes in address, e-mail address, telephone number, or changes in the Client's situation that may impact the project;

- d. maintaining regular contact with Volunteer as is necessary to complete the project; and
- e. keeping and being on time for all appointments.

5. *Volunteer Responsibilities.* Volunteer will rely on the information and documents provided by Client. Volunteer agrees to:

- a. keep the Client informed about the status of the project;
- b. keep all sensitive information provided by the Client confidential unless authorized by the Client to disclose it; [or insert firm's privacy policy]
- c. consult with the Client before making any significant decisions about the project;
- d. return all original documents that were furnished by Client; and
- e. maintain Client's file for \_\_\_\_\_ years.

Volunteer cannot guarantee the success of any given matter, but will strive to represent Client's interests professionally and efficiently. For best results, I look forward to a high degree of cooperation from you. Although I will endeavor to achieve a satisfactory result and to keep you informed of the status of your case, I can make no guarantee of any kind concerning the outcome of this appeal.

6. *Uses of Document by Others.* Client authorizes the use by Volunteer of the documents drafted during the course of the project for use in assisting other clients. However, the Client may direct Volunteer to delete information in documents that Client deems confidential.

7. *Discharge of Volunteer.* Volunteer understands that Client may end this agreement at any time for any reason by notifying the Volunteer in writing. However, if Client is dissatisfied about the way in which professional services are being provided by Volunteer, the Client must first take his or her complaint or concern to the APBP. Client understands and hereby acknowledges that, in the event that Client discharges Volunteer, the APBP cannot and does not promise that Client will be referred to another Volunteer.

8. *Withdrawal of Representation by Volunteer.* Client understands that Volunteer reserves the right to withdraw from representing Client, after taking reasonable steps, including first giving Client notice of intention to withdraw. Volunteer may withdraw if in his or her judgment:

- a. Client does not cooperate with Volunteer or, by Client's conduct, makes it unreasonably difficult for Volunteer to carry out the representation effectively or efficiently; or
- b. Client insists that Volunteer engage in conduct that is contrary to the judgment and advice of Volunteer or is contrary to law; or
- c. Continued representation of Client would result in a violation of the rules of ethics and professional responsibility; for example, if a conflict of interest develops or is discovered; or
- d. Client is no longer financially eligible for professional services free of charge because of a material change in Client's resources or alteration in Client's objectives. Financial eligibility will be determined solely by the Montana Legal Services Association.

9. *Dispute Resolution.* Occasionally, volunteers and their clients have disputes arising from their relationship. If this happens, upon request of either Client or Volunteer, the dispute will be resolved by a neutral facilitator, acceptable to both parties, provided by the APBP.

10. *Disclaimer of Liability.* Volunteer will not be liable to Client for any loss or damage whatsoever, whether direct or indirect, which arises in contract, tort, by statute or otherwise in connection with professional services save only to the extent that fraud or bad faith are applicable.

11. *Complete Agreement.* Client has read this agreement in its entirety before signing it. Client understands the terms of this agreement and agrees that it will apply throughout the course the project. This writing represents the entire agreement between the parties.

I am pleased to have this opportunity to assist you and look forward to working with you.

Very truly yours,

Agreed to and accepted:

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

**EXHIBIT J**  
**ATTORNEY CONFIRMATION OF ACCEPTANCE OF APBP CASE**

**ATTORNEY NAME:** \_\_\_\_\_

**CLIENT NAME:** \_\_\_\_\_

**CASE TITLE AND NUMBER:** \_\_\_\_\_

**I have interviewed the aforementioned client and confirm I am able to represent the client pursuant to the guidelines of the Appellate Pro Bono Program.**

**DATE CASE WAS OPENED** \_\_\_\_\_

**I have interviewed the aforementioned client and have determined I am unable to represent the client** (please provide a brief description of circumstances below).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**I have been unable to make contact with the client within a reasonable amount of time** (please provide a brief description of circumstances below).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please return this completed form by mail or e-mail to:

Patricia Fain  
Statewide Pro Bono Coordinator  
Montana Supreme Court  
P. O. 21304  
Billings, MT 59104-1304  
[pfain@mt.gov](mailto:pfain@mt.gov)

**EXHIBIT K**  
IN THE SUPREME COURT OF THE STATE OF MONTANA

DA \_\_\_\_\_  
\_\_\_\_\_

Plaintiff and Appellee,

v.

NOTICE OF APPEARANCE

Defendant and Appellant.  
\_\_\_\_\_

\_\_\_\_\_ hereby appears as pro bono counsel through  
the Appellate Pro Bono Program for \_\_\_\_\_  
in the above-captioned cause. All pleadings, papers and briefs to be served  
hereafter in this matter shall be mailed to:

Attorney Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[Signature]

Certificate of Service

I hereby certify that I have filed a true and accurate copy of the foregoing Notice of Appearance with the Clerk of the Montana Supreme Court and that I have served true and accurate copies upon and each attorney of record and any other self-represented litigants as follows:

\_\_\_\_\_  
Counsel for \_\_\_\_\_  
*[designation of party]*

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Address and zip code

OR:  
\_\_\_\_\_

Self-represented \_\_\_\_\_  
*[designation of party]*

\_\_\_\_\_  
\_\_\_\_\_

Address and zip code

## Appellate Pro Bono Program Attorney Registration

[Exit this Registration Form](#)

### APPELLATE PRO BONO PROGRAM ATTORNEY REGISTRATION

By Order dated may 22, 2012 the Montana Supreme Court established an Appellate Pro Bono Program (APBP) designed to offer the assistance of appellate counsel to qualified litigants. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Self-Represented Law Clerk.

Only selected self-represented litigants who meet Montana Legal Services (MLSA) financial criteria are eligible to receive pro bono legal services from the APBP volunteer attorneys. Upon MLSA's acceptance and attorney's confirmation of representation, the volunteer attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. There are opportunities to volunteer as the appellate attorney, a mentor to the lead attorney or as a law student willing to assist in the appeal under the supervision of the lead attorney.

Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibilities of the parties.

If you are an attorney licensed in the State of Montana and are interested in participating as a volunteer in the Montana Pro Bono Appellate Program (APBP), please complete this registration form and click submit at the end of the application. If you need additional information about the APBP before registering, click [HERE](#) to read an overview of the Program.

[Next](#)

# Appellate Pro Bono Program Attorney Registration

Exit this Registration Form

## ATTORNEY REGISTRATION

### \* 1. Attorney Full Name

First Name

Middle Initial

Last Name

### \* 2. Attorney Montana Bar Number

### 3. Contact Information

Address

City

Zip Code

Telephone

Fax

E-Mail

### 4. E-mail (Choose One)

I regularly check and respond to the E-mail account provided above.

I do not regularly check my e-mail and prefer not to receive correspondence or APBP requests by E-mail.

### 5. Please indicate your APBP participation preferences by checking all applicable boxes below and listing any areas of praactice in which you would be willing to take or mentor an appellate pro bono case.

I prefer to serve as a mentor only

I am willing to take a case or mentor another attorney

I prefer only to take a case

I am a law student

I may be interested in being paired with an experienced mentor

I have a mentor who can assist me within my own firm

**6. Please indicate the areas of practice/case type in which you are willing to accept a referral**

Case Type	<input type="text"/>

**7. Briefly describe your previous appeals experience within Montana and any other jurisdictions.**

**8. Please provide any additional information you feel would be helpful in matching you with a pro bono client and/or mentor.**



Prev

Submit

FILED

May 22 2012

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12-0028

FILED

MAY 22 2012

IN THE MATTER OF ESTABLISHING AN )  
APPELLATE PRO BONO PROGRAM )

ORDER *Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

On January 13, 2012, the Court entered an order calling for public comment on a proposal to establish an Appellate Pro Bono Program to further access to justice for civil litigants who lack financial means to retain counsel. Having now considered the comments submitted,

IT IS HEREBY ORDERED that there is established within this Court an Appellate Pro Bono Program (APBP) designed to offer the assistance of appellate counsel to qualified litigants in cases in which the Court has determined that supplemental briefing would be beneficial to the Court. The APBP will be developed and coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Pro Se Law Clerk in accordance with the following guidelines:

**1. Volunteer counsel:**

The Montana Supreme Court's Pro Bono Coordinator will develop a volunteer database and registry for attorneys and law students who volunteer to assist pro se litigants in appeals pending before the Supreme Court. Each volunteer will fill out an on-line application which will include, among other information, areas of the attorney's or student's subject matter expertise and interest. Experienced appellate attorneys may volunteer to mentor less experienced volunteer attorneys in supplemental briefing and arguing the appeal, should argument be ordered. Law students under supervision of the UM Law School also may apply to participate as volunteer counsel in accordance with the Court's student practice protocol.

**2. Program Eligibility:**

Cases involving at least one self-represented party may be selected by the Court for participation in the program where the Court determines, after briefing has been completed, that the Court will benefit from additional briefing on one or more issues. The Court's staff and Law Clerks may bring appropriate cases to the Court's attention

during the briefing process on appeal or, in original proceedings involving self-represented litigants, during their review of motions or petitions.

Once the Supreme Court identifies an appeal where pro bono assistance may be beneficial to the Court, the Montana Supreme Court's Pro Se Law Clerk (PSLC) will provide the identified self-represented litigant with an application form for participation in the program, which explains eligibility requirements and the scope of representation. Should the litigant choose not to participate in the program, the case will be submitted on the litigant's pro se briefing.

Financial eligibility for the program will be determined in accordance with the criteria used to determine eligibility for services from the Montana Legal Services Association (MLSA). Appointment of pro bono counsel will be coordinated with MLSA's pro bono referral process to ensure proper financial eligibility screening for litigants and provision of malpractice insurance coverage for pro bono counsel who otherwise lack such coverage.

If the litigant applies and is approved for appointment of counsel under the Appellate Pro Bono Program, the Pro Bono Coordinator will circulate a case-specific confidential memorandum to a pool of volunteer attorneys for determination of conflicts of interest. The Pro Bono Coordinator will select an attorney from the qualified pool. The Pro Bono Coordinator will notify the volunteer attorney or student and the litigant of the attorney or student selected.

In the event multiple parties to the appeal are appearing pro se, volunteer counsel will be offered as described above for each qualified self-represented litigant.

**3. Volunteer counsel/student:**

The volunteer counsel will provide the litigant with an engagement letter and file a notice of appearance (noting the appointment is under the Appellate Pro Bono Program). The Court will set a briefing schedule and the Montana Rules of Appellate Procedure will apply as in all other proceedings.

**4. Supreme Court:**

Volunteer counsel shall advise the Court whether oral argument is requested. The Court will consider the preferences of counsel and whether the case is appropriate for oral argument in determining whether to classify the case for argument. The Court shall schedule the oral argument and determine the time allowed to each party in accordance with its Internal Operating Rules.

**5. Pro Bono Coordinator/Pro Se Law Clerk:**

The Pro Bono Coordinator and Pro Se Law Clerk will be cross-trained so that the appointment of counsel is not interrupted due to the temporary unavailability of either. Back-up staff may be trained as needs are identified.

The Pro Bono Coordinator will develop the database and access to attorneys and law student volunteers. A rotation or randomized system of selecting counsel will be established.

The PSLC will prepare the case-specific confidential memorandum for each case with review and oversight by the Court.

The PSLC and Pro Bono Coordinator will develop the forms required to support this program.

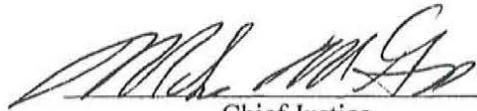
**6. Appeal Costs**

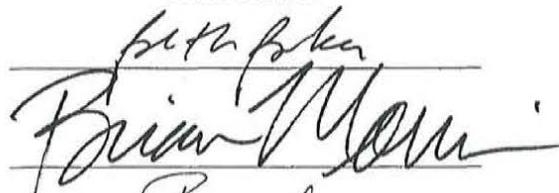
Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

IT IS FURTHER ORDERED that the Program will take effect July 1, 2012.

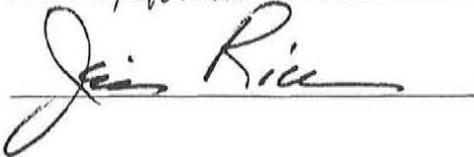
A copy of this Order will be posted on the Montana Supreme Court website. In addition, the Clerk is directed to provide copies of this order to the Chairs of the Equal Justice Task Force, the Commission on Self-Represented Litigants, and the State Bar's Access to Justice Committee; the Montana Law Library; the Montana Legal Services Association; the State Bar of Montana; and the University of Montana School of Law.

DATED this 22<sup>nd</sup> day of May, 2012.

  
\_\_\_\_\_  
Chief Justice

  
\_\_\_\_\_  
Brian Moran

  
\_\_\_\_\_  
Patricia Cotter

  
\_\_\_\_\_  
Jim Rice

\_\_\_\_\_

\_\_\_\_\_  
Justices

Justice James C. Nelson, dissenting.

I dissent from this Court's Order establishing the "Appellate Pro Bono Program" (APBP). While I do not impugn the good intentions of those promoting APBP, I suggest that the proposal is ill thought-out and will likely create more work and problems than it solves. Indeed, on the scant record presented, I suggest that the proposal is premature at best and, more likely, is not needed at all.

According to the materials circulated to this Court and to the public, APBP is envisioned to offer the assistance of pro bono appellate counsel to "qualified litigants." The Court's Order does not provide any concrete criteria for identifying which self-represented litigants will "qualify" to receive the special assistance of APBP and which self-represented litigants will not so "qualify." Evidently, the assistance will be provided to those self-represented litigants whose cases this Court, subjectively and arbitrarily, decides will "benefit" from additional briefing on one or more issues. Attorneys, as well as law students, are encouraged to offer their services to the program, and the Court will require oral argument in "appropriate" cases. The Court's staff and law clerks may bring "appropriate" cases to the Court's attention during the briefing process on appeal or, in original proceedings involving self-represented litigants, during their review of motions or petitions. Again, no criteria are provided as to what constitutes an "appropriate" case. If both parties are self-represented on appeal, both will be offered the benefit of APBP. There is a financial eligibility requirement and, apparently, the implicit requirement that attorneys and law students taking part in APBP will be referred through the Montana Legal Services Association so that such practitioners can take advantage of that organization's malpractice insurance coverage—assuming that the volunteer does not have his or her own errors-and-omissions insurance. There is, of course, more in the circulated materials and in the Court's Order—details that involve, among other things, labor and time-intensive coordination, possible mentoring and supervision of law students, and additional duties imposed on this Court's Pro Bono Coordinator and this Court's Pro Se Law Clerk. However, the above fairly sums up the proposal.

At the outset, I question the premise upon which this entire program is based—namely, that this Court is faced with a sufficient number cases involving self-represented

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litigants where “supplemental briefing” and oral argument would be “beneficial.” Indeed, I suggest that APBP is a solution in search of a problem. This much can be seen from the skeletal nature of the program outlined in the Court’s Order and the amorphous standards (rather than concrete criteria) articulated by the Court regarding the cases to which the program will apply. If there were truly a need for APBP, one would expect the Court’s Order to identify with some sort of specificity the cases to which it will apply—rather than just saying, somewhat vaguely, that we’re creating an appellate pro bono program and will apply it whenever we think it’s “appropriate” or “beneficial” to do so. Anecdotally—and that is about all there is to rely on here—I can recall one or maybe two self-represented cases in the last two years that, in my view, would have “benefited” from supplemental briefing.

And that is the fundamental problem. We are presented with no actual data or statistics demonstrating the depth and seriousness of the problem to which APBP is presumably directed. The gross numbers and anecdotal evidence reflecting the increase in cases involving self-represented litigants, generally, say nothing about the necessity to create APBP. Those numbers and conventional wisdom show that more and more people cannot afford to hire attorneys—or, at least, attorneys who are interested in representing them in their particular case. And, as I expect most of us would agree, self-represented cases, as a class, would all benefit from supplemental briefing by pro bono counsel. Typically, such cases are not well briefed in the first place, and very often the trial court record is equally inadequate for appellate review.

The Court has decided, however, that a select number of those cases should be entitled to the benefit of supplemental briefing by counsel or a law student. Resorting to my own conventional wisdom and anecdotal experience, I suggest that there are very few appellate cases where there is one or more self-represented litigants and where the case actually merits supplemental briefing, much less oral argument. In the couple of cases where additional briefing might have been helpful, there were other problems that no amount of supplemental briefing could have fixed.

In point of fact, cases involving self-represented litigants—especially those who represented themselves in the trial court—typically are burdened with serious procedural

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problems including: the failure to make and preserve an adequate record in the trial court; the failure to make contemporaneous objections; the failure to raise and argue appropriate theories and arguments supporting the objections that were made; the failure to produce and to get admitted the necessary testimonial and documentary evidence—the list goes on and on. In the face of these problems and shortcomings, our staff, our law clerks, and our Pro Se Law Clerk—most of whom already have sufficient other work to keep them busy—apparently will now be required to examine all self-represented appeals and original proceedings (the latter being even rarer than the former)—all of which theoretically *could* benefit from supplemental briefing—and ferret out those cases which, under this Court’s non-test, are “appropriate” and “will benefit” from supplemental briefing and oral argument. This, I assume, presupposes that in addition to “brief checking” (for procedural compliance with the Montana Rules of Appellate Procedure), which our law clerks already are required to do, they will also be expected to read the briefs, motions, and petitions filed by self-represented litigants and examine the adequacy of the district court record—a daunting task—so as to find “appropriate” cases (whatever those are) to bring to the Court’s attention. I suggest there are few, if any, clerks who have that kind of time.

Furthermore, by its terms, APBP is not just restricted to appeals. It obviously covers those, but also covers “original proceedings,” “petitions” (which encompasses a vast array of other proceedings including not only true “original proceedings” but also petitions for habeas corpus, supervisory control, mandamus, prohibition, and postconviction relief, all of which are “civil proceedings”), and the “motions” that self-represented litigants file. In short, if APBP operates as set out, it will quickly morph into one that this Court does not have adequate personnel or resources to administer.

But more to the point, what is it that supplemental briefing is supposed to accomplish? Is pro bono appellate counsel supposed to propose and argue new theories, issues, and errors that were not preserved in the trial court? If so, this flies in the face of caselaw prohibiting that very sort of practice by attorneys and by those self-represented

litigants whose cases apparently do not merit “supplemental briefing.”<sup>1</sup> Also, as for the costs of transcripts and the costs of transmitting the record on appeal to the Clerk of this Court, we know from the Court’s Order that those will remain the responsibility of the self-represented litigant. As we are all aware, however, self-represented litigants often cannot afford the costs of necessary transcripts, and the case comes to this Court without a sufficient record to review for legal error. If that is the sort of case which merits supplemental briefing—and this Court may determine that it is, absent the benefit of being able to first review the transcripts—then it seems to me that we are creating an untenable situation: engage pro-bono counsel who will be forced to argue the case without reference to the oral record or will be required to fund the cost of the transcripts himself or herself in order to do the briefing and oral argument properly—the latter being an unlikely possibility for law students. Moreover, by this Court’s assisting “qualified litigants” in setting forth their arguments on appeal and then deciding those same arguments, we are inviting ethical problems and setting the stage for violations of the right to an impartial tribunal.

For the foregoing reasons, if it is going to work at all, APBP must necessarily presume that the self-represented litigants on appeal were represented by counsel in the trial court proceedings. This is a necessary assumption if the record-preservation problems discussed above are to be avoided. That happens sometimes—trial counsel bails out before the appeal because he or she and the client had a falling out or, more likely, because the client has run out of money.<sup>2</sup> But, for a substantial number of self-

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<sup>1</sup> The well-established general rule is that this Court will not consider issues not raised before the trial court or new legal theories raised on appeal. *In re M.W.*, 2012 MT 44, ¶ 14, 364 Mont. 211, 272 P.3d 112; *State v. Montgomery*, 2010 MT 193, ¶ 11, 357 Mont. 348, 239 P.3d 929; *Whitehorn v. Whitehorn Farms, Inc.*, 2008 MT 361, ¶ 21, 346 Mont. 394, 195 P.3d 836; *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161; *State v. Courville*, 2002 MT 330, ¶ 5, 313 Mont. 218, 61 P.3d 749.

<sup>2</sup> It goes without saying that, with some notable exceptions (parental rights termination proceedings and commitment proceedings, for example), there is no general right to appointed counsel in civil proceedings. There is no “civil *Gideon* right.” There should be, but the fact is there is not, and it is highly unlikely that Montana’s legislative and executive branches will fund a civil *Gideon* program within the lifetimes of anyone currently involved in this matter.

represented cases, there will have been no representation in the trial court and the case will come to this Court burdened with the aforementioned procedural problems that nothing, short of a remand for retrial in the district court, will fix. That is certainly true for appeals, and is even more likely when we throw motions, original proceedings, and petitions for habeas corpus, supervisory control, mandamus, and prohibition into the mix.

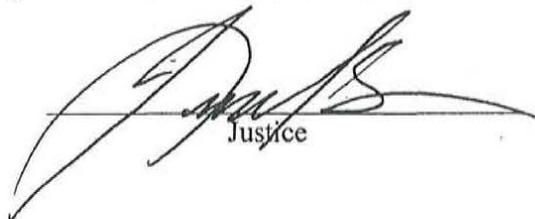
This brings me to the issue of fairness. On one hand, we pick and choose those few cases (although I expect that, since we now have a “program,” the number will mushroom exponentially) for which supplemental briefing will be beneficial and, at the same time, implicitly tell untold numbers of other self-represented litigants that they are stuck with their inadequate records, their inadequate briefs, their inadequate arguments, and, perhaps, their ineffective trial counsel. Rightly, those people should be heard to say, “Why not me? Why not my case?” Furthermore, in those cases where one party has counsel and the other does not, we will appear to be punishing the litigant who had the ability to hire an attorney: he or she will be required to pay for more briefing and, perhaps, a remand or an oral argument. The represented litigant may not be able to take advantage of inadequacies and mistakes made by the self-represented client. While this observation may strike some as harsh and unfair, it is part and parcel of what litigation is all about: making a good case for your client and taking advantage of your opponent’s mistakes. Assisting those who cannot afford counsel by encouraging, generally, pro bono service or by lobbying for legislation that would fund representation for a wider variety of cases is one thing. However, targeting certain self-represented litigants with certain cases and then offering and providing those individuals with the sorts of services that might well help them prevail against the other party is a wholly different matter. Doing so removes this Court from its proper position of arbiter and places it into the position of advocate instead.

Finally, besides the aforementioned structural problems, the seminal problem remains. We are presented with no actual data or statistics that would enable this Court to determine the actual number of cases involving self-represented litigants where an adequate record has been preserved for appellate review and where supplemental briefing would be beneficial and could be ordered without a remand—versus the number of cases

where that is not so. In short, the existence of a problem to which APBP is addressed has not been established with anything other than anecdotal evidence. Correspondingly, we are provided with no real structure to APBP and how the aforementioned problems inherent in the program will be adequately and fairly addressed and resolved. Furthermore, unless APBP contemplates that pro bono appellate counsel will simply be turned loose to create the proverbial silk purse of a supplemental brief from a sow's ear of a trial court record, I suggest that this lack of data, statistical evidence, and structure militates in favor of either dropping the idea altogether or, at least, putting it on hold until such time as adequate facts, data, statistics, structure, and criteria—as opposed to good intentions—are available for review.

The devil is always in the details; and, in that regard, I suggest that there are many important details in this proposal for which no actual data or evidence has been presented to this Court. I maintain that what we have before us does not demonstrate that there is actually a problem which mandates the solution proposed. Indeed, in my view—and assuming that we are still addressing the very few self-represented cases which come before this Court for which supplemental briefing might actually be beneficial—this Court can, as we already have done on occasion, contact the Pro Bono Coordinator and request that she attempt to locate an attorney willing to represent the self-represented litigant on a pro bono basis.

For the foregoing reasons, I decline to join this Court's Order. I dissent.



Justice

# **NEW YORK**

## **EXHIBIT C - Part 3**



## NYSBA PRO BONO APPEALS PROGRAM

[BROCHURE](#) [APPLICATION](#) [PRO SE APPEALS MANUAL](#) [FAQ](#) [DECISIONS](#) [ARTICLES](#)

The New York State Bar Association has established a Pro Bono Appeals Program that provides pro bono representation for selected appeals to the Appellate Division, Third and Fourth Judicial Departments. This unique program is designed to help persons of modest means who are taking, or responding to, appeals regarding fundamental civil legal issues, such as family stability, personal safety or subsistence income. Note that the Program does not provide representation for criminal matters, is not administered by the court system, and gives preference to applicants who do not qualify for assigned counsel and cases that could have a broad impact.

The Program brochure offers further information about the program territory, financial and subject matter criteria, and the three program partners: the NYSBA Committee on Courts of Appellate Jurisdiction, The Legal Project, and The Rural Law Center of New York. We invite trial attorneys and nonprofit agencies to assist clients in completing applications and identifying meritorious appeal issues. Note that applications of persons who are appealing from an order or judgment will not be reviewed unless a notice of appeal has already been served and filed. You may also want to click on the links to a few of the decisions regarding appeals handled by the Program and to articles describing the Program.

The Pro Bono Appeals Program is made possible by the generous efforts of our many volunteers and grants from The New York Bar Foundation. We would like to thank these appellate attorneys for their outstanding pro bono contributions to the program:

Andria L. Bentley, Esq. (Albany, NY)  
 Elizabeth F. Bernhardt, Esq., Cohen & Gresser LLP (NYC)  
 Nomi D. Berenson, Esq., and Valerie A. Koffman, Esq., Goodwin Procter LLP (NYC)  
 Andrew O. Bunn, Esq., DLA Piper LLP (Florham Park, NJ)  
 David M. Cost, Esq., Hiscock & Barclay LLP (Albany, NY)  
 Cynthia F. Feathers, Esq. (Glens Falls, NY)  
 Steven N. Feinman, Esq., The Feinman Law Firm (White Plains, NY)  
 Annette G. Hasapidis, Esq., Law Offices of Annette G. Hasapidis (South Salem, NY)  
 George J. Hoffman, Jr., Esq., O'Connor, O'Connor, Bresee & First, P.C. (Albany, NY)  
 Jeremy E. Hollander, Esq., Skadden, Arps, Slate, Meagher & Flom LLP (NYC)  
 Timothy W. Hoover, Esq., Phillips Lytle LLP (Buffalo, NY)  
 Linda B. Johnson, Esq., Hinman, Howard & Kattell LLP (West Sand Lake, NY)  
 Joshua N. Koplovitz, Esq., Wapner Koplovitz & Futerfas PLLC (Kingston, NY)  
 E. Barry Lyon, Esq., ABB, Inc. (Norwalk, CT)  
 Henry M. Mascia, Esq., U.S. Department of Justice (Dobbs Ferry, NY)  
 Malvina Nathanson, Esq. (NYC)  
 Alan J. Pierce, Esq., Hancock Estabrook LLP (Syracuse, NY)  
 Joshua L. Seifert, Esq., (NYC)

In addition, the Committee on Courts of Appellate Jurisdiction thanks our vital program partners, The Rural Law Center of NY (Susan Patnode, Esq., Executive Director) and The Legal Project (Lisa Frisch, Executive Director).

### [FAQ](#)

#### Types of Cases

**Q: What kinds of cases does the Program accept?**

A: The Program offers representation in appeals involving education, family stability, health, housing, personal safety, public benefits and subsistence income.

**Q. I have a divorce appeal involving child support and maintenance. Is that covered by the family stability category?**

A. Yes.

**Q. I have an appeal involving the denial of unemployment insurance benefits by the Unemployment Appeal Board. Is that covered by public benefits and subsistence income?**

A. Yes. Note that if you won before the Appeal Board, and the employer appealed, you could apply for an assigned attorney, paid for by the State. However, if you are the party taking the appeal, no assigned attorney is available to you.

**Q: Does the Program offer representation for criminal appeals?**

A: No, the Program only handles civil appeals in specified categories.

**Geographic Area Covered**

**Q: What area of New York does the Program cover?**

A: The Program covers appeals from orders or judgments rendered by trial courts in the 50 counties of the Appellate Division, Third and Fourth Departments. The counties are listed in our program brochure. The Program also covers certain administrative appeals to the Third Department.

**Q: What if my appeal is to the First or Second Department? Can the Program help me?**

A: No. The Program is currently limited to the Third and Fourth Departments.

**Q: Why isn't the Program offered statewide? Isn't the Program a part of the court system?**

A: No, the Pro Bono Appeals Program is not administered by the courts, and it is separate from Assigned Counsel programs. It is an independent initiative of the NYSBA Committee on Courts of Appellate Jurisdiction, in partnership with The Legal Project and the Rural Law Center of New York.

**Parties Represented**

**Q: I just received a decision that I want to appeal from. Can the Program help me?**

A: Before the Program will review your application, the court must render an order or a judgment, and you or your attorney must serve and file a notice of appeal.

**Q: I won, and the other party is appealing. Can the Program help me?**

A: Yes, the Program also represents parties responding to an appeal.

**Process**

**Q: How do I apply to the Program?**

A: Fill out the Program application, with the assistance of your trial attorney, and submit it to the Program, by fax, email or mail, as described in the Program brochure.

**Q. I don't have an attorney to help me fill out the application. Can I still apply to the Program?**

A. Yes, we will consider your application, but if an attorney represented you in the trial court, it would be very helpful to have that attorney help identify appeal issues for our consideration.

**Q. Do I have to apply for an assigned attorney and have my application denied before I can apply to your Program?**

A. No. However, we will give a preference to applicants who do not qualify for assigned counsel.

**Q. What happens once I submit my application?**

A. First we check to make sure that your appeal qualifies based on the topic and the income level -- the Program offers representation to applicants who make up to 250% of Federal Poverty Guidelines. The income chart is available in the Program's brochure. Then a group of attorneys from the Committee on Courts of Appellate Jurisdiction discusses which cases should be accepted, based on numerous factors, including the merits of the appeal and the potential impact of the case on creating important legal precedent. Please remember that applying to the Program does not guarantee representation. Therefore, you should continue to seek other counsel while your application is being considered.

**Volunteers**

**Q. Who are the attorneys that volunteer to take cases?**

A. Cases selected for representation are first offered to the members of the full Committee on Courts of Appellate

Jurisdiction, which includes many experienced appellate attorneys from throughout New York State. Some appeals are handled by non-Committee members, but they must have extensive appellate expertise and be supervised by a Committee member, since offering high-quality appellate representation is a primary goal and commitment of our Program.

**Q: I'm an attorney. How can I volunteer with the Program?**

A: Experienced appellate attorneys are encouraged to volunteer with the Pro Bono Appeals Program. Please send an e-mail with your resume to [info@probonoappealsny.org](mailto:info@probonoappealsny.org).

SELECTED DECISIONS

[Oswald v Oswald](#)

[Matter of Robert AA v Colleen BB](#)

[Matter of Cranston v Horton](#)

**[Matter of Monaco v Armer](#)**

**[Matter of Bowman v Bowman](#)**

**[Matter of Rosi v Moon](#)**

**[Matter of Jennifer G. v Benjamin H.](#)**

**[Chang v Yu-Jen Chang](#)**

ARTICLES

[State Bar Expands Pro Bono Appeals Program, New York Law Journal, April 15, 2013](#)

[Pro Bono Appeals Program Expands to Fourth Department, April 11, 2013](#)

[State Bar Offers Pro Bono Appeals Program, October 25, 2012](#)

**[Law Center aids pro bono expansion](#)**, Press-Republican, December 17, 2011

**[State Bar Expands the Reach of Its Appellate Pro Bono Program](#)**, New York Law Journal, December 8, 2011

**[State Bar Association expands free legal aid program in region](#)**, Daily Freeman, December 5, 2011

**[NY Bar Association to offer free legal service](#)**, The Saratogian, December 4, 2011

**[New York State Bar Association Expands Program Providing Pro Bono Attorneys for Appeals to the Third Department](#)**, New York State Bar Association, November 30, 2011

**[Mother's win in court changes laws](#)**, Post Star, July 24, 2011

**[State Bar committee launches pro bono appeals program](#)**, State Bar News, September/October 2010, p. 13

Related Files

[NYLJ Article](#) (Adobe PDF File)

[Oswald v Oswald](#) (Adobe PDF File)

[Back](#)

### Appeals Program: The Power of Partnership

The New York State Bar Association's Committee on Courts of Appellate Jurisdiction has created a Pro Bono Appeals Program to help meet the needs of the many litigants who need legal representation in state appellate courts, but cannot afford to hire an appellate attorney and are not eligible for assigned counsel. The Program serves litigants in upstate New York whose income is less than 250% of the Federal Poverty Guidelines.

Representation is provided in selected appeals involving issues in one or more of these categories: shelter and housing, subsistence income and benefits, health and education, personal safety, and family stability. The Program does not provide representation for criminal issues.

The value and success of the Pro Bono Appeals Program is based on the strength of the partnerships of participating organizations with invaluable expertise.

The NYSBA Committee on Courts of Appellate Jurisdiction provides dedicated, experienced appellate attorneys from throughout the state who select cases, volunteer to handle appeals, and oversee the appellate attorneys from outside the Committee who generously donate their services.

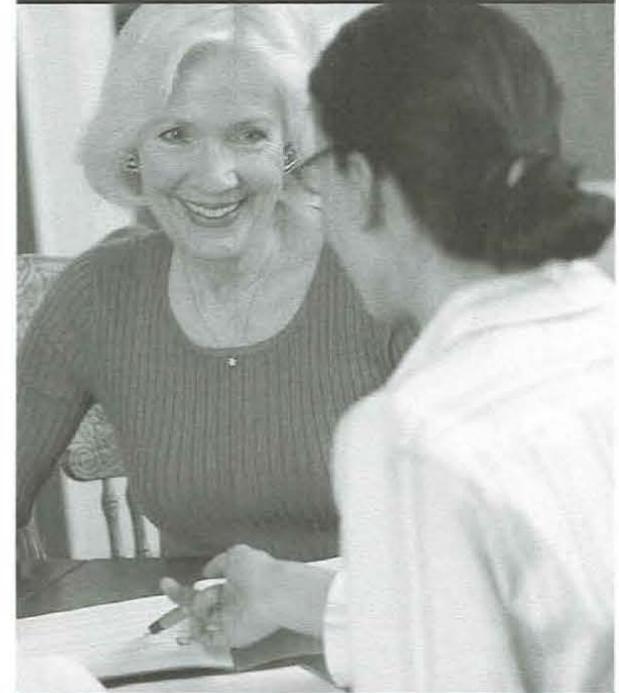
The Rural Law Center of New York and The Legal Project provide pro bono expertise, outreach to the community, extensive administrative support, CLE training, and malpractice insurance.

Many other organizations play a critical role. The Third and Fourth Departments have provided guidance, insight, and support and helped ensure that attorneys are aware of the program. Nonprofit and legal services organizations throughout the Third and Fourth Departments provide local outreach, refer appeals, assist clients in completing applications, and inspire volunteerism by local appellate counsel. Trial attorneys and human services organizations also refer clients to the Program.

#### Program Criteria

The Committee invites agencies and attorneys to make referrals for representation if a client meets these criteria:

- The client wishes to appeal a trial court order or judgment to the Appellate Division, Third or Fourth Department or, having won in the trial court, is responding to an appeal by the losing party.
- The litigation occurred in a county within the Third or Fourth Department (see list in this brochure).
- The applicant's income is less than 250% of Federal Poverty Guidelines.
- The appeal presents an issue in a category listed above.



## NYSBA Pro Bono Appeals Program

A Partnership of the New York State Bar Association Committee on Courts of Appellate Jurisdiction, The Rural Law Center of New York, and The Legal Project.



NEW YORK STATE BAR ASSOCIATION  
One Elk Street  
Albany, NY 12207



### Application and Pre-Screening

- Prospective clients must fill out the Appeals Program application form, available from the website below. The client should fill out the application with the referring attorney or program. A completed application constitutes an agreement for the Appeals Program to contact the prospective client's trial attorney to ask questions about the case. The application forms and conversations concerning the case will be kept confidential and used solely to determine whether to accept the case and to select an appeals attorney. For an application go to [www.nysba.org/probonoappeals](http://www.nysba.org/probonoappeals).

### Selection of Appeals

- For the most prompt processing, applications for both Third and Fourth Department appeals should be faxed or emailed to:  
(800) 832-9150  
[info@probonoappealsny.org](mailto:info@probonoappealsny.org)

For applicants who wish to mail their applications, the following addresses should be used:

**For Third Department applications:**  
Pro Bono Appeals Program  
c/o Rural Law Center of New York  
90 State Street, Suite 700  
Albany, NY 12207

**For Fourth Department applications:**  
Pro Bono Appeals Program  
c/o Worker Justice Center of New York  
1187 Culver Road  
Rochester, NY 14609

- The Program will conduct a pre-screening process, based on income and subject matter criteria. The prospective client may receive a letter stating that representation cannot be provided or may be contacted for further information.
- Cases that meet the threshold criteria will then be referred to the Committee, which will examine cases and determine which ones should be accepted, based on several discretionary factors. These factors include the issues presented, the merits of the appeal, the likelihood that the appeal could establish valuable precedent, the number of appeals currently being handled in the Program, and the number of available volunteer lawyers.

- Preferences will be given to applicants who do not qualify for assigned counsel.
- There is no guarantee that the Committee will select any particular case or that pro bono counsel will be found. Therefore, prospective clients should not forgo efforts to seek other counsel for the appeal.
- Appeals identified as eligible for representation will be described in a case summary sent to the pool of volunteer attorneys. An appeal will be placed with an appropriate attorney, based on experience or interest.
- If a case is accepted and a volunteer attorney is found, the attorney will contact the client directly. The client will be asked to sign a retainer agreement outlining what free legal services will be provided for the appeal and the process that will be followed.

### Expenses

Appeals involve expenses for transcripts, copying records and briefs, and filing fees. If the client is able to pay for some or all of these expenses, the retainer agreement will specify the client's responsibility. Otherwise, the volunteer attorney will make an application for free transcripts and a waiver of filing fees in an effort to minimize expenses. If such application is denied, the Program may not be able to handle the appeal.

### Counties Covered by the Appeals Program

#### Third Department:

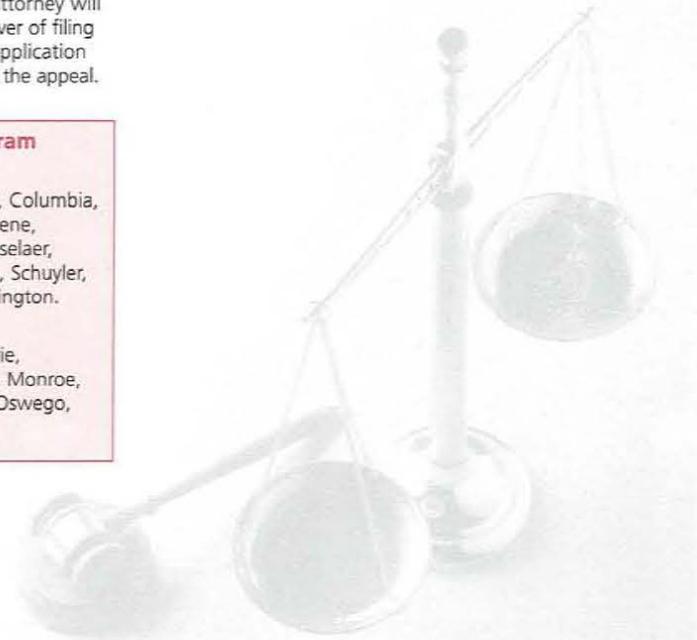
Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington.

#### Fourth Department:

Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, Yates.

### 2012–2013 Federal Poverty Guidelines

Persons in Family	Poverty Guidelines	250% of Poverty Guidelines
One	\$ 11,170	\$ 27,925
Two	\$ 15,130	\$ 37,825
Three	\$ 19,090	\$ 47,725
Four	\$ 23,050	\$ 57,625
Five	\$ 27,010	\$ 67,525
Six	\$ 30,970	\$ 77,425
Seven	\$ 34,930	\$ 87,325
Eight	\$ 38,890	\$ 97,225



NEW YORK STATE BAR ASSOCIATION

CIVIL APPEALS  
PRO BONO PILOT PROGRAM

*A Collaboration of the New York State Bar Association  
Committee on Courts of Appellate Jurisdiction,  
The Legal Project, and the Rural Law Center of New York*

Please fax, mail or email this completed form to:  
Civil Appeals Pro Bono Pilot Program  
The Legal Project  
Stuyvesant Plaza  
1475 Western Avenue  
Albany, NY 12203  
Fax (518) 435-1773  
info@legalproject.org

*This form should be filled out jointly by the prospective client and the trial attorney or nonprofit program referring this case to the Appeals Program.*

REFERRAL SOURCE INFORMATION

Name of Referring Trial Attorney or Referring Nonprofit Program   
Address   
Telephone  Email   
Date Referred

APPLICANT INFORMATION

Name   
Address   
County   
Telephone (Home/Cell)  (Work)   
Email  Monthly Income From All Sources

STATUS OF ASSIGNED COUNSEL APPLICATION TO THIRD DEPARTMENT

Pending  Denied  Approved  None submitted

CASE INFORMATION (Please check all that apply.)

Type of case:

Divorce  Family Offense  
 Custody/Visitation  Paternity  
 Termination of Parental Rights  Other

Does this case involve domestic violence?  Yes  No

Is there a domestic violence advocate involved on your behalf?  Yes  No

If yes, please note name of advocate and program and a phone number:

**To be filled out by the referring attorney or program:**

Describe the legal issue(s) that you believe could be raised on appeal, the grounds for reversal or modification to be advanced and why they have merit. If the respondent seeks representation, why is affirmance important? Please explain why this appeal should be considered for pro bono representation:

IF THE FOLLOWING DOCUMENTS HAVE BEEN COMPLETED,  
PLEASE ATTACH THEM TO THIS APPLICATION:

- Pre-calendar Statement
- Poor Person Motion

IF SUCH DOCUMENTS HAVE NOT BEEN COMPLETED,  
PLEASE PROVIDE THE FOLLOWING INFORMATION:

- (1) The title of the underlying action and the date of commencement:

- (2) The full names and addresses of the original parties:

Appellant:

Phone  Fax

Appellant's Counsel:

Phone  Fax

Respondent:

Phone  Fax

Respondent's Counsel:

Phone  Fax

(3) Any change in the parties:

(4) The court, judge, and county from which the appeal is taken:

(5) Index number:

RJI number:

(6) Specific nature of the underlying action or proceeding:

(7) Whether there is another pending appeal or pending related action or proceeding:

Yes  No

If yes, please describe:

**TO BE FILLED OUT BY THE APPLICANT:**

(8) If you are employed, your employer's name and address and position, and if you are a student, your school and who pays your tuition.

(9) If you are employed, what is your gross weekly salary?

(10) If you are married and your spouse is employed, what is his/her gross weekly salary?

(11) List other sources of income

(12) List assets, including a home, car, checking and savings accounts, including those jointly held, stocks, and bonds.

(13) List monthly expenses, including rent or mortgage, food, utilities, car, insurance, and loan repayment

\_\_\_\_\_  
Applicant's Signature (print name below)

THE FOLLOWING DOCUMENTS MUST BE ATTACHED TO THIS APPLICATION:

- √ NOTICE OF APPEAL
- √ ORDER OR DECISION BEING APPEALED
- √ APPELLANT'S BRIEF IF YOU ARE RESPONDENT AND THE BRIEF HAS BEEN FILED

# State Bar committee launches pro bono appeals program

By Cynthia Feathers



Feathers

Often, litigants of modest means cannot obtain counsel to pursue worthy appeals. They may earn too much to qualify for assigned counsel, but too little to retain appellate counsel.

As a result, worthy appeals may not be taken, and many unjust results may remain unchallenged.

Recognizing this unmet need, the State Bar's Committee on Courts of Appellate Jurisdiction has launched the Civil Appeals Pro Bono Pilot Program. The committee's initial effort is a pilot venture limited to appeals in which the devastation of erroneous decisions is particularly acute: those involving the family.

### Program a first

The pilot program will provide free representation, in a wide variety of Family Court and matrimonial appeals to the Third Department, to selected appellants and respondents whose

income is 250 percent or less of federal poverty guidelines. At its June 18 meeting in Cooperstown, the Executive Committee approved the pilot program, which is believed to be unique in the country.

Two years ago, Committee Chair Hon. Betty Weinberg Ellerin of New York (Alston & Bird LLP) made developing and implementing the initiative a committee priority. Her tenure as a presiding justice of the Appellate Division, First Department, gave her special insight into the potential value of such a project to both the courts and litigants.

In shaping the program, the role of another presiding justice was critical. Hon. Anthony V. Cardona of the Third Department offered invaluable support and guidance to the committee.

The committee is partnering with two Third Department-based nonprofit organizations dedicated to providing legal services to low-income New Yorkers: The Legal Project in Albany, headed by Executive Director Lisa Frisch, and the Rural Law Center of New York in Plattsburgh, led by Executive Director Susan Patnode. Frisch is a chair of the State Bar's Pro Bono Coordinators Network; Patnode is a past chair.

*The pilot program will provide free representation, in a wide variety of Family Court and matrimonial appeals to the Third Department, to selected appellants and respondents whose income is 250 percent or less of federal poverty guidelines.*

### Applications available

Brochures and applications for representation through the pro bono appeals program are available at [www.nysba.org/probono/ccaj](http://www.nysba.org/probono/ccaj). To apply, litigants must complete the application form with the assistance of an attorney or nonprofit program familiar with the case.

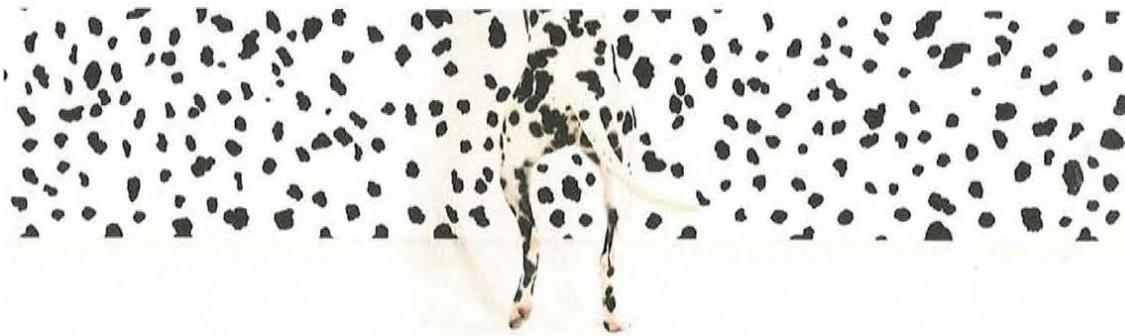
Following initial intake by The Legal Project and the Rural Law Center, the Pro Bono Appeals Program Subcommittee does a merits review and decides which applicants may receive representation, based on a variety of discretionary factors. Preferences will be given to family law and matrimonial cases in which assigned counsel is not available or there are issues involving domestic violence.

Subcommittee members are Elizabeth Bernhard of New York (Cohen & Gresser

LLP), Steven Feinman of White Plains (Feinman & Grossbard, PC), E. Barry Lyon of Norwalk, Connecticut (ABB Inc.), and Malvina Nathanson of New York.

Members of the full Committee on Courts of Appellate Jurisdiction serve as volunteer appellate attorneys and receive malpractice insurance coverage from the nonprofit organization partners. The committee's hope is that the pilot project will evolve into an expanded program covering other high need areas (such as government benefits and housing). The committee also hopes to establish similar programs in each Appellate Division and to attract additional volunteer appellate attorneys. ♦

*Feathers of Saratoga Springs (Law Office of Cynthia Feathers, Attorney At Law) is the subcommittee chair.*



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THE NEW YORK BAR FOUNDATION

*2012 Annual Report*

Lawyers caring. Lawyers sharing.  
Around the Corner and Around the State.



## The NYSBA Pro Bono Appeals Program

Family Court and matrimonial appeals deal with some of the most urgent and fundamental legal needs litigants face. Assigned counsel is generally not available to litigants making less than 150 percent of Federal Poverty Guidelines, but such persons often cannot afford to retain counsel. Legal services providers serving the relevant upstate region lack resources needed to provide such representation, and few law firms have written pro bono policies or commit to do pro bono appeals. Thus, many litigants proceed pro se or abandon appeals which may be meritorious.

The program is offered through the NYSBA Committee on Courts of Appellate Jurisdiction, and the organizational partners are the Rural Law Center of New York and The Legal Project. Our applicants are appellate litigants whose income is less than 250% of Federal Poverty Guidelines. We provide representation on appeal to the Appellate Division, Third Department, with a planned expansion to the Fourth Department in January 2013.

The Pro Bono Appeals Program shares a story and photo of how The New York Bar Foundation has impacted their program:

Bar Foundation funding has been instrumental to the launch and continued success of the Pro Bono Appeals Program. We offer pro bono representation to appellate litigants of modest means in appeals involving issues concerning the essentials of life: shelter and housing, subsistence income and benefits, health and education, personal safety, and family stability. Kaitlin, the child you see in her mother Becky's arms, suffers from a progressive disease. We were able to triple the support paid on her behalf; and our appeal changed the law in New York State to make it easier for custodial parents to bring petitions in their home state seeking to modify certain out-of-state support orders (*Bowman v. Bowman*, 82 AD3d 144 [3rd Dept 2011]).





NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

## News Release

**For Immediate Release****Contact: Lise Bang-Jensen**  
Director, Media Services & Public Affairs  
lbang-jensen@nysba.org  
518.487.5530**April 11, 2013**

### PRO BONO APPEALS PROGRAM HELPING LOWER-INCOME NEW YORKERS EXPANDS TO FOURTH JUDICIAL DEPARTMENT

Attorneys in Western New York are offering lower-income individuals a second chance to have their day in court, by volunteering to handle appeals of selected civil cases in the Fourth Judicial Department.

The Pro Bono Appeals Program, created by the New York State Bar Association, is offering free representation to individuals of modest means in civil (non-criminal) cases involving the essentials of life, such as family stability, unemployment insurance, education, housing and health.

Experienced appellate attorneys will handle the appeals for individuals who lost civil cases in trial court, as well as individuals who won in lower court but must respond to appeals by the opposing party.

The State Bar's Committee on Courts of Appellate Jurisdiction will select cases based on several factors, including the merits of the issues raised and the potential impact of the case. For example, appellate decisions can set precedents, having far-reaching impact beyond a single case.

The new program in the Fourth Department builds upon the experience of the State Bar Pro Bono Appeals Program in the Third Judicial Department, which the State Bar Association launched with The Legal Project and the Rural Law Center of New York in 2009. Since then, it has handled cases involving child custody, grandparent visitation, abuse and neglect, family offenses, unemployment insurance, constitutional issues, divorce and workers compensation benefits.

"The New York State Bar Association is proud to offer this innovative program in the Fourth Department as part of our long-standing commitment to increasing access to justice for all New Yorkers," said President-elect David M. Schraver of Rochester (Nixon Peabody).

Schraver praised Presiding Justice Henry J. Scudder for his invaluable support for the Pro Bono Appeals Program in the Fourth Department.

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Last Review and Update: Mar 04, 2013

2013 NY Slip Op 02811

HENRY P. OSWALD, Respondent,  
v.  
VICTORIA A. OSWALD, Appellant.

515519

Appellate Division of the Supreme Court  
of New York, Third Department

Decided April 25, 2013

Pro Bono Appeals Program, Albany (Joshua  
L. Seifert of counsel), for appellant.

Bartlett, Pontiff, Stewart & Rhodes, PC,  
Glens Falls (Karla Williams Buettner of  
counsel), for respondent.

Before: Peters, P.J., Rose, Stein and Egan  
Jr., JJ.

PETERS, P.J.

On October 29, 2005, plaintiff and defendant were married in a ceremony performed by a minister of the Universal Life Church (hereinafter ULC) in the Town of Jackson, Washington County. Three days earlier, the parties had executed an antenuptial agreement which, by its terms, was to take effect "only upon the solemnization of [the] marriage." Five years after the marriage, plaintiff commenced this action seeking a declaration that the marriage was void from its inception, and that the antenuptial agreement was thus unenforceable, because the officiant lacked authority under the Domestic Relations Law to solemnize the marriage. Alternatively, plaintiff sought a divorce as well as enforcement of the antenuptial agreement and equitable distribution of the parties' assets. Defendant answered, denying that the marriage was invalid and asserting a counterclaim for divorce. Plaintiff then

moved for summary judgment on his declaratory judgment claim and defendant cross-moved for summary judgment, arguing that plaintiff had not carried his burden of proving the invalidity of the marriage and seeking a declaration that the antenuptial agreement was void on different grounds. Concluding that it was constrained by the holdings in *Ranieri v Ranieri* (146 AD2d 34 [1989], *lv dismissed* 74 NY2d 792 [1989]) and *Ravenal v Ravenal* (72 Misc 2d 100 [1972]) to find the marriage void as a matter of law, Supreme Court granted plaintiff's motion and denied defendant's cross motion. Defendant appeals.

Initially, defendant contends that plaintiff should be estopped from arguing that the marriage was void because such position is contrary to representations he made on the parties' joint tax returns. As defendant correctly notes, a party to litigation may be estopped from asserting a position contrary to that taken on his or her tax returns (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *Naghavi v New York Life Ins. Co.*, 260 AD2d 252, 252 [1999]). However, a marriage that is void "cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife" (*Lipschutz v Kiderman*, 76 AD3d 178, 183 [2010]; *see Landsman v Landsman*, 302 NY 45, 48 [1950]; *see also People v Kay*, 141 Misc 574, 578 [1931]). Thus, Supreme Court correctly found that plaintiff was not estopped from challenging the validity of the marriage.

Addressing the merits, we first note that, inasmuch as *Ranieri v Ranieri* (*supra*) was the only appellate decision in this state addressing the question of whether a minister of the ULC has authority under New York law to solemnize a marriage, Supreme Court was bound to follow it

(see *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [1984]). This Court, however, is not so constrained (*id.* at 664-665), and we decline to follow the Second Department's determination. *Ranieri* was decided a quarter century ago, and we simply cannot presume that the belief system, structure and inner workings of the ULC have remained static since that time. With the issue having resurfaced, we find it appropriate to address it anew.

Having moved for summary judgment on his cause of action to declare the marriage null and void, plaintiff had the burden to submit competent evidence sufficient to demonstrate the absence of all material issues of fact (see CPLR 3212 [b]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Finding that plaintiff failed to meet that burden, we now reverse the grant of summary judgment in his favor.

Domestic Relations Law § 11 provides that "[n]o marriage shall be valid" unless it is solemnized by, among others, "a clergy[] [member] or minister of any religion" (Domestic Relations Law § 11 [1]). Pursuant to the Religious Corporations Law, the terms clergy member and minister include "a person having authority ... from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue" (Religious Corporations Law § 2). The statute defines an "unincorporated church" as a "congregation, society, or other assemblage of persons who are accustomed to statedly meet for divine worship or other religious observances, without having been incorporated for that purpose" (Religious Corporations Law § 2). Thus, the inquiry here distills to (1) whether the officiant of the parties' marriage was authorized by the

ULC to preside over and direct its spiritual affairs, and (2) whether the ULC is a "church" within the meaning of the statute.

With respect to the former, plaintiff's own submissions, which included the officiant's "Credentials of Ministry," establish that the officiant was ordained a minister of the ULC in August 2000 and remains in good standing. Furthermore, documents submitted from the ULC's website state that those ordained as a minister by the ULC are authorized to perform weddings, baptisms and funerals and to otherwise conduct religious services through the ULC. Indeed, plaintiff concedes that the officiant is a minister of the ULC and has not presented any proof assailing her authority to conduct the spiritual affairs of the ULC. Plaintiff, instead, stresses the unconventional nature of the method employed by the ULC in selecting its ministers in an ostensible attempt to undermine the legitimacy of authority bestowed upon its ministers. However, judicial involvement is permitted only when the issue can be resolved by application of neutral principles of law (see *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]) and, other than determining whether the ULC adhered to its own rules and regulations in selecting and ordaining the officiant as a minister, it is not the role of the courts to question the ULC's membership requirements or the method by which it selects its ministers (see *id.* at 287-288; *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 31 AD3d 541, 542 [2006], *aff'd* 9 NY3d 282 [2007]; *Park Slope Jewish Ctr. v Stern*, 128 AD2d 847, 848 [1987], *appeals dismissed* 70 NY2d 746 [1987], 72 NY2d 873 [1988]; *Matter of Kissel v Russian Orthodox Greek Catholic Holy Trinity Church of Yonkers*, 103 AD2d 830, 831 [1984]).

With respect to the question of whether the ULC constitutes a "church" within the meaning of the Religious Corporations Law, the affidavits from plaintiff and his attorney merely aver, "upon information and belief," that the ULC does not have an actual church or stated place of worship. Such allegations are without probative value (*see Lockwood v Layton*, 79 AD3d 1342, 1344 [2010]; *Anderson v Livonia, Avon & Lakeville R.R. Corp.*, 300 AD2d 1134, 1135 [2002]; *Onondaga Soil Testing v Barton, Brown, Clyde & Loguidice*, 69 AD2d 984, 984 [1979]). Moreover, the statement from the ULC's website that "the communication and fellowship of our ministers is equal to the once a week sacramonious [sic] fellowship in some of our most segregated and elitist churches" is, at best, ambiguous as to whether members of the ULC are accustomed to meet for divine worship or other religious observances (*see Religious Corporations Law § 2*). In any event, even had plaintiff sustained his initial burden on this point, we would find that defendant's submissions in opposition to the motion, which included an affidavit from the president of the ULC attesting that the ULC has numerous places of worship throughout New York State as well as a list of such congregations, raise genuine factual issues precluding an award of summary judgment.

Plaintiff's assertion that the ULC professes no belief to distinguish its church as a religion provides no basis to conclude, as a matter of law, that the ULC is not a church within the meaning of the Religious Corporations Law (*see Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of N.Y.*, 55 NY2d 512, 518 [1982] [stating that "the courts may not inquire into or classify the content of the doctrine, dogmas, and teachings held by [a] body to be integral to its religion but must accept that body's characterization of its

own beliefs and activities and those of its adherents, so long as that characterization is made in good faith and is not sham"]; *see also Matter of O'Neill*, 2008 Pa Dist & Cnty Dec LEXIS 135, \*12 [Ct Common Pleas, Bucks County, PA, Dec. 31, 2008, No. 08-01620-29-1]). In some respects, the ULC conducts itself like more conventional churches and encompasses many of the same ideas and values that are present in traditional religions. The ULC ordains ministers and, although ministers are not required to preside over a specific congregation or work within a physical church, the ULC encourages that practice. Additionally, since the ULC's formation in 1959, it has consistently advanced and advocated for its beliefs.

Accordingly, we find that plaintiff failed to establish as a matter of law that the officiant did not have authority to solemnize the parties' marriage, thus warranting denial of his motion. While defendant urges us to search the record and grant summary judgment in her favor (*see CPLR 3212 [b]*; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1091 [2012]), such relief is not available on the limited record before us, as genuine issues of fact remain.

Finally, defendant argues that Supreme Court erred by failing to address her claim that she was entitled to equitable distribution even if the marriage was void. In light of our determination, we need not reach the merits of such claim. However, we note that Supreme Court must address the merits thereof if it again determines, on remittal, that the marriage is void.

Rose, Stein and Egan Jr., JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted plaintiff's motion for summary judgment; motion denied; and, as so modified, affirmed.

82 A.D.3d 144 (2011)  
917 N.Y.S.2d 379

**In the Matter of REBECCA L.  
BOWMAN, Appellant,**  
v.  
**JASON R. BOWMAN, Respondent.**

510386.

**Appellate Division of the Supreme Court  
of New York, Third Department.**

Decided February 17, 2011.

145\*145 *Pro Bono Appeals  
Program, Albany (Cynthia Feathers of  
counsel), for appellant.*

*Jason R. Bowman, San Diego, California,  
respondent pro se.*

SPAIN, ROSE, LAHTINEN and  
McCARTHY, JJ., concur.

#### **OPINION OF THE COURT**

PETERS, J.P.

Petitioner and respondent were married in Washington and are the parents of a daughter (born in 2005). Following the parties' 146\*146 separation in 2007, petitioner and the child relocated to Saratoga County and respondent moved to California. Pursuant to a judgment of divorce entered in Washington which incorporated, but did not merge, a custody order and order of child support, petitioner was granted custody and respondent was awarded visitation and ordered to pay child support in the amount of \$479 per month until the child reached 18 years of age, as well as a certain percentage of extraordinary health care expenses.

In 2009, petitioner filed a petition in Saratoga County to modify respondent's

visitation. Respondent answered and cross-petitioned seeking sole custody of the child. Both parties appeared before Family Court and, in December 2009, an order was entered modifying the visitation provisions of the custody order. In the meantime, petitioner registered the Washington support order in New York and commenced this proceeding seeking an upward modification. Respondent moved to dismiss the petition on the ground that New York did not have personal jurisdiction over him or subject matter jurisdiction to modify the Washington support order. A Support Magistrate granted respondent's motion to dismiss the petition for lack of subject matter jurisdiction. Family Court subsequently dismissed petitioner's objections regarding jurisdiction and confirmed the Support Magistrate's order, prompting this appeal.

Petitioner's contention that Family Court has jurisdiction to modify the Washington child support order centers around a perceived conflict between the jurisdictional requirements contained in the Uniform Interstate Family Support Act (hereinafter UIFSA; *see* Family Ct Act art 5-B) and the Federal Full Faith and Credit for Child Support Orders Act (hereinafter FFCCSOA; *see* 28 USC § 1738B). "FFCCSOA 'follow[s] the contours of UIFSA' ... [and t]he two statutes have complementary goals" (*Matter of Auclair v Bolderson*, 6 AD3d 892, 893 [2004], *lv denied* 3 NY3d 610 [2004], quoting *LeTellier v LeTellier*, 40 SW3d 490, 498 [Tenn 2001]). UIFSA, which Congress required each state to adopt in order to receive federal funding (*see Matter of Spencer v Spencer*, 10 NY3d 60, 65 [2008]), was created "to alleviate the confusion engendered by multiple child support orders from different jurisdictions ... [and] is addressed to the courts' subject matter

jurisdiction to entertain support proceedings where there is more than one state involved" (*Ventura v Leong*, 68 AD3d 1318, 1320 [2009] [citations omitted]; see *Matter of Spencer v Spencer*, 10 NY3d at 66; *Matter of Auclair v 147\*147 Bolderson*, 6 AD3d at 893-894). FFCCSOA "requires that all child support orders be given full faith and credit and precludes out-of-[s]tate modifications of such orders by establishing jurisdictional rules whereby [s]tates are to refrain from modifying or issuing contrary orders except in limited circumstances" (*Matter of Reis v Zimmer*, 263 AD2d 136, 142 [1999] [internal quotation marks and citation omitted], amended 270 AD2d 968 [2000]; see 28 USC § 1738B [a]; *Matter of Spencer v Spencer*, 10 NY3d at 65; *Matter of Auclair v Bolderson*, 6 AD3d at 893). Like UIFSA, FFCCSOA was enacted

"(1) to facilitate the enforcement of child support orders among the [s]tates; (2) to discourage continuing interstate controversies over child support in the interest of greater financial stability and secure family relationships for the child; and (3) to avoid jurisdictional competition and conflict among [s]tate courts in the establishment of child support orders" (Pub L 103-383, § 2 [c]).

Under both UIFSA and FFCCSOA, the state issuing a child support order retains continuing, exclusive jurisdiction over that order so long as an individual contestant continues to reside in the issuing state (see Family Ct Act § 580-205 [a], [d]; 28 USC § 1738B [d], [e] [2] [A]; *Matter of Spencer v Spencer*, 10 NY3d at 66; *Matter of Auclair v Bolderson*, 6 AD3d at 894). Here, inasmuch as neither the parties nor the child continues to reside in Washington, that state ceased to have

continuing, exclusive jurisdiction (see Family Ct Act § 580-205 [a] [1]; 28 USC § 1738B [d]). This fact alone, however, does not confer upon the New York courts the power to modify the child support order.

Where, as here, the issuing state has lost continuing jurisdiction, UIFSA confers jurisdiction upon the New York courts to modify an out-of-state support order only if that order is registered in New York (see Family Ct Act § 580-611 [a]) and "(1) none of the parties or children continues to reside in the issuing state; (2) the party seeking modification is not a resident of the modifying state; and (3) the nonmoving party is subject to personal jurisdiction in the modifying state" (*Matter of Auclair v Bolderson*, 6 AD3d at 894; see Family Ct Act § 580-611 [a] [1]). Putting aside, for the moment, the question of whether respondent is subject to the personal jurisdiction of New York, it is not disputed that petitioner resides in New York. Therefore, under UIFSA, Family Court lacks jurisdiction to modify the Washington support order.

148\*148 FFCCSOA, on the other hand, provides that where the issuing court loses its continuing, exclusive jurisdiction, a state court may modify a child support order issued by another state "if ... the court has jurisdiction to make such a child support order pursuant to [28 USC § 1738B] subsection (i)" (28 USC § 1738B [e] [1]). 28 USC § 1738B (i), in turn, provides that "[i]f there is no individual contestant or child residing in the issuing [s]tate, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another [s]tate shall register that order in a [s]tate with jurisdiction over the nonmovant for the purpose of modification" (emphasis added).

The parties' dispute centers on the meaning of the phrase "jurisdiction over the nonmovant."

Petitioner argues that the phrase "jurisdiction over the nonmovant" in FFCCSOA contemplates only a requirement of personal jurisdiction, not subject matter jurisdiction, and to the extent that UIFSA sets forth the additional requirement that the party seeking modification be a nonresident of the modifying state, it is preempted by FFCCSOA under the Supremacy Clause of the US Constitution. Respondent, on the other hand, argues that the term "jurisdiction over the nonmovant" in FFCCSOA should be interpreted to refer to both personal and subject matter jurisdiction, and that FFCCSOA should be read as incorporating the subject matter jurisdiction requirements of UIFSA—i.e., the nonresidency requirement—such that the jurisdictional requirements of the two statutes are harmonious. Initially, we agree with petitioner that the term "jurisdiction over the nonmovant" plainly and expressly refers to personal jurisdiction alone, and not subject matter jurisdiction (*see Draper v Burke*, 450 Mass 676, 684-685, 881 NE2d 122, 128 [2008]; *but see LeTellier v LeTellier*, 40 SW3d 490, 498-499 [Tenn 2001], *supra*). Indeed, in *Matter of Auclair v Bolderson* (6 AD3d 892 [2004], *supra*)—a case in which we were not confronted with the question of whether the provisions of FFCCSOA and UIFSA conflict—this Court interpreted this phrase to mean "personal jurisdiction over the nonmoving party" (*id.* at 894). Moreover, inasmuch as we find the phrase "jurisdiction over the nonmovant" to be clear and unambiguous, we need not consider the legislative history of FFCCSOA to aid in our interpretation (*see Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 373 [2007]; *Matter of Raritan*

*Dev. Corp. v Silva*, 91 NY2d 98, 106-107 [1997]).

149\*149 In light of our conclusion that FFCCSOA requires only personal jurisdiction, and given the absence of UIFSA's nonresidency requirement in FFCCSOA, we are confronted with the issue of whether FFCCSOA preempts this inconsistent provision of UIFSA. In determining whether state law is preempted by federal law under the Supremacy Clause (*see* US Const, art VI, cl 2), our "sole task is to ascertain the intent of Congress" (*Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 763 [2007], *cert denied* 552 US 1141 [2008], quoting *California Fed. Sav. & Loan Assn. v Guerra*, 479 US 272, 280 [1987]).

"Congressional preemptive intent may be discerned in three ways: (1) expressly in the language of the [f]ederal statute; (2) implicitly, when the [f]ederal legislation is so comprehensive in scope that it is inferable that Congress intended to fully occupy the 'field' of its subject matter; or (3) implicitly, when [s]tate law actually 'conflicts' with [f]ederal law" (*Drattel v Toyota Motor Corp.*, 92 NY2d 35, 42 [1998] [citation omitted]; *accord Rosario v Diagonal Realty, LLC*, 8 NY3d at 763).

Here, FFCCSOA does not contain an express statement by Congress that it intended to preempt UIFSA. On the issue of implied preemption, we find both the existence of an actual conflict and an intent by Congress to occupy the field, thereby impliedly preempting the jurisdictional requirements of UIFSA.

As previously noted, FFCCSOA and UIFSA both attempt to eliminate judicial competition and conflicting orders in interstate child support disputes by establishing clear, definite rules as to which

state has jurisdiction to modify or enforce child support orders (*see* 28 USC § 1738B [a]; Pub L 103-383, § 2 [c]). And, a review of the legislative history of FFCCSOA reveals that Congress determined that there was a need for uniformity among the states as to the enforcement of child support orders.<sup>[1]</sup> As a result of these and other related problems, Congress exercised its authority, under the Full Faith and Credit Clause, 150\*150 the Commerce Clause, the Due Process Clause, and the General Welfare Clause to enact FFCCSOA (*see* Pub L 103-383, § 2; HR Rep 206; S Rep 361). Specifically, FFCCSOA states that each state "shall enforce according to its terms a child support order... of another [s]tate; and ... shall not seek or make a modification of such an order *except in accordance with [its provisions]*" (28 USC § 1738B [a] [emphasis added]). In our view, this congressional directive, as well as the legislative history behind the enactment of FFCCSOA, supports a finding that this federal jurisdictional statute establishes a policy of federal preemption in modification and enforcement of out-of-state child support.<sup>[2]</sup> Accordingly, because UIFSA conflicts with FFCCSOA in this regard, the jurisdictional provisions of UIFSA are preempted by those of FFCCSOA by operation of the Supremacy Clause.

Our conclusion here is analogous to the impact of the enactment of the Federal Parental Kidnaping Prevention Act of 1980 (28 USC § 1738A [hereinafter PKPA]), which requires that full faith and credit be given to child custody determinations, upon the Uniform Child Custody Jurisdiction Act (hereinafter UCCJA), embodied in Domestic Relations Law former article 5-A. Like UIFSA, UCCJA had been enacted by all 50 states and was designed to prevent jurisdictional competition and conflict between state courts in the enforcement and

modification of custody and visitation orders (*see* Domestic Relations Law former § 75-b [1] [a]). The purposes of UCCJA are to "discourage 151\*151 continuing controversies over child custody," to "deter abductions and other unilateral removals of children" and to "facilitate the enforcement of custody decrees of other states" (Domestic Relations Law former § 75-b [d], [e], [g]). With similar goals in mind, and with the need for uniformity, Congress enacted PKPA (*see* Pub L 96-611, § 7 [c] [5]).

Notably, the Court of Appeals has held that where UCCJA and PKPA conflict, PKPA preempts UCCJA by virtue of the Supremacy Clause (*see Matter of Mott v Patricia Ann R.*, 91 NY2d 856, 859-860 [1997]; *see also Frankel v Siravo*, 278 AD2d 66, 67[1st Dept 2000]; *Matter of Jackson-Ordia v Ordia*, 224 AD2d 529, 529 [2d Dept 1996]; *Matter of Hahn v Rychling*, 258 AD2d 832, 834 [3d Dept 1999], *lv dismissed* 93 NY2d 954 [1999]; *Matter of Reis v Zimmer*, 263 AD2d 136, 143-144 [4th Dept 1999], *supra*).<sup>[3]</sup> Given the similar goals of PKPA and FFCCSOA and unanimous findings that PKPA preempts inconsistent state law, we see no basis to reach a different conclusion on the issue of preemption with respect to FFCCSOA. Moreover, the Court of Appeals all but expressly answered the question of preemption in *Matter of Spencer v Spencer* (10 NY3d 60 [2008], *supra*). There, apparently foreseeing an issue regarding inconsistencies between FFCCSOA and UIFSA, the Court of Appeals noted that "[t]his is not a case where the two statutes conflict. Rather, the relevant provisions are consistent. Indeed, where UIFSA is silent, the FFCCSOA may help fill any gaps" (*id.* at 66). Moreover, in discussing whether a child support order made subsequent to an

expired support order constituted a "modification," the Court stated that "a subsequent child support order is a 'modification' as defined by the federal statute. The FFCCSOA defines 'modification' of a child support order and, under the Supremacy Clause of the United States Constitution, we are bound to follow that definition" (*id.* at 67 [emphasis added]). Likewise in this case, FFCCSOA defines the jurisdictional requirements for this state's modification of a sister state's child support order and, to the extent that UIFSA is inconsistent with those requirements, we are compelled to follow those contained in FFCCSOA. For all of these reasons, we find that 152\*152 the jurisdictional requirements of FFCCSOA preempt those of UIFSA.

Having found that the jurisdictional requirements of FFCCSOA preempt those of UIFSA, we now address the remaining requirement of FFCCSOA—whether personal jurisdiction may be maintained over respondent in New York. Due process permits a state court to exercise personal jurisdiction over a nondomiciliary so long as he or she has sufficient "minimum contacts" with the forum state such that the maintenance of the lawsuit "does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v. Washington*, 326 US 310, 316 [1945], quoting *Milliken v. Meyer*, 311 US 457, 463 [1940]; accord *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]). These minimum contacts must be the result of "some act by which the [nondomiciliary] purposefully avails [him]self [or herself] of the privilege of conducting activities within the forum [s]tate" (*Hanson v. Denckla*, 357 US 235, 253 [1958]; accord *Kulko v. Superior Court of Cal., City & County of San Francisco*, 436 US 84, 94

[1978]; see *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d at 216).

Here, respondent acquiesced in the child's relocation to New York, paid child support in this state and visited with the child in New York. While these acts, standing alone, are insufficient to confer personal jurisdiction over respondent (see *Kulko v. Superior Court of Cal., City & County of San Francisco*, 436 US at 94-96; *Matter of Hauger v. Hauger*, 275 AD2d 953, 953-954 [2000]; *Birdsall v. Melita*, 260 AD2d 809, 810-811 [1999], *lv denied* 93 NY2d 812 [1999]), respondent also invoked the aid of the New York courts and protections of our state's laws by filing an action in New York to modify the Washington custody and visitation order, and thereafter benefitted from Family Court's order modifying visitation. "Use of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident" (*Matter of Sayeh R.*, 91 NY2d 306, 319 [1997] [citation omitted] [concluding that the respondent "deliberately and affirmatively sought the protection of this (s)tate's laws, and thereby rendered herself amenable to our general long-arm jurisdiction"]; accord *Andrew Greenberg, Inc. v. Sirtech Can., Ltd.*, 79 AD3d 1419, 1423 [2010]; *Lynch v. Austin*, 96 AD2d 196, 199 [1983]; see *Matter of Richardson v. Richardson*, 80 AD3d 32, 35 [2010] [personal jurisdiction over the petitioner found where he affirmatively sought the entry of orders of protection against the respondents]). Furthermore, 153\*153 under these circumstances, we find that the exercise of jurisdiction over respondent will not offend notions of fair play and substantial justice (see generally *Burger King Corp. v. Rudzewicz*, 471 US 462, 477 [1985]; *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d at 217). As such, we find that

personal jurisdiction may be exercised over respondent in New York.

Therefore, inasmuch as none of the parties continues to reside in Washington, the Washington support order was registered in New York and New York may exercise personal jurisdiction over respondent, the jurisdictional requirements of FFCCSOA have been satisfied. Thus, Family Court possesses jurisdiction to modify the Washington child support order.

Ordered that the order is reversed, on the law, without costs, motion denied, and matter remitted to the Family Court of Saratoga County for further proceedings not inconsistent with this Court's decision.

[1] In its report that accompanied the bill containing FFCCSOA, the House of Representatives noted that hearings held before various subcommittees of Congress "have demonstrated the inadequacy of existing [s]tate law to protect the interests of children and custodial parents in enforcing child support orders where the non-custodial parent lives in a different [s]tate" (HR Rep 206, 103rd Cong, 1st Sess, at 4 [1993]). The report also pointed out that "the Full Faith and Credit clause of Article IV of the Constitution, and implementing legislation adopted by the Congress, have generally not been construed to apply to orders where the matter involves an ongoing obligation and the court retains the power to modify its decision" (HR Rep 206, 103rd Cong, 1st Sess, at 4-5 [1993]).

Likewise, the Senate found that "a large and growing number of child support cases involve disputes across state lines, and the laws by which courts determine their authority to establish and modify child support orders are not uniform" (S Rep 361, 103rd Cong, 2d Sess, at 5, reprinted in 1994

US Code Cong & Admin. News, at 3261-3262). The Senate report stated that "[t]his lack of uniformity ... has led to a number of deficiencies in child support collection [and] encourages non-custodial parents to relocate outside the [s]tates where their children and custodial parents reside, in order to avoid the jurisdiction of the courts of such [s]tates" (S Rep 361, 103rd Cong, 2d Sess, at 5, reprinted in 1994 US Code Cong & Admin News, at 3262).

[2] Although the United States Supreme Court has held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the [s]tates and not to the laws of the United States" (*Rose v Rose*, 481 US 619, 625 [1987], quoting *In re Burrus*, 136 US 586, 593-594 [1890]; accord *Hisquierdo v Hisquierdo*, 439 US 572, 581 [1979]), FFCCSOA is a procedural and jurisdictional statute which does not impose principles of substantive law on the states (*cf. In re Clausen*, 442 Mich 648, 670 n 24, 502 NW2d 649, 658 n 24 [1993]; *Arbogast v Arbogast*, 174 W Va 498, 502, 327 SE2d 675, 679 [1984]).

[3] Although New York replaced UCCJA with the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA) in 2002 (*see* L 2001, ch 386, § 1), UCCJEA is a revised version of UCCJA that seeks to conform to the provisions of PKPA (*see* Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 75-b, at 323), and it has been held that the jurisdictional provisions of PKPA preempt those of UCCJEA that are inconsistent (*see Stocker v Sheehan*, 13 AD3d 1, 10 [2004]).

# **NORTH CAROLINA**



## GUARDIAN AD LITEM PRO BONO PROGRAM

### STATEWIDE APPEALS DATA Data for 2012

#### Appellate Cases

188 appeals filed  
156 appeals represented by GAL Program  
82 appeals represented by  
GAL pro bono attorneys

#### Appellate Attorneys

1 Associate Counsel  
1 Appellate Counsel  
8 Contract Appellate Attorneys  
56 Pro Bono Appellate Attorneys



### ATTORNEY QUOTES

"Knowing that everything possible from the legal standpoint is being done for a child in need makes being a GAL pro bono appellate attorney very rewarding. I would strongly recommend other attorneys consider pro bono service with the GAL program because it is gratifying work that can be done on a flexible schedule. In addition, as with most appellate work, you have the opportunity to enhance your research and legal writing skills." — **Jay Butler, Partner**  
**Parker Poe Adams & Bernstein, LLP**

"There is no greater service or use of a law degree than advocating on behalf of children." — **Ashley Edwards, Associate**,  
**Parker Poe Adams & Bernstein, LLP**

*In 1983, the North Carolina General Assembly established the Office of Guardian ad Litem (GAL) Services as a division of the North Carolina Administrative Office of the Courts. Pursuant to N.C. Gen. Stat. §7B-601, when a petition alleging abuse or neglect of a juvenile is filed in district court, the judge appoints a volunteer Guardian ad Litem advocate and an attorney advocate to provide team representation to the child, who has full party status in trial and appellate proceedings. Through a collaborative model utilizing Guardian ad Litem attorney advocates, volunteers, and staff, the program provides a voice and legal advocacy in court to all North Carolina children who are alleged by the Department of Social Services to have been abused or neglected. If those cases are appealed, the Guardian ad Litem Program continues to represent the child on appeal through the use of staff, contract, and pro bono appellate attorneys. Contract and pro bono appellate attorneys are trained and supported by the GAL Associate Counsel and GAL Appellate Counsel.*

#### Guardian ad Litem Pro Bono Appellate Attorneys:

- Review trial transcripts and juvenile records
- Review and settle the record on appeal
- Respond to appellate motions and writs
- Draft and file Guardian ad Litem Appellee Briefs
- Fulfill statutory mandates to provide and promote the best interests of juveniles in appellate proceedings
- Provide a voice for abused and neglected children in North Carolina
- Help achieve safety and permanency in a child's life

#### GAL APPELLATE PROCEDURE IN A NUTSHELL

- Filed under NC Rule of Appellate Procedure 3.1, governing expedited filings of juvenile appeals
- Juvenile's identity must be protected
- Requires work from pro bono appellate attorney within the first 45 days
- GAL appellee must respond to proposed record on appeal within 10 days
- GAL Appellee Brief usually filed within 90-120 days from the start of the appeal
- GAL appeals receive calendaring priority
- Most GAL appeals resolved without oral arguments
- Complete GAL appeal resolved within 6-9 months



North Carolina  
**GUARDIAN AD LITEM**  
A CHILD'S ADVOCATE IN COURT

To learn more about Guardian ad Litem Pro Bono Attorney Opportunities, contact our Appellate Counsel, Tawanda Foster, at 919-890-1255 or [tawanda.n.foster@nccourts.org](mailto:tawanda.n.foster@nccourts.org). Find us on the web at [www.ncgal.org](http://www.ncgal.org) or on Facebook as "NC Guardian ad Litem."

## Volunteer Attorneys Needed

### You can make a difference in the life of a child...

Pro bono attorneys have become a vital part of the North Carolina Guardian ad Litem (GAL) since the inception of the Pro Bono Project. With offices in every county of the state, the GAL program offers a variety of opportunities for attorneys who want to advocate for the best interests of abused and neglected children.

We provide free CLE training for our pro bono attorneys in basic abuse and neglect laws, court processes, and appellate advocacy. Pro bono attorneys also stay updated on current legal events through our GAL publications.

Our needs vary from county to county, and include:

- Filing and defending appeals
- Serving as the guardian ad litem in abuse and neglect cases

Our greatest current and ongoing need is for pro bono attorneys to handle appellate cases. In just the last two years our program has seen an exponential growth with more than 200 appeals currently open. As you can imagine, it is difficult for many of our program's attorneys to maintain their trial court work while continuing to successfully advocate on numerous appeals. Luckily, private sector attorneys can take on an appeal anywhere in the state on behalf of our program and to ensure that a child's best interests continue to be heard.

### Do you want to sign up? Questions?

Send an e-mail to [tawanda.n.foster@nccourts.org](mailto:tawanda.n.foster@nccourts.org)  
or call 919- 890-1255.

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- [Special Immigrant Juvenile Status \(SIJS\)](#)

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**CHAPTER 6**  
**MOTIONS, APPEALS, AND OTHER PROCEDURAL**  
**TOOLS FOR GAL REPRESENTATION**

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## MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS

### 3. Writ of supersedeas [Rule 23 of the Rules of Appellate Procedure]

**a. Which court to petition:** Unless initially docketed in the supreme court, application for a writ of supersedeas must be made to the court of appeals (unless seeking relief from a ruling of the court of appeals). See specific language in Rule 23(a)(2) and (b).

**b. Purpose/circumstances:** The purpose for a writ of supersedeas is to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal under the following circumstances:

- when such judgment is not automatically stayed by the taking of appeal or a petition for mandamus, prohibition or certiorari has been filed **AND**
  - a stay order has been sought and denied in the trial court, **OR**
  - extraordinary circumstances make it impracticable to obtain a stay from the trial court.

**c. Temporary stay:** Pending a determination on the writ of supersedeas, an application can be made for a temporary stay, and for good cause shown, the court may issue an order for a temporary stay ex parte.

**d. Details concerning filing, service, content, response, etc.** are explained in Rule 23 of the Rules of Appellate Procedure.

### E. Appeals

Obviously, an appeal is another avenue for seeking relief from a judgment. See Appeals in § 6.8, directly following this section.

## § 6.8 Appeals <sup>10</sup>

\* This section on appeals is a summary of participation in a Guardian ad Litem appeal. For a comprehensive understanding of Guardian ad Litem appeals, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals*, which is available from the Guardian ad Litem State Office. Attorney advocates should be aware that GAL Program Policy requires state office approval for appeals. In addition, the Guardian ad Litem Program has an Appellate Coordinator and a Pro Bono Project to help with appeals. Please contact the GAL State Office for assistance with appeals.

### A. Expedited Appeals Procedure

A new expedited appeals process for Guardian ad Litem appeals became effective in May 2006. The new Rule 3A of the N.C. Rules of Appellate Procedure explains the changes of which you should be aware. In its entirety, Rule 3A provides the following:

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<sup>10</sup> This section on Appeals was drafted and edited by Pamela N. Williams, GAL Appellate Coordinator. Some material remains from the 2002 edition from materials adapted from Janice Perrin Paul, *The Appealing Attorney: The Appellate Process in Juvenile Cases*, prepared for a conference titled "Collaboration on Behalf of the Child," sponsored by the Guardian ad Litem Program, July 1994.

## GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL

### **Rule 3A. Appeal in qualifying juvenile cases -- How and when taken, special rules.**

**(a) Filing the notice of appeal.** Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/r neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

**(b) Special provisions.** For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcript to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

1. a notice of approval of the proposed record;
2. specific objections or amendments to the proposed record on appeal, or
3. a proposed alternative record on appeal.

## MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

1. the appellant shall file his or her proposed record on appeal, and
2. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) Briefs. Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

**(c) Calendaring priority.** Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

N.C. R. App. P. 3A (2007).

The new Rule 3A shortens the length of GAL appeals by a year or more, marking a major step forward in expediting permanency for the children GAL represents. GAL attorneys should pay particular attention to Rule 3A's two most important timesaving features: Production of the transcript under Rule 3A(b)(1) and of the record on appeal under Rule 3A(b)(2).

Under Rule 3A(b)(1), the AOC Court Reporting Coordinator assigns the transcriptionist to the appeal. The transcriptionist must then deliver the transcript within 35 days to both parties and the Court of

## GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL

Appeals. Any motions for extension of time to complete the transcript are now filed in the Court of Appeals, rather than in the trial court. Although this requirement is not clearly stated in Rule 3A, it is implied in the text of the Rule. The Court of Appeals has, by ruling on such motions to extend even though the appeal has not yet been docketed in the Court, acknowledged this requirement. Motions to extend the time to produce the transcript are filed by counsel for appellants, not the transcriptionist.

Rule 3A(b)(2) requires the appellant to serve the proposed record on appeal upon all other parties on appeal within 10 days after receiving the transcript. These parties must then submit any objections to the proposed record within 10 days of receiving it from the appellant. If the parties agree to the settled record within 20 days after the appellant received the transcript, or if the appellee serves neither notice of approval nor objection to the proposed record, then the duty falls on the appellant to file three copies of the record with the Court of Appeals. However, if the parties cannot agree to a settled record within 30 days after the appellant's receipt of the transcript, then the appellant must file the proposed record, and the appellee must file any objections or amendments or the proposed alternative record on appeal.

The rule speeds up the appeals process in two other provisions. First, absent extraordinary circumstances, the court will not grant extensions of time to prepare the transcript, record and briefs. In the past, these areas led to huge delays. Also, Rule 3A gives "calendar priority" to GAL cases. Unless otherwise ordered by the Court of Appeals, the rule limits cases to being heard only on the record and briefs – without oral argument.

The briefing schedule remains essentially the same as it was under Rule 3, with one important exception. Under Rule 3A(b)(3), the appellant's brief is due within 30 days after the settled record has been filed with the appellate court. In the past, the date the record was mailed to the parties triggered the 30-day briefing schedule. Finally, Rule 3A requires that both the appellant and the appellant's attorney sign the notice of appeal. The rule also prohibits trial counsel from withdrawing from the case until the record has been filed with the appellate court.

### B. Preserving the Record on Appeal

1. **The appellate court will only review a claim, defense, or theory** that is presented in the trial court.
2. **An error by the trial court will not be reviewed in the absence of** a timely objection setting forth the specific grounds on which it is based. (See Rule of Appellate Procedure 10.)
  - a. Rule 46 of the Rules of Civil Procedure governs the instances in which objections must be made in order to preserve an exception on appeal. Objections need to be made regarding the admissibility of evidence. It is wise to be very familiar with Rule 46.
  - b. With respect to rulings and orders not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. A party need only apprise the court of the objection to the court's action or make known the action he/she desires the court to take and the ground therefor; however, if a party has no opportunity to object or except to a ruling when made, the absence of an objection/exception does not prejudice the party. G.S. 1A-1, Rule 46(b)
  - c. The "plain error doctrine" is not applicable to civil cases. *In re Gleisner*, 539 S.E.2d 362 (2000). (A "plain error" is a fundamental error that is so prejudicial as to result in a miscarriage of justice or in the denial to appellant of a fair trial, and justifies relief on appeal though not objected to in the trial court.) *Id.*

## MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS

3. See **Rule of Appellate Procedure 9** regarding the composition of the record on appeal.
4. **Practical advice on preserving the record**
  - a. **Admit all relevant evidence**, both documentary and testimonial. Remember that argument is not evidence.
  - b. **Object and state the grounds for the objection.** A specific objection will preserve the evidentiary error on appeal to the extent of the particular objection; a general objection raises only the objection of relevancy and waives any other ground for exclusion. (See 1 Wigmore, Evidence, Sec. 18.)
  - c. **Move to strike** a question or answer when appropriate, especially when the question is asked and answered before you have a chance to object. Failure to do so will constitute a waiver on appeal.
  - d. **Avoid producing evidence that you objected to as inadmissible.** If you object to inadmissible evidence and then produce similar evidence through your own witnesses, you will be deemed to have waived your objection. However, you may object to the testimony of a witness and then cross-examine that witness to the extent that your cross is limited to explaining or rebutting the improper evidence.
  - e. **Make an offer of proof** to preserve for review an error in excluding evidence. When making an offer of proof, state for the record the legal basis for the admissibility of the evidence offered. This includes stating what the evidence would have tended to show or to what the witness would have testified. (See G.S. 1A-1, Rule 43.)
  - f. **Don't use a motion in limine as a substitute for objections.** A pretrial motion in limine cannot serve as a substitute for making timely trial objections.
  - g. **Generally insist that everything be on the record.** Politely resist "at the bench" or "in chambers" conferences – or make sure that such discussions are recorded by the court reporter, or have the court or a party summarize on the record the substance of the off-the-record conference.
  - h. **Request a ruling if the judge fails to rule** on a motion or objection, and ask for clarification of ambiguous rulings.
  - i. **Make motions in writing whenever possible.** File a supporting brief or memorandum of law if necessary.
  - j. **Make an on-the-record checklist of exhibits** admitted into evidence.
  - k. **State your objection on the record to such things as egregious nonverbal behavior** by opposing counsel or the trial judge.
  - l. **Review proposed orders carefully.** Make sure all relevant facts and conclusions are incorporated into the order.

## GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL

### **m. Ensure that all reports are incorporated into the order and made a part of the record.**

Be sure that the GAL's recommendations are expressly made a part of the order. Even if the court does not order what the GAL recommended, or does not want to incorporate the report, ask that the order recite what the GAL recommended or objected to.

### **C. When Not to Appeal**

**Practical advice:** Do not appeal just because you are angry with the other side. Don't appeal when you disagree with the judge's decision but are satisfied there are no grounds for reversible error. Don't appeal procedural or technical errors in a final order if the evidence would support the order, or on remand the judge would find the omitted facts. Don't appeal when the issue is not important and does not advance an ultimate goal in the case; appeal only if you would have a different result if you won the appeal.

### **D. Appropriate Courtesy to Trial Judge on Appeal**

**Practical advice:** When possible, it is best to avoid surprising the judge in his or her courtroom at the end of the case with your intent to appeal. Filing a written motion for a court reporter or giving the judge a memorandum of law prior to hearing that indicates that the issue before the court is important might alert the judge to the possibility of an appeal. Send the judge a copy of the appellate documents and materials.

### **E. Appeals of Rulings Made Pursuant to Abuse, Neglect and Dependency Proceedings**

**1. Proper Parties to Appeal.** Under §7B-1001, those who may appeal a final order under §7B-1001 include the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

**2. Proper Order to Appeal.** Under § 7B-1001, only a final order can be appealed. These orders include the following: (a) any order finding absence of jurisdiction; (b) any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken; (c) any initial order of disposition and the adjudication order upon which it is based; (d) any order, other than a nonsecure custody order, that changes legal custody of a juvenile; (e) any order relieving D.S.S. of reunification efforts; and (f) any order terminating parental rights or denying a petition/motion for termination of parental rights.

The order from which the appeal flows must be entered at the trial court, meaning it must be "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2007).

**3. Notice of Appeal.** The notice of appeal must be signed by both the attorney (if any) and the appealing party. N.C. R. App. P. 3A. The appellant has 30 days to appeal an order.

### **F. Appeals from Termination of Parental Rights Orders**

**1. Right to Appeal.** The following parties may appeal a termination of parental rights order: the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

**2. Timing and Notice.** The appellant has 30 days to file a notice of appeal and must serve all parties as is customary.

## MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS

### G. Other Important Requirements for All Appeals: The Rules of Appellate Procedure <sup>11</sup>

The Rules of Appellate Procedure are mandatory and failure to follow them subjects an appeal to dismissal. See *State v. Hart*, 361 N.C. 309; 644 S.E.2d 201 (2007); *Viar v. N.C. Dept. of Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005).

**1. Filing the Notice of Appeal.** Pursuant to Rule 3A, as noted above, the appellant must also sign the notice of appeal, along with counsel, if any. In addition, all documents referring to the juvenile must not include his/her name, address, social security number and date of birth. Refer to the juvenile with his/her initials or use a pseudonym.

**2. DSS and GAL Joining on Appeal.** When GAL and DSS have the same position on appeal, it is appropriate and wise for them to join on appeal, which will lessen the time the appellate judge and clerks will spend learning that position. It is not uncommon for the two parties to join and share the duties in authoring the joint brief. However, if GAL differs at all from the DSS position, the GAL attorney advocate should prepare his/her own full-length brief, as GAL is a party to the action. The GAL brief is on behalf of the children involved in the case. See N.C. R. App. P. 28 for an explanation on what should be in an appellant and appellee brief.

3. Preparation of the transcript and record on appeal shall be pursuant to Rule 3A, as set out above, which provides timelines that are different from other civil appeals.

4. For pointers on how to write an effective GAL brief and what to do for oral arguments, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

5. The appendices to the Rules of Appellate Procedure are extremely useful. They provide specific charts and examples to assist attorneys in meeting the requirements of the Rules. See also the timetables for juvenile appeals in Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

## § 6.9 Stay of Proceedings Pending Judgment

### A. Stay of Proceedings, Disposition Pending Appeal

[See statutes for more details.]

#### 1. Disposition pending appeal

**a. In nontermination proceedings:** Pending disposition of an appeal, the judge may enter a temporary order affecting the custody or placement of the juvenile for compelling reasons, which must be stated in writing, as the judge finds to be in the best interest of the juvenile. When the child has suffered physical abuse by one with a history of violent behavior, the court shall consider the opinion of the mental health professional who performed an evaluation under 7B-503(b) before returning the juvenile to the custody of that individual. For placement in foster care, the provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to such order. [7B-1003]

<sup>11</sup> For an in-depth discussion of the Rules of Appellate Procedure and Guardian ad Litem appeals, please consult Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

## GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL

**b. In termination proceedings:** “Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State.” [7B-1113]

### **2. Automatic stay of proceedings for all judgments until time to appeal has expired [G.S. 1A-1, Rule 62(a)]**

Judgments shall not be executed nor proceedings be taken for enforcement of judgment until expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment.

### **3. Stay upon appeal, application for relief from denial of stay [G.S. 1A-1, Rule 62(d), Rule of Appellate Procedure 8]**

a. When an appeal is taken, the appellant may obtain a stay of execution. (See G.S. 1A-1, Rule 62(a) and G.S. 7B-1003.)

b. Procedure for seeking relief for denial of a stay is set out in Rule 8 of the Rules of Appellate Procedure.

## MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS

### **B. Stay on Motion in the Trial Court for New Trial, Amendment, or Relief from Judgment [Rule of Civil Procedure 62(b)]**

The trial court may stay the execution of proceedings in its discretion and on such conditions for the security of the adverse party as are proper, pending the disposition of a motion made under the following rules:

- New trial or to amend a judgment (Rule 59)
- Motion for relief from a judgment (Rule 60)
- Motion for judgment (Rule 50)
- Motion for amendment to the findings (Rule 52(b))

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# OSB Appellate Practice Section

Official website and blog for the Oregon State Bar's Appellate Practice Section.

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September 17, 2013 at [Tonkon Torp.](#)

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## Appellate Pro Bono Program

After a year of cooperative work between the courts, the Appellate Practice Section's executive committee, and other bar members, we are pleased to announce the creation of the Oregon Appellate Pro Bono Program. Modeled after the pro bono program in the U.S. Court of Appeals for the Ninth Circuit, the program creates a pool of volunteer attorneys willing to represent *pro se* litigants in appellate cases. The Oregon Supreme Court or Court of Appeals selects cases in which the court would benefit from attorney representation.

Any active member of the bar is eligible to participate. In addition to assisting the courts in appropriate cases, the program is also intended to provide members of the bar with appellate experience. Members of the bar who are interested in receiving e-mail announcements about available cases should send an e-mail to [orapprobono@gmail.com](mailto:orapprobono@gmail.com). The email should include your name, bar number, email address, phone number, and mailing address.

Below is a sample notification of a case referred to the program:

"Greetings, everyone.

The Oregon Court of Appeals has referred the below case to the program in order to determine whether volunteer counsel is available to represent respondent on appeal. This case involves a dispute over custody and visitation of a minor child. The plaintiff /appellant (represented by counsel below and on appeal) appeals from a judgment that grants relief from default and sets aside a default judgment relating to visitation rights, denies plaintiff's motions for temporary and extended visitation, for sole custody, and to hold defendant in contempt. Respondent proceeded *pro se* at trial and has, so far, done the same on appeal.

As with all cases referred to the pro bono program, selection of a case for the program does not represent a determination by the Court of the merits of any side of or theory in the case, but simply a belief that representation by counsel may assist the Court in its review.

*If, after reviewing the below information carefully, you are interested and would be available to handle this matter pro bono, please respond to this email as soon as possible. No need to respond if you are unavailable.*

Before volunteering, please review the Statement of Program Principles for the program, [available here](#), particularly parts III, IV,

## OREGON APPELLATE RESOURCES

[Oregon Courts: Oregon Judicial Department Home](#)

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## OSB Appellate Practice Section: Appellate Pro Bono Program

and V. Note that the program does not have funds available to cover costs; issues regarding costs will need to be addressed with the prospective client. According to the trial court record, this client has previously requested and received waivers or deferrals of fees due to indigency.

Out of those attorneys who respond, we will randomly select one, and be in touch with that attorney regarding initial contact with the potential client (including contact information, checking conflicts, etc.). (We will likely make the initial assignment no later than Friday morning, 4/22.) You would still need to discuss representation as you would with any client, though this would be on pro bono terms, and (for the moment, at least) limited to the appeal.

If you are not experienced in appellate work, and would like to have an experienced appellate counsel as a mentor, let us know when you volunteer and we will try to match you up if you are selected.

Please send any inquiries to me and Derek Green at this email address. Thanks again for your willingness to participate.

Jeff Dobbins  
Willamette U. College of Law

**Oregon Appellate Pro Bono Program Case #0005**

**Summary:** The Oregon Court of Appeals has referred to the program an appeal in which *pro bono* representation of respondent might be of assistance to the court. As noted above, this case involves a dispute over custody and visitation of a minor child. Plaintiff / appellant Jaquelin Gardner (represented by counsel below and on appeal) appeals from a judgment (Lincoln Co. Cir. Ct.) that grants relief from default and sets aside a default judgment relating to visitation rights, and also denies plaintiff's motions for temporary and extended visitation, for sole custody, and to hold defendant / respondent (Marci Rae Taylor) in contempt. Defendant / respondent Taylor proceeded *pro se* at trial and has proceeded so far on appeal *pro se*. She has approached the clerk's office seeking assistance with the filing of a brief.

**Referral from:** Oregon Court of Appeals

**Status:** Briefing Pending in Oregon Court of Appeals  
(answering brief due)

**Case Title:** Marci Taylor, Jacquelin E Gardner v. Marci Rae Taylor, Court of Appeals No. A144895

**Possible Need for Counsel for:** Respondent Marci Rae Taylor

**Deadlines:** Respondent's Answering Brief due 5/26."

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**Oregon Appellate Court Pro Bono Program  
Statement of Program Principles**

**Primary Purpose:** To assist the appellate courts of the State of Oregon by connecting volunteer appellate attorneys with pro se clients in cases where pro bono representation by counsel would be helpful to the Court.

**Secondary Purpose:** To provide attorneys in the state with experience in appellate representation, and provide a further opportunity to meet pro bono goals in the state.

**I. Creation of Program**

The Oregon Appellate Court Pro Bono Program is a volunteer project managed with the assistance of the Executive Committee of the Appellate Practice Section of the Oregon State Bar, and in cooperation with the Oregon Supreme Court and Court of Appeals.

The Appellate Practice Section Executive Committee shall identify a volunteer attorney or attorneys to serve as program managers for the Program.

A Program Committee is established, consisting of the program managers, the Appellate Commissioner, designees of the Chief Justice and Chief Judge, and a member of the Appellate Practice Section Executive Committee, as well as such other individuals that the named members may choose to invite. The Program Committee shall meet at least yearly in order to review the program and propose changes to the program as appropriate or necessary.

**II. Identification of Cases**

A) The appellate courts have discretion to identify cases appropriate for inclusion in the program. A case may be appropriate for inclusion in the program if the Court believes that referral of a case to volunteer counsel would be helpful to the Court.

B) The program is not intended to supplant established programs for representation of criminal defendants or any other pro bono programs established in the state.

C) The appellate courts may identify internal processes, procedures, and individuals responsible for the identification of appeals appropriate for the program

D) The Appellate Commissioner and designees of the Chief Justice and Chief Judge have responsibility for contacting the program managers in order to request assignment of volunteer attorneys through the program.

E) The Appellate Commissioner and designees of the Chief Justice and Chief Judge should notify the judges of the Courts on a yearly basis of the availability of the program.

G) In appropriate cases, the appellate courts may request participation of counsel through the program as “amicus to the court,” rather than as a representative of any particular party.

F) Selection of case for the program does not reflect a determination of the merit of any party’s position or theory, but rather simply indicates that the referral of a case to pro bono counsel is considered to be of potential benefit to the court.

### **III. Volunteer Attorney Participation**

#### **A. Participation Requirements for Volunteer Attorneys**

Volunteer participation in the program is open to (1) active members of the Oregon State Bar, and (2) law school clinical programs, as addressed below. In addition, participation is subject to the following terms and conditions:

1) Neither the court, bar, nor program managers are able to reimburse the volunteer attorney for expenses (e.g., travel for argument, copy costs, etc.) incurred during the course of representation.

2) No fees for the attorney's time may be charged to the client. If a relevant provision permits recovery of attorney fees by counsel, the volunteer attorney may request and receive such fees as provided by applicable law. Counsel must evaluate the costs of the appeal, including the cost for preparation of the record, and address payment of those costs in the initial representation letter.

3) The volunteer attorney is always responsible for ultimate compliance with ethics rules, including rules regarding the evaluation of conflicts, personal interest, and maintenance of PLF and any other relevant insurance.

4) The program managers, in cooperation with the Program Committee and State Bar, should evaluate whether the program would benefit from being officially sponsored as a Bar pro bono program. If so, the program managers may, in cooperation with the Executive Committee of the Appellate Practice Section, file the necessary application with the Bar.

#### **B. Identifying Volunteer Attorneys**

The program managers shall distribute information about the program to all active members of the Oregon State Bar through a yearly email. The email should include relevant information about the program, instructions on how to register as a volunteer attorney, and contact information. The website for the Bar's Appellate Section should also include information about the program and contact information. Attorneys who are interested in volunteering for the program would need to respond by registering with the program managers.

#### **C. Registering Volunteer Attorneys**

To register, an attorney must sign and submit a simple registration form to the program managers. In the registration, the volunteer attorney shall provide contact and bar membership information, and sign a statement confirming that she or he (1) meets the eligibility requirements, and (2) agrees to abide by the terms and conditions of the program.

The program managers should compile and maintain a list of the registered volunteers. Although the volunteer attorneys must continue to affirm that they meet the eligibility requirements, the program managers should check bar membership records to confirm active bar membership. The program managers should update and purge the list of volunteers on a yearly basis.

#### **D. Law School Clinical Programs**

Law school clinical programs, or faculty members who are active members of the bar and willing to supervise student participants, may request assignment of cases during the year as appropriate. Faculty or staff advisors of students participating in the program through this mechanism must comply with all relevant requirements regarding the representation of clients under this program, and are ultimately responsible for the

representation.

#### **IV. Assignment of Cases to Volunteer Attorneys**

A) The court shall notify the parties and the program manager when a case has been identified for possible inclusion in the pro bono program. The program managers shall then provide the pro se party with a consent form to sign if the party is interested in participating in the program, and send an email notice about the case to the list of registered volunteers. The email will include general, objective information about the case generated by the court and program managers, and include the names of the parties and any counsel, the case's current procedural posture (e.g., whether briefs have been filed, any upcoming time deadlines, etc.), and the general issues presented. The goal of the email is merely to provide an overview of the case and conflict information, not to provide any legal assessment. The email shall state that any attorney interested in volunteering to take on the case should email the program manager.

B) The program managers shall then randomly select an attorney to the case from those who have volunteered to take on the case, subject to three exceptions: (1) registered volunteers who have not had an active case through the program in the last three years will be given preference over those who have, (2) registered volunteers who have previously requested and not been assigned an active case through the program will be given preference over those who are requesting participation for the first time, and (3) if the court specifically requests referral to an experienced appellate attorney due to the complexity of an appeal, the program managers shall select an experienced appellate attorney. (However, given that one of the purposes of this program is to provide less-experienced appellate attorneys with appellate opportunities, this last exception is intended to be rare.)

C) The program managers shall notify the selected volunteer attorney of their selection for a particular case once the pro se party has agreed to be included in the program. If the selected attorney is interested in proceeding with representation, she or he should contact the pro se party and establish representation. Within 14 days, the attorney should either establish representation and file a notice of appearance with the Court, or notify the program managers regarding progress on the issue of representation.

D) Counsel is encouraged to review the case prior to agreeing to representation in order to clear conflicts and to ensure the issues are appropriately presented for appellate review. If counsel believes that their representation is impermissible, or otherwise unlikely to aid in the court's review of the case, they may decline representation and so inform the program managers. The program managers may, if appropriate, select another attorney pursuant to section (B) in order to evaluate representation.

#### **V. Terms of Representation.**

##### **A. Representation Letter**

The program managers shall draft a model representation letter that volunteer attorneys may use for guidance. The model letter shall specify that the volunteer attorney has agreed to represent the client on a *pro bono* basis and that the representation is limited to the appellate proceedings in which the Court has requested assistance. The model letter should address payment of costs on appeal. The model letter shall also state that the attorney has discussed, and the client has agreed, that the attorney may consult

with the program coordinators on non-privileged matters, but that the client understands that such consultation does not create an attorney-client relationship between the coordinators and the client. Willamette Law or other law school programs may volunteer to provide moot courts for program participants on terms to be identified later.

**B. Procedural Matters**

Counsel that is participating through the program should anticipate that the Court will manage any identified case as it would any other appeal. That said, however, the Court may recognize in evaluating requests for extension and other procedural matters that counsel is performing volunteer service and may need some additional flexibility in managing the case.

If pro bono counsel establishes representation under this program after briefing at a particular stage is complete, the Court may request supplemental briefing from the parties.

**C. Further representation**

If the case continues beyond the stage for which representation under the program was initially established, appropriate further representation may be established between counsel and the client outside of this program. If further representation within the auspices of the program is desired by counsel, counsel should contact the program managers regarding such representation.

**D. Recognition**

On an annual basis, the Executive Committee of the Appellate Practice Section of the State Bar should acknowledge the work of pro bono counsel who provide their services under this program.

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## How to Participate in the Tennessee Appellate Pro Bono Pilot Program

By Lynn Pointer on Mon, 04/23/2012 - 3:28pm

In January 2011, the Tennessee Bar Association (TBA) and Tennessee Alliance for Legal Services (TALS) launched the **Tennessee Appellate Pro Bono Pilot Program**, a pilot initiative that provides pro bono representation to litigants appearing in the Tennessee appellate courts who otherwise could not afford counsel.

The Tennessee Appellate Pro Bono Pilot Program has three primary goals:

- To improve access to justice for low-income litigants in Tennessee's appellate courts by establishing a qualified panel of appellate attorneys to provide pro bono representation on appeal;
- To provide increased opportunities for attorneys with appellate practice expertise to use their skills to serve clients who could not otherwise afford representation; and
- To provide an opportunity for senior appellate attorneys to mentor and supervise young lawyers seeking appellate practice experience through pro bono representation.

The program will also provide pro bono attorneys to assist (or co-counsel with) public interest lawyers who are primary counsel in cases on appeal. Criteria for case selection include a significant novel or unsettled question of law, error in the trial court that may have implications outside of the individual case, a current split of authority, or a possible precedent-setting decision coupled with the financial need of the party. All applicants to the program must not otherwise be able to afford appellate counsel.

The program will maintain a network of volunteer attorneys to whom cases may be referred. When a case is selected for pro bono representation, the screening committee will immediately send notice to the designated panel of appellate attorneys with a request for response within a short time period. When an attorney responds that she is able to accept the case, the client and the trial attorney will be notified and representation will begin.

**HOW YOU CAN PARTICIPATE:** Do you have experience litigating in the Tennessee Supreme Court or Courts of Appeals? Do you want to enhance or develop your appellate litigation skills with the mentorship of experienced appellate attorneys? Join us in kicking off the Tennessee Appellate Pro Bono Pilot Program. A volunteer participation form is attached.

Attachment	Size
<a href="#">TBA Appellate Pro Bono Volunteer Form.doc</a>	33.5 KB

<p><b>Member Services</b></p> <ul style="list-style-type: none"> <li>• Fastcase</li> <li>• Member Search</li> <li>• TBA Member Benefits</li> <li>• Cart Search</li> <li>• Law Practice Management</li> <li>• Legal Links</li> </ul>	<p><b>CLE</b></p> <ul style="list-style-type: none"> <li>• Course Catalog</li> <li>• Create CLE Account</li> </ul> <p><b>Programs</b></p> <ul style="list-style-type: none"> <li>• Celebrate Pro Bono</li> </ul>	<p><b>TBA Groups</b></p> <ul style="list-style-type: none"> <li>• Committees</li> <li>• LAW PAC</li> <li>• TBALL Class of 2013</li> <li>• Leadership Law Alumni</li> <li>• Mentoring Task Force</li> <li>• Sections</li> <li>• TBASCUS</li> <li>• Tennessee Legal</li> </ul>	<p><b>Publications</b></p> <ul style="list-style-type: none"> <li>• Blog Listing</li> <li>• Bookstore</li> <li>• Current Legal News</li> <li>• Disciplinary Listings</li> <li>• TBAConnect</li> <li>• TBA Today</li> </ul>	<p><b>Access To Justice</b></p> <ul style="list-style-type: none"> <li>• Access to Justice Committee</li> <li>• Attorney Web Pages</li> <li>• Celebrate Pro Bono</li> <li>• Corporate Counsel Pro Bono Initiative</li> </ul>	<p><b>Contact</b></p> <ul style="list-style-type: none"> <li>• Staff</li> </ul> <p><b>Help</b></p> <ul style="list-style-type: none"> <li>• Website Map</li> <li>• Website Search</li> <li>• Bar Center</li> </ul>
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## **TENNESSEE APPELLATE PRO BONO PILOT PROGRAM**

*A joint project of the TBA, TBA Appellate Practice Section, TBA Access to Justice Committee, and the Tennessee Alliance for Legal Services*

In 2011, the Tennessee Bar Association (TBA) and Tennessee Alliance for Legal Services (TALS) launched the **Tennessee Appellate Pro Bono Pilot Program**, a pilot initiative that provides pro bono representation to litigants appearing in the Tennessee appellate courts who otherwise could not afford counsel.

The Tennessee Appellate Pro Bono Pilot Program has three primary goals:

- To improve access to justice for low-income litigants in Tennessee's appellate courts by establishing a qualified panel of appellate attorneys to provide pro bono representation on appeal;
- To provide increased opportunities for attorneys with appellate practice expertise to use their skills to serve clients who could not otherwise afford representation; and
- To provide an opportunity for senior appellate attorneys to mentor and supervise young lawyers seeking appellate practice experience through pro bono representation.

**Case Referral:** In its pilot phase, the Appellate Pro Bono Program will accept cases referred by legal services attorneys or attorneys who have represented clients pro bono in the lower courts but cannot continue on appeal. Judges and justices may refer cases to the program that they believe to be appropriate for pro bono representation. The Program will also consider cases from attorneys seeking appellate co-counsel or consultation on appellate issues. TALS will provide organizational and administrative support to the Program. Cases should be referred to TALS, which will conduct the initial screening to establish that the potential client cannot afford private counsel on appeal.

**Case Screening:** Referred cases will be screened by TALS staff in consultation with a committee of attorneys from the TBA Appellate Practice Section. Cases will be selected for representation based upon criteria including the presence of issues of first impression or complex legal issues, matters involving vindication of substantial constitutional or statutory rights, questions of unsettled authority, potentially meritorious claims and issues that are common but may evade review.

**Attorney Appointment:** The Program will maintain a network of volunteer attorneys to whom cases may be referred. If a case is selected for pro bono representation, the screening committee will immediately send notice to the designated panel of appellate attorneys with a request for response within a short time period. When an attorney responds that she is able to accept the case, the client and the trial attorney will be notified and representation will begin.

**HOW YOU CAN PARTICIPATE:** Do you have experience litigating in the Tennessee Supreme Court or Courts of Appeals? Do you want to enhance or develop your appellate litigation skills with the mentorship of experienced appellate attorneys? Join us by participating in the Tennessee Appellate Pro Bono Pilot Program. A volunteer participation form is attached.

## TENNESSEE APPELLATE PRO BONO PILOT PROGRAM

*A joint project of the TBA, TBA Appellate Practice Section, TBA Access to Justice Committee, and the Tennessee Alliance for Legal Services*

### Structure and Overview

The Tennessee Alliance for Legal Services and the Tennessee Bar Association plan the launch of a pilot program in which attorneys will provide pro bono representation to low-income litigants in civil cases appealed to the Tennessee Court of Appeals and the Tennessee Supreme Court. The program will also provide case assistance or co-counsel support to public interest lawyers who are lead counsel in cases on appeal. The program is devised by the TBA, the TBA Appellate Practice Section, the TBA Access to Justice Committee and the Tennessee Alliance for Legal Services.

#### Program structure:

##### 1. Coordinating Committee:

A Coordinating Committee will oversee the project and have decision-making authority regarding the appellate project and its administration. The Coordinating Committee will be comprised of nine members each serving two year terms. The members of the Committee shall be as follows: three appellate lawyers representing the TBA Appellate Practice Section, two lawyers representing the TALS Substantive Law Task Forces; two relevant staff members from the TBA; and two relevant staff members from TALS.

A chair shall be selected annually to lead the Coordinating Committee and will work with TALS and TBA staff to ensure that the project is functioning well. The chair will be the primary spokesperson for the project.

##### 2. Sources of referral:

- a. Public interest lawyers with cases pending on appeal or cases that they believe merit appeal;
- b. Pro bono lawyers who handle a case at the trial court level but cannot continue to represent the client or would like assistance to handle the case on appeal; and,
- c. Members of the Tennessee judiciary.

##### 3. Administration of Appellate Program:

TALS will provide staff responsible for processing cases and transmitting case information to the Coordinating Committee for review.

- Applications: For a case to be considered for representation, lawyers or other referrers will submit a basic application for assistance to the program. The application will include a description of why the case meets the basic criteria

for appeal and include any other reasons why the case may be particularly appropriate for pro bono representation. For example, a case may present a novel or unsettled issue of law, the resolution of which would substantially assist law development. Additional criteria are set out below.

- Once the application is received, TALS staff, with consultation by the Chair of the Coordinating Committee, will perform an initial review of the application form, the court docket, any briefs or motions filed to date, and selected pleadings from the trial court or the Court of Appeals. They may call the applicant to request additional information. Based on this initial review, staff will recommend to the Coordinating Committee whether to accept or reject a case or seek further information on the case. Staff will utilize mutually accepted case selection criteria.
- Criteria for case selection include the presence of issues of first impression or complex legal issues, matters involving vindication of substantial constitutional or statutory rights, questions of unsettled authority, potentially meritorious claims, and issues that are common but may evade review. All applicants to the program must not otherwise be able to afford appellate counsel.
- If a case is accepted by the Coordinating Committee, staff will refer the case to an identified pool of appellate pro bono lawyers who will be asked to accept or decline the case.
- If a volunteer attorney agrees to accept the representation, staff will then send a Notice of Acceptance informing the applicant of his or her selection for participation in the program.
- The applicant will notify the Coordinating Committee of the date by which it must have a decision on counsel, and if counsel cannot be provided by that date, staff will inform the applicant that representation will not be provided. This process will take place on an expedited basis to ensure no delay in pursuing the appeal.

This staff person will also manage finances related to the preparation of transcripts, attorney fees, and other financial matters. Finally, staff will maintain statistics about the pro bono program, including hours spent on the cases, funds donated by lawyers or firms to cover the cost of litigation expenses, the types of cases referred to the program, results in the accepted cases, and feedback from attorneys and clients.

#### **4. Appellate Pro Bono Lawyers:**

The TBA will maintain a list of volunteer attorneys specifically identified for this program. Volunteer attorneys may be members of the TBA Appellate Practice Section, other attorneys with significant appellate experience, or attorneys without

significant appellate experience who will be paired with an experienced mentor in the program. Lawyers will be asked to apply to serve on the panel and to detail their relevant appellate experience, particular areas of expertise, and any standing conflicts.

**5. Litigation Fund:**

TALS and the TBA hope that many participating attorneys and their firms will provide financial support for an accepted appeal as part of their pro bono commitment. TALS and the TBA will also coordinate on raising a pool of funds adequate to support the costs of filing fees, transcription services, and other related expenses. In the event that an appellate pro bono attorney's firm will not cover the litigation costs of these items, the litigation fund will be tapped. These funds will be maintained by TALS and paid out as needed in appropriate cases.

**6. Lawyers Professional Liability Insurance:**

Volunteer lawyers participating in the program will be covered by professional liability insurance maintained by TALS. TALS has a specific pro bono rider to its general organizational policy for this purpose.

**TENNESSEE APPELLATE PRO BONO PILOT PROGRAM**  
*A joint project of the TBA, TBA Appellate Practice Section, TBA Access to Justice Committee, and the  
Tennessee Alliance for Legal Services*

**Applicant Information (to be completed by the referring attorney)**

Name: \_\_\_\_\_  
Firm/Organization: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Email: \_\_\_\_\_  
Phone: \_\_\_\_\_

**Case Information**

Case Caption: \_\_\_\_\_  
Trial Court & Case No. \_\_\_\_\_  
Party Seeking Representation: \_\_\_\_\_  
Appellant or Appellee: \_\_\_\_\_  
Was the client granted in forma pauperis status at the trial court? \_\_\_\_\_

Adverse Party or Parties: \_\_\_\_\_  
Opposing Counsel: \_\_\_\_\_  
\_\_\_\_\_

Type of Case: \_\_\_\_\_

**Date by which you must receive notification of pro bono attorney assistance.** The Pro Bono Program will work on the timeline you give us, so please be sure you allow sufficient time to plan if pro bono counsel is not available:

\_\_\_\_\_

In a separate document, please respond to the following three inquiries:

- 1) Briefly describe the case and the decision to be appealed. You should also attach a copy of any final order to be appealed.
- 2) Briefly describe the issues to be raised or defended on appeal:
- 3) Briefly indicate why this case is appropriate for pro bono representation. For example, counsel may be particularly appropriate if the case involves issues of first impression or complex legal issues, matters involving vindication of substantial constitutional or statutory rights, questions of unsettled authority, potentially meritorious claims, or issues that are common but may evade review.

**Please submit this form, along with a completed copy of the attached Affidavit of Financial Need and copies of the Notice of Appeal (if available) and the trial court's final judgment, to:**

TN Alliance for Legal Services  
ATTN: Anne Fox  
50 Vantage Way, Suite 250  
Nashville, TN 37228  
afox@tals.org

**TENNESSEE APPELLATE PRO BONO PILOT PROGRAM**

*A joint project of the TBA, TBA Appellate Practice Section, TBA Access to Justice Committee,  
and the Tennessee Alliance for Legal Services*

**VOLUNTEER FORM**

Name: \_\_\_\_\_  
BPR: \_\_\_\_\_  
Firm/Organization: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Email: \_\_\_\_\_  
Phone: \_\_\_\_\_

- I have appellate practice experience and would like to volunteer to provide pro-bono representation to low-income clients in the Tennessee appellate courts.
- I would like to work with an appellate practice mentor to provide pro-bono representation to low-income clients in the Tennessee appellate courts.

**I have represented clients in:**

- Tennessee Court of Appeals
- Tennessee Court of Criminal Appeals
- Tennessee Supreme Court
- Other appellate courts:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**My areas of practice expertise include:**

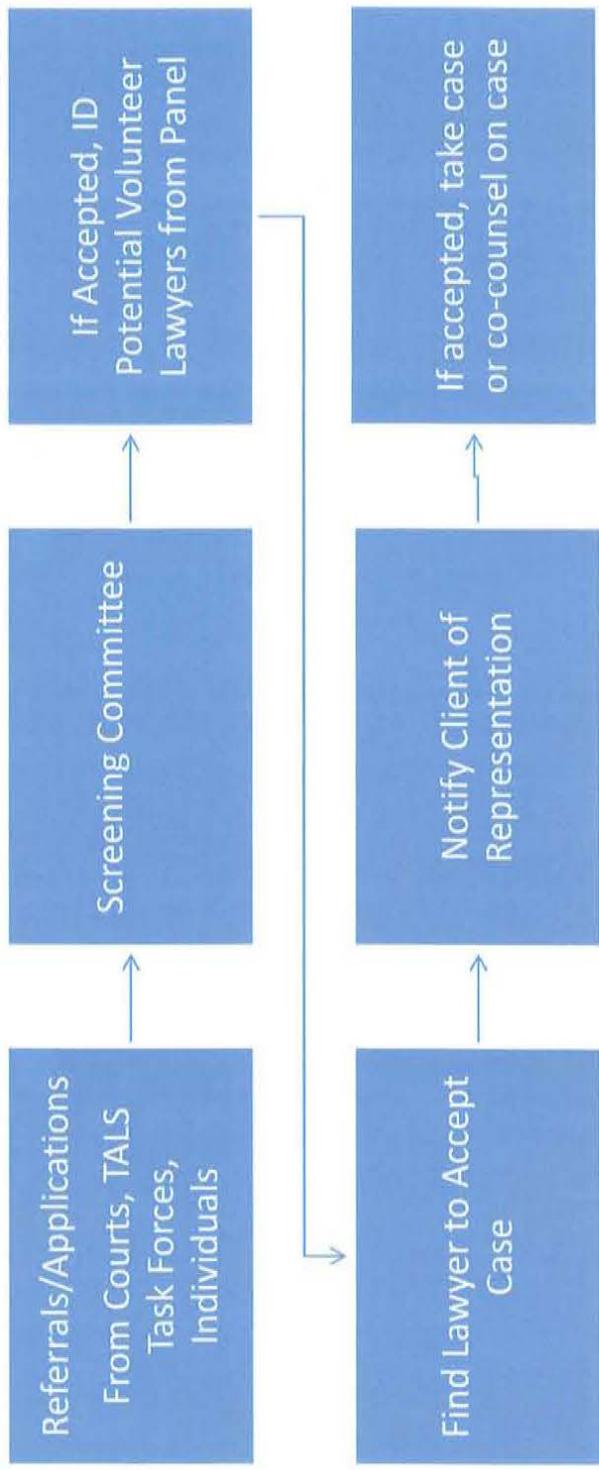
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**I am particularly interested in taking cases in the following areas:**

- Family Law
- Juvenile Law
- Civil Rights
- Housing Law
- Consumer Protection Law
- Civil or Appellate Procedure
- Immigration Law
- Constitutional Law

*Please return your completed form to Liz Todaro via email at [ltodaro@tnbar.org](mailto:ltodaro@tnbar.org) or fax to (615) 297-8058.*

# TN Appellate Pro Bono Project



# TEXAS



## APPELLATE SECTION

### *Sign up for the New and Improved Appellate Section Pro Bono Program*

**Represent people who really need your help!  
Get more “face time” with the appellate courts!**

The State Bar of Texas Appellate Section is increasing our reach with our pro bono program for the delivery of appellate legal services to those members of our community who cannot afford counsel. We are working closely with the Supreme Court of Texas, the First, Third, and Fourteenth Court of Appeals through our pilot programs for pro bono representation in those courts. Through these pilots, we are offering our volunteers more variety and greater appellate experience in those courts. The Texas Supreme Court refers cases to the Pro Bono Pilot when there is a pro se party and the Court has requested briefs on the merits. The Court of Appeals pilots give priority to cases selected to be in their programs for oral argument. We are also looking into program options involving criminal, habeas corpus, and immigration appeals in the federal system. You can find out more about all of our programs at <http://www.tex-app.org/probono.php>.

As part of our recruiting effort, we are establishing a tiered program to attract a wide variety of appellate practitioners. Our goal is to include as many high-quality appellate attorneys as possible, allowing each lawyer to contribute to the best of his or her ability and time constraints. More senior appellate lawyers have the option of either taking on a case as lead counsel or mentoring more junior practitioners by brainstorming about the issues, reviewing and editing briefs, and assisting with oral argument preparation (*e.g.*, moot courts) without having to undertake full responsibility for the case. More junior appellate lawyers can gain valuable experience by taking a lead role in representing pro bono clients on appeal, with opportunities to present oral argument. Our lawyers can enjoy an enhanced pro bono experience as part of a team that furthers the best possible presentation of the issues to the courts.

The application form on the other side of this sheet requests your basic contact information, as well as your areas of interest. It also allows you to indicate whether you are interested in a hands-on or mentoring role. From this information, we will compile tailored email groups to circulate information regarding cases that have been selected for the program quickly, widely, and equitably. We encourage you to fill out and send this form back to us right away so that you can be part of our exciting pro bono team.

## Appellate Pro Bono Sign Up

Name: \_\_\_\_\_ Work Phone #: \_\_\_\_\_  
Firm/Employer: \_\_\_\_\_ Fax #: \_\_\_\_\_  
Address: \_\_\_\_\_ Cell Phone: \_\_\_\_\_  
\_\_\_\_\_ Email: \_\_\_\_\_

Preferences (check all that apply):

- |  |  |
|--|--|
| <input type="checkbox"/> Lead lawyer                                   | <input type="checkbox"/> Criminal      |
| <input type="checkbox"/> Mentor  | <input type="checkbox"/> Habeas Corpus |
| <input type="checkbox"/> Appellate courts only                         | <input type="checkbox"/> Immigration   |
| <input type="checkbox"/> Appellate and trial support                   |  |
| <input type="checkbox"/> Preference for particular areas of law: _____ |  |

**Please mail or fax or email to:**

**Mike Truesdale, Co-Chair**  
**Law Office of Michael S. Truesdale, PLLC**  
**801 West Avenue, Suite 201**  
**Austin, TX 78701**  
**512-482-8671 866-847-8719 (fax)**  
**Email: [mike@truesdalelaw.com](mailto:mike@truesdalelaw.com)**



# State Bar of Texas APPELLATE SECTION

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## ProBono Projects

### Get Involved!

After much dedicated work in Pro Bono Pilot Programs in the Supreme Court of Texas and the Third Court of Appeals, the Section now has Pro Bono Programs established or on the way in several state Appellate Courts, including the Supreme Court, and the First, Second, Third and Fourteenth Courts of Appeals. If you would like to become involved in our pro bono programs, please fill out this Sign-Up Sheet and send to the address indicated. Doing so will place you on our listserv of talented volunteers who receive email summaries of potential cases. You are under no obligation to take a case simply by signing up, but we hope that you will do so when you receive the electronic call for help.

Our goal is to match clients who cannot afford legal representation with volunteer Texas lawyers who agree to serve without expectation of compensation. We may take other select cases, on a discretionary basis. In our programs, the clients obtain qualified counsel to help them navigate the often complicated appeals process, while the attorneys gain valuable experience and exposure to the appellate courts. We have pooled our volunteers into a database/listserv so that we can disseminate information about pro bono cases more quickly and expedite the matching process. Our volunteers can sign up as lead lawyers or as mentors—i.e., providing oversight and input into the client's case and thereby enhancing the representation. So far, we have over 120 volunteers and have placed numerous cases.

To sign up for the programs, please fill out [this form](#).

For more information on, and useful forms for participating in, the Pro Bono Programs before the various appellate courts, please click on the links to the Programs in those various courts, set out below. Many thanks for your interest in the Program, and we look forward to working with you.

**Supreme Court of Texas**

**First Court of Appeals in Houston**

**Second Court of Appeals in Ft. Worth**

**Third Court of Appeals in Austin**

**Fourteenth Court of Appeals in Houston**

### Upcoming Events

2013

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**State Bar of Texas**  
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### Texas Supreme Court Pro Bono Program

The Supreme Court refers cases to the Program when it requests full briefing on the merits and there is at least one party who is proceeding pro se because of his or her financial circumstances. Parties represented by counsel at the petition stage may also request the Appellate Section's Pro Bono Committee to be included in the Program if Court requests merits briefing as well. A full explanation of the proposed Program is available in the attached Proposal that was adopted by the Supreme Court.

**Practice Guide**

The **Guide to Practice Before the Supreme Court of Texas** may help you navigate through the appellate process in the Supreme Court of Texas. Of course, you should always consult the Texas Rules of Appellate Procedure, and we have a number of appellate resource links in left side menu bar under 'Appellate Research Links'.

**Forms**

The Appellate Section has also prepared **Instructions and Templates for Preparing a Petition for Review in the Supreme Court of Texas**. These instructions may be used to help you complete an electronic template for a petition for review that can be filled out using Microsoft Word or an electronic template that can be filled out using Adobe Acrobat. Or you can print the handwritten template and use it as a guide for completing a petition for review."

The following forms may also assist you in taking a case to the Texas Supreme Court:

- **Motion for Extension of Time to File Petition for Review**
- **Sample Waiver Letter for Respondent**
- **Motion for Extension of Time to File Brief**
- **Request for Inclusion in Pro Bono Program**

**Upcoming Events**

2013

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**Join the Section!**

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The screenshot shows the website for the State Bar of Texas Appellate Section. At the top left is the State Bar of Texas logo. The main header reads "State Bar of Texas APPELLATE SECTION". Below the header is a navigation menu with items: Home, Member Directory, The Section, Appellate Advocate, Research, Pro Bono, Annual Meetings, and Links. The main content area is titled "First Court of Appeals in Houston Pro Bono Program". It contains a paragraph describing the program, a "Practice Guide" section, and a "Forms" section listing various legal forms. On the right side, there is an "Upcoming Events" section for 2013, with two Twitter links for "The Advocate" and "The Section". Below these is a "Join the Section!" button with an image of a person standing on a scale.

**First Court of Appeals in Houston Pro Bono Program**

The program finds volunteer lawyers to screen and represent pro bono clients in the First Court of Appeals. Through this Program, volunteer lawyers obtain greater appellate experience in, and exposure to, the First Court of Appeals. The Court has indicated that it will give special consideration to hearing oral argument in cases accepted through the Program. A description of this Program is found in the Pro Bono Program Pamphlet.

**Practice Guide**

The Civil Appeals Pamphlet for the Pro Bono Project may help you navigate through the appellate process in the First Court of Appeals. Of course, you should always consult the Texas Rules of Appellate Procedure, and we have a number of appellate resource links in left side menu bar under 'Appellate Research Links'.

**Forms**

The following forms may assist you in handling a case in the First Court of Appeals:

- Notice of Appeal
- Motion for Extension of Time to File Notice of Appeal
- Docketing Statement
- Affidavit of Indigence
- Motion for Extension of Time to File Affidavit of Indigence
- Designation of Items to Be Included in Clerk's Record
- Supplemental Designation Letter as to Items for Clerk's Record
- Request for Reporter's Record
- Motion for Extension of Time to File Brief

**Upcoming Events**  
2013

The Advocate on Twitter

The Section on Twitter

**Join the Section!**

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The screenshot shows the website for the State Bar of Texas Appellate Section. At the top left is the State Bar of Texas logo, a circular emblem with a star and the text 'STATE BAR OF TEXAS' and 'FOUNDED IN 1916'. To the right of the logo, the text 'State Bar of Texas' is written in a serif font, and 'APPELLATE SECTION' is written in a large, bold, green, stylized font. Below this is a horizontal navigation menu with tabs for 'Home', 'Member Directory', 'The Section', 'Appellate Advocata', 'Research', 'Pro Bono', 'Annual Meetings', and 'Links'. The main content area features a heading 'Second Court of Appeals in Ft. Worth Pro Bono Program'. Below the heading is a paragraph: 'The program finds volunteer lawyers to screen and represent pro bono clients in the Second Court of Appeals. Through this Program, volunteer lawyers obtain greater appellate experience in, and exposure to, the Second Court of Appeals. A description of this Program is found in the Pro Bono Program Pamphlet.' This is followed by a 'Practice Guide' section with a paragraph: 'The Civil Appeals Pamphlet for the Pro Bono Project may help you ask for an attorney in the Second Court of Appeals. Of course, you should always consult the Texas Rules of Appellate Procedure, and we have a number of appellate resource links in left side menu bar under 'Appellate Research Links'.' Below that is a 'Forms' section with the text 'The following forms may assist you in handling a case in the Second Court of Appeals:' and a bulleted list: '• Docketing Statement' and '• Affidavit of Indigence'. On the right side of the page, there is an 'Upcoming Events' section with a horizontal line and the year '2013'. Below this are two social media links: 'The Advocate on Twitter' and 'The Section on Twitter', each with a blue Twitter bird icon. At the bottom right is a small image of a person standing on a pedestal with an American flag in the background, and the text 'Join the Section!'. At the very bottom of the page, there is a small footer: 'Accessibility | Site Policies | ©2013 Appellate Section, State Bar of Texas. All rights reserved. Site design by web designs of houston'.



# State Bar of Texas

## APPELLATE SECTION

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### Third Court of Appeals in Austin Pro Bono Program

A special committee screens and selects potential cases, and finds volunteer lawyers to represent pro bono clients in the Third Court of Appeals Program. Through this Program, our section's volunteer lawyers obtain greater appellate experience in, and exposure to, the Austin Court of Appeals. The Court has indicated that it will give special consideration to hearing oral argument in cases accepted through the Program. A description of this Program is found in the **Pro Bono Pamphlet**.

**Practice Guide**

The **Pro Bono Program Pamphlet** may help you navigate through the appellate process in the Third Court of Appeals. Of course, you should always consult the Texas Rules of Appellate Procedure, and we have a number of appellate resource links in left side menu bar under 'Appellate Research Links'.

**Forms**

- [Notice of Appeal](#)
- [Docketing Statement \(Third Court of Appeals\)](#)
- [Affidavit of Indigence](#)
- [Designation of Items to Be Included in Clerk's Record](#)
- [Supplemental Designation Letter as to Items for Clerk's \(Or Reporter's\) Record](#)
- [Request for Reporter's Record](#)
- [Motion for Extension of Time to File Brief](#)

**Upcoming Events**

2013

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The Advocate on Twitter


The Section on Twitter



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## State Bar of Texas

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### Fourteenth Court of Appeals in Houston Pro Bono Program

The program finds volunteer lawyers to screen and represent pro bono clients in the Fourteenth Court of Appeals. Through this Program, volunteer lawyers obtain greater appellate experience in, and exposure to, the Fourteenth Court of Appeals. The Court has indicated that it will give special consideration to hearing oral argument in cases accepted through the Program. A description of this Program is found in the Pro Bono Program Pamphlet.

**Practice Guide**

The Civil Appeals Pamphlet for the Pro Bono Project may help you navigate through the appellate process in the Fourteenth Court of Appeals. Of course, you should always consult the Texas Rules of Appellate Procedure, and we have a number of appellate resource links in left side menu bar under 'Appellate Research Links'.

**Forms**

The following forms may assist you in handling a case in the Fourteenth Court of Appeals:

- Notice of Appeal
- Motion for Extension of Time to File Notice of Appeal
- Docketing Statement
- Affidavit of Indigence
- Mediation Statement
- Motion for Extension of Time to File Affidavit of Indigence
- Designation of Items to Be Included in Clerk's Record
- Supplemental Designation Letter as to Items for Clerk's Record
- Request for Reporter's Record
- Motion for Extension of Time to File Brief

**Upcoming Events**

2013

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 The Advocate on Twitter

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[date]

Michael S. Truesdale  
Program Liaison  
Supreme Court Pro Bono Pilot Program  
Law Office of Michael S. Truesdale, PLLC  
801 West Avenue, Suite 201  
Austin, TX 78701  
Re: No. [Supreme Court docket number], [name of case]

Dear Ms. Greer:

Petitioner requests that the State Bar of Texas Appellate Section's Pro Bono Committee consider this request for inclusion in the Supreme Court of Texas' Pro Bono Pilot Program.

[Include all that apply:]

[Currently, Petitioner is proceeding pro se and will file/has filed a petition for review in this matter.]

[Currently, Petitioner is being represented by the undersigned counsel and will file/has filed a petition for review. If the Court deems it advisable that further briefing and/or argument be provided, Petitioner requests that his/her case be considered for the appointment of pro bono counsel.]

[Petitioner is proceeding as an indigent in this proceeding and/or meets the financial eligibility requirements for the Program.]

[Petitioner is submitting the attached affidavit of indigence for the Committee's consideration.]

[The Supreme Court of Texas requested that the parties submit briefs on the merits

by letter dated \_\_\_\_\_, 200\_\_.]

Very truly yours,

\_\_\_\_\_  
Name of person filing motion

State bar number, if any

Address

Phone number

Telecopy

# PRO BONO PROGRAM FOR CIVIL APPEALS

SPONSORED AND ADMINISTERED BY  
THE PRO BONO COMMITTEES FOR  
THE STATE BAR OF TEXAS APPELLATE SECTION  
AND  
THE HOUSTON BAR ASSOCIATION APPELLATE SECTION  
IN THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

**DECEMBER 2009**

## I. PRO BONO PROGRAM

The State Bar of Texas Appellate Section Pro Bono Committee and the Houston Bar Association's Appellate Practice Section Pro Bono Committee ("Pro Bono Committee") are conducting a Pro Bono Program to place a limited number of civil appeals with appellate counsel who will represent the appellant before the First Court. The goal of the program is to match clients who are financially unable to obtain legal representation with volunteer lawyers who agree to serve without expectation of compensation for their service.

The Pro Bono Program is administered completely by the Pro Bono Program Committee. The First Court of Appeals has no direct role in screening or selecting cases for inclusion in the Program.

If you lack the financial means to pay for an appellate attorney and indicate your desire to be included in the Pro Bono Program, as explained in this Pamphlet, you may be considered for participation in the

program. Even if you had paid counsel in the trial court, you can indicate your interest in seeking a pro bono attorney through this Program if you can no longer afford an attorney to represent you on appeal. **PLEASE NOTE:** There is no guarantee that the Pro Bono Committee will select your case for inclusion in the Program and that pro bono counsel can be found to represent you. Accordingly, you should not forego seeking other counsel to represent you in this proceeding.

### A. The Selection Process

The Docketing Statement is one of the first documents that you file when you start an appeal. If you would like for your case to be considered for inclusion in the Pro Bono Program, Section X of the First Court of Appeals' Docketing Statement includes a brief description of the Program along with a list of questions for you to answer. After you complete the Docketing Statement and indicate interest in your case being considered for possible inclusion in the

Program, a copy of your Docketing Statement will be forwarded to the Pro Bono Committee for screening. To assist the screening process, it is very important that you fill out the Docketing Statement carefully and completely so that the Pro Bono Committee will have as much information as possible when considering your appeal.

By filling out the request for consideration, you are agreeing that members of the Pro Bono Committee can contact the counsel of record in the trial court to ask for clarification of questions or issues as to your case. These conversations will be kept confidential to the extent permitted by law and used solely for purposes of the committee's selection process. You are also authorizing the Pro Bono Committee to transmit basic, publicly available, facts about your case via the Internet to its pool of volunteer lawyers in

an attempt to find an appellate lawyer to take your case.

The Pro Bono Committee screens and selects civil cases for inclusion in the Program based upon a number of discretionary criteria, including the financial means of the appellant. The committee uses 200% of U.S. Poverty Guidelines as a benchmark for determining whether an appellant qualifies for free legal services. These guidelines are published by the U.S. Department of Health and Human Services,<sup>1</sup> and the following chart sets forth the relevant numbers:

<b>Persons in Family or Household</b>	<b>200% of Federal Poverty Guidelines</b>
1	\$19,600.00
2	\$26,400.00
3	\$33,200.00
4	\$40,000.00
5	\$46,800.00
6	\$53,600.00
7	\$60,400.00
8	\$67,200.00

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<sup>1</sup> Federal Register, Vol. 71, No. 15, January 24, 2006, pp. 3848-3849, available at <http://aspe.hhs.gov/poverty/06poverty.shtml>.

If you have not already submitted an affidavit of indigence in the trial court, you may be asked to submit financial information as a condition of your participation in the Pro Bono Program. Although your ability to pay for legal counsel is not the only factor the Pro Bono Committee evaluates for participation in the Pro Bono Program, it is nonetheless a significant factor in the committee's decision-making process.

There are a number of other factors that the Pro Bono Committee considers in deciding whether to place an appeal in the Program, including the number of appeals currently in the program, the number of available volunteer lawyers, and the issues presented. Based upon a review of these and other factors, the Pro Bono Committee makes a recommendation for each case. If the Committee recommends that a case be included in the Program and a volunteer lawyer agrees to take the case, you will

receive a letter from the Committee within approximately 30-40 days of submitting your Docketing Statement notifying you of the match.

#### **B. The Attorneys**

The Pro Bono Committee has undertaken a substantial recruiting effort to enlist pro bono appellate lawyers willing to volunteer their time to take on cases selected for inclusion in the Program, as well as other specialty pro bono programs that the committee is sponsoring. We have inquired to find out the particular areas of interest and expertise of our volunteers so that we can be in a position to make appropriate matches between cases and volunteer attorneys according to their areas of interest, experience, and availability.

#### **C. Placement of Cases in the Program**

When an appeal is identified by the Pro Bono Committee as a candidate for the Program, the committee provides limited information regarding the case, such as the

nature of the case, issues on appeal, the status of appellate proceedings, and any impending deadlines, and solicits volunteers to take the case. Based upon the responses, the Pro Bono Committee will make an appropriate match.

If your case is chosen and counsel is located, the Committee will send you a letter advising you of the match, providing contact information for your pro bono attorney and advising you that you have 14 days to object if you do not want this attorney to represent you. If you do object, you need simply notify the Committee in writing. You need not indicate your reasons for objecting, but there is, of course, no guarantee that the Committee will be able to find replacement counsel.

Assuming you do not object to the volunteer attorney within 14 days of receiving the Committee's letter, that attorney will undertake further

representation of you in the appeal without charging legal fees.

#### **D. Representation in the Appeal**

If a volunteer lawyer is matched with your case through the Program, that lawyer will be your lawyer in handling the appeal on your behalf in the First Court of Appeals from that point forward. He or she will prepare the briefs and any necessary motions and present oral argument to the Court of Appeals if argument is ordered.

The scope of the representation is limited to the appeal in the First Court of Appeals and terminates once those proceedings are concluded—typically after the opinion issues, or the Court rules on any timely filed motions for rehearing. If you are unsuccessful in the First Court of Appeals, but desire to go forward to the Texas Supreme Court, you will need to make other arrangements for representation in that court, unless your Pro Bono counsel agrees in writing to undertake the further

representation. Please be advised that the Pro Bono Committee has a program with the Texas Supreme Court, although the procedures and requirements for that program necessarily differ from this one.

## II. ADDITIONAL INFORMATION

Additional information about the pro bono appellate programs is available at the State Bar of Texas Appellate Pro Bono website, <http://www.tex-app.org/probono.php> and the Houston Bar Association Appellate Section website, <http://www.hba.org/folder-sections/sec-apellate.htm>.

# VIRGINIA

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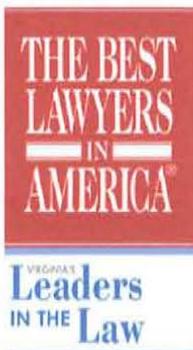
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# Virginia Appellate News & Analysis

by L. Steven Emmert

Inside the Case Decisions, Rulings &amp; Opinions.

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Sunday, October 6, 2013

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## Essays

### SUPREME COURT APPROVES PRO BONO CIVIL PANEL

[Posted February 18, 2007] The Supreme Court of Virginia has approved the creation of a panel of attorneys willing to accept assignments in civil appeals where one party is indigent and unrepresented. Effective immediately, the program will ensure that both sides of an appeal are professionally briefed and argued.

The program, which is outlined in detail below, calls for the creation of two lists, one comprising experienced appellate lawyers, and one with those who are looking for an opportunity to gain such experience. One attorney from each list will be assigned to each case, thus giving those in the second group an opportunity to learn on-the-job from someone who knows the appellate ropes.

The program only addresses purely civil cases; the Commonwealth already funds programs to pay for attorneys in criminal and habeas corpus cases.

I have volunteered to work with the Clerk of the Supreme Court to populate the lists, and respectfully solicit your help with that. If you're licensed in Virginia and you'd like to be on either list, please contact me (please give me your name, phone number, e-mail address, and which list you'd occupy), and I'll ensure that you're included in the program.

If you need any further impetus to consider the value of this fine work, I encourage you to take a look at Rule 6.1(a) of the Rules of Professional Conduct. Thanks in advance for your help.

\* \* \*

### PRO BONO CIVIL APPEALS PANEL OF ATTORNEYS TO PROVIDE REPRESENTATION FOR INDIGENT PARTIES

#### Objectives

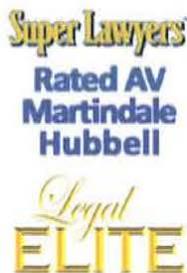
1. To ensure that each side of all civil appeals in the Supreme Court, where one of the parties is an indigent proceeding pro se, receives professionally prepared briefing and oral argument at the merits stage.
2. To enable appellate attorneys to fulfill the requirements of Rule 6.1 of the Rules of Professional Conduct (2% of time devoted to pro bono work).
3. To enable attorneys to gain experience in the handling of appellate cases, with the secondary goal of improving the quality of appellate advocacy overall, through the use of a mentoring model, which pairs two attorneys in each case.

#### Scope of Anticipated Need

The Clerk estimates that counsel will be needed three to four times per year, based on historical experience.

#### Approach

Create a panel of attorneys willing to appear in such cases on a pro bono basis. The core group will comprise at least twelve experienced appellate practitioners (so no one of them will be called upon more often than once every three to four years). A second group will be



open to less experienced attorneys (including seasoned trial lawyers without significant appellate experience), without limitation in number.

When the Court awards an appeal in which one side is an indigent party unrepresented by counsel, and the Court determines it would be beneficial to provide representation for that party, the Clerk will contact the party to determine if he/she is willing to have pro bono counsel to provide representation. If the party consents, the Clerk will then contact one attorney from the core group and one from the second group to ascertain if they are willing to accept the case. Upon confirmation from counsel of their willingness to accept the case, the Clerk then will enter the order granting the appeal and forward a copy of the order to counsel assigned to that side of the case. This arrangement fosters learning through mentoring; enables the attorneys to share the workload in the case; and permits two different perspectives in shaping the course of the representation.

#### **Nature of the Assignment**

The two attorneys from the Panel will serve as counsel of record for the prose party. The entry of the grant order, upon confirmation of the assignment of the Panel attorneys to the appeal, will begin the period for filing of the brief of appellant under Rule 5:26(b)(1), in the event the panel attorneys represent the appellant. The Court may extend the due date for the brief of appellant upon application by the assigned attorneys.

#### **Administration**

The panel will be administered by the Clerk of the Supreme Court, with the assistance of the chair of the State Bar's Appellate Practice Subcommittee. The Clerk will assign attorneys to cases and transmit to them copies of briefs and other papers necessary to effectuate the representation of the party or the filing of the amicus brief.

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## For the Good: Appellate Practice Section Pro Bono Volunteers Help Indigent Clients Pursue Civil Appeals at Courts' Request

What is the lure of pro bono work? Giving back to the community? Getting the chance to work on novel and important legal issues that establish precedent or help shape the law? Tackling unique cases that sharpen legal skills? How about an opportunity to do all three but at the request of the Wisconsin Supreme Court or the 7th Circuit Court of Appeals? For the past 10 years, volunteers with the Pro Bono Program of the State Bar of Wisconsin Appellate Practice Section have been providing pro bono services for all these reasons.

NILESH P. PATEL

What is the lure of pro bono work? Giving back to the community? Getting the chance to work on novel and important legal issues that establish precedent or help shape the law? Tackling unique cases that sharpen legal skills? How about an opportunity to do all three but at the request of the Wisconsin Supreme Court or the 7th Circuit Court of Appeals? For the past 10 years, volunteers with the Pro Bono Program of the State Bar of Wisconsin Appellate Practice Section have been providing pro bono services for all these reasons.

Each year the section's Pro Bono Program provides counsel for indigent clients in about 10 to 12 civil appeals at the request of the appellate courts. According to attorney Colleen Ball, who administers the program along with attorney Robert Henak, although the Wisconsin State Public Defender provides appellate counsel to indigent clients in criminal cases, there is no comparable resource for indigent clients pursuing civil appeals. Without counsel, these appellants typically cannot properly research the legal issues or present effective arguments to advance their cases, making it difficult for courts to evaluate the merits of a case.

The program does not take representation requests from individual clients, because there are not enough resources for volunteer attorneys to review the merits of cases and evaluate indigent status. Instead, the program relies on court employees to spot significant cases or appellate attorneys at public interest organizations like the ACLU or the Legal Aid Society who request amicus briefs to develop an area of the law. Most of the case referrals come from the Wisconsin Supreme Court, possibly because the most novel and complex legal issues tend to be raised at that level. If the appellant does not sufficiently develop the legal issues, the court may ask for a supplement to the petition before deciding whether to review the case. Thus, the program's work can directly affect the viability of an appeal and enable the court to determine whether a case raises an issue that will clarify the law or establish legal precedent.

About 30 lawyers volunteer their time for the program. Any attorney can be on the referral list and can decline a representation request. Volunteer attorneys can consult with other attorneys on cases and receive assistance with preparing oral arguments. The amount of time required depends on who the lawyer is appointed to represent (a party or an amicus) and the complexity of the case and issues.

The program has provided direct or amicus representation on appeals involving prisoners' rights, family law, fee shifting in public interest litigation, civil procedure, and criminal law.

Some recent and pending representations include the following:

- **Attorney Brent Nisteler** represented an inmate in *Jackson v. U.S.*, 541 F.3d 688 (7th Cir. 2008), involving an injured prisoner denied medical assistance, in which the court ruled that the relation-back doctrine applies to Federal Tort Claims Act suits against the United States.
- **Attorney Dan LaFave** filed an amicus brief for Disability Rights Wisconsin, NAACP, and the Benedict Center in *Christensen v. Sullivan*, Appeal No. 2006AP803, which addresses the circuit court's authority to impose monetary sanctions for contempt after the underlying conduct (violations of a consent decree concerning conditions at the Milwaukee County Jail) had ceased.
- **Attorney John Rhode** represents the ex-husband in *Gaffney v. Gaffney*, Appeal No. 2008AP2297, in which the husband, who has a disability, argues that in applying the statutory test for a maintenance award in a divorce action, the circuit court failed to address his "needs."
- **Attorney Rob Henak** was appointed to file a supplemental petition for review in *State v. Allen*, Appeal No. 2007AP795, which addresses whether a criminal defendant waives any legal challenges to his or her conviction or sentence that were overlooked by the appointed counsel's no-merit report and the court of appeals' ruling on that report.



Henak



- **Attorney Colleen Ball** represented the petitioner in *State ex rel. Hipp v. Murray*, 2008 WI 67, 310 Wis. 2d 342, 750 N.W.2d 873, in which the Wisconsin Supreme Court established the procedure for subpoenaing and examining witnesses for John Doe proceedings.

Ball

For more information about the Pro Bono Program, or to volunteer and be placed on the referral list, contact Colleen Ball at [cball@applaw.com](mailto:cball@applaw.com) or Robert Henak at [henaklaw@sbcglobal.net](mailto:henaklaw@sbcglobal.net). For more information about the Appellate Practice Section, please visit [www.wisbar.org/sections/app](http://www.wisbar.org/sections/app).

**Nilesh P. Patel**, U.W. 2002, is an advisor with the U.W. Law School's Career Services office. He also is the principal of the Mahadev Law Group LLC, Madison, and a member of the Wisconsin Lawyer editorial advisory board.

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# Arizona Court of Appeals Pro Bono Representation Program Manual

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## **PROGRAM OVERVIEW**

The Arizona Court of Appeals Pro Bono Program (“Program”) provides pro bono counsel to pro se parties in selected civil and juvenile appeals and special actions (“Appeals”) in cases identified by the court to assist the court in resolving those Appeals more efficiently. [*See* Administrative Order No. 2014-1]

The goal of the Program is to provide pro bono counsel to pro se parties in civil and juvenile Appeals identified by the court in which briefing and argument by counsel would benefit the court’s consideration of the matter. Each Appeal selected for the Program has been screened by a staff attorney, a judge and/or a panel of judges. A party cannot apply to participate in the Program; only cases selected by the court are eligible to participate in the Program. Only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument, are selected for the Program. Selection of an Appeal for the Program does not constitute an opinion by the court about the merits of the Appeal. Moreover, no judge who has participated in the selection of an appeal for participation on the Program will be involved in resolving that Appeal, either individually or with the panel of judges that decides the Appeal.

The Program depends upon the volunteer efforts of attorneys. Pro Bono Attorney Coordinators in Division One and Division Two recruit and coordinate volunteer attorneys for the Program. Once the Court selects an appeal for the Program, the Pro Bono Attorney Coordinator for the Division locates counsel for the case. Except for appointments for purposes of settlement conferences, the court usually will hear oral argument in cases selected for the Program.

The Program enhances the court's review of cases selected and also offers attorneys a valuable learning experience while providing representation to pro se litigants in cases selected for the Program.

### **SELECTION OF APPEALS FOR THE PROGRAM**

A significant percentage of non-criminal appeals filed in the Arizona Court of Appeals have at least one party who is proceeding pro se.

A pro se appeal may be selected for participation in the Program at any time. However, pro se appeals typically are identified as candidates for participation in the Program: (1) during the court's initial jurisdictional review; (2) during motion practice; or (3) after the matter has been assigned to a merits panel for resolution. A pro se Appeal may be identified as a candidate for the Program by a staff attorney, an individual judge or a panel of judges as part of the motions panel or an individual judge or a panel of judges as part of the merits panel.

Direct criminal and most post-conviction relief Appeals are not eligible for the Program because the appellants in those cases are entitled to appointed counsel and because any appellant proceeding pro se in such a case is typically doing so by choice. Similarly, juvenile Appeals in which the parties are entitled to appointed counsel are not included in the program.

Finally, cases selected for Division One's Appellate Pro Bono Pilot Program ("Pilot Program") are not eligible to participate in the Appeals Pro Bono Program. The Pilot Program is a cooperative venture between Division One, the Appellate Section of the Arizona Bar Association, Community Legal Services-Volunteer Lawyers Program of the Maricopa County Bar Association, the State Bar Modest Means Program and the Arizona Foundation for Legal Services and Education.

Additional information about the Pilot Program may be found at [www.azcourts.gov/coa1/AppellateAssistanceProgram.aspx](http://www.azcourts.gov/coa1/AppellateAssistanceProgram.aspx). The Pilot Program matches indigent persons involved in eligible cases from Maricopa County Superior Court with volunteer lawyers to receive legal assistance for free or at a reduced rate.

### **APPOINTMENT OF COUNSEL**

Once an order has been issued placing an Appeal in the Program, the relevant Court Pro Bono Coordinator contacts the Pro Bono Attorney Coordinator for the Division in which pro bono counsel is to be appointed and makes available briefs and other case information, including, where possible, relevant portions of the record on Appeal. The Pro Bono Attorney Coordinator then checks for conflicts. If the Pro Bono Attorney Coordinator determines that he or she has a conflict, the Pro Bono Attorney Coordinator advises the Court Pro Bono Coordinator of the fact that a conflict exists and has no further involvement with the process of appointing pro bono counsel. If the Pro Bono Attorney Coordinator determines that no conflict exists, the Pro Bono Attorney Coordinator then contacts potential pro bono counsel. Potential pro bono counsel then checks for conflicts. If potential pro bono counsel determines that he or she has a conflict, potential pro bono counsel advises the Pro Bono Attorney Coordinator of the fact that a conflict exists and declines the potential appointment as pro bono counsel. If potential pro bono counsel determines that no conflict exists, potential pro bono counsel will then have the opportunity to familiarize themselves with the issues on Appeal, the history of the case and the parties involved.

If no pro bono counsel is available for a given Appeal in the relevant Division, the Pro Bono Attorney Coordinator will contact the Pro Bono Attorney

Coordinator from the other Division to locate available pro bono counsel to handle the Appeal. If pro bono counsel is required for more than one party to an Appeal, the Court Pro Bono Coordinator will endeavor to contact one Pro Bono Attorney Coordinator for the appointment of counsel for appellant and the other Pro Bono Attorney Coordinator for the appointment of counsel for appellee. Pro bono counsel must be authorized to undertake such legal representation in Arizona.

If willing and available pro bono counsel reviews the briefs and/or other materials and determines that no arguable basis exists for an appeal, pro bono counsel may decline the appointment and advise the relevant Pro Bono Attorney Coordinator of that declination. If a Pro Bono Attorney Coordinator has been unable to locate pro bono counsel who will accept the appointment within the time allocated in the Order Placing Case In Court's Pro Bono Program And Staying Appeal, the Pro Bono Attorney Coordinator must notify the Court Pro Bono Coordinator.

Once willing and available pro bono counsel has been located for an Appeal, after client consultation and consent to the representation, pro bono counsel will send a letter to the client outlining the terms of the representation agreement to obtain the client's written consent. Pro bono counsel will then file a notice of appearance that, in cases that already have been briefed, will address whether replacement briefing or supplemental briefing will be submitted. The court encourages the submission of replacement briefing rather than supplemental briefing. The Court Pro Bono Coordinator causes an order to issue appointing pro bono counsel and establishing a briefing schedule. [See Appendices 1, 2, 3, and 4 for examples of relevant forms of orders and a sample representation letter.] Where appropriate, pro bono counsel may request that the Appeal be included in the court's Mediation Program.

Pro bono counsel who has filed a notice of appearance may move to withdraw as counsel based on any of the established grounds for doing so. Such a motion will be freely granted. If leave to withdraw is granted, absent extraordinary circumstances, no other pro bono counsel will be appointed and the Order Placing Case In Court's Pro Bono Program And Staying Appeal will be vacated.

### **PRO BONO ATTORNEY COORDINATORS**

Each of the Divisions has a Pro Bono Attorney Coordinator who recruits volunteer attorneys who are willing and available to serve as pro bono counsel in the Program, maintains the current list of volunteers and identifies individual attorneys willing to accept specific appointments. The Pro Bono Attorney Coordinators and their contact information is set forth below and, along with the attorney sign-up form, is available on the Court's website at <http://www.appeals2.az.gov>.

The Pro Bono Attorney Coordinators recruit volunteers to serve as potential pro bono counsel through a variety of methods, including word of mouth, advertisements or announcements in bar association newsletters or events and otherwise.

The limited scope of the representation of a litigant on Appeal is intended to be attractive as a manageable pro bono commitment. In addition, the Court's commitment to hearing oral argument in these cases and the prescreening of the Appeals selected for the Program are intended to provide strong incentives for participation.

## **SCOPE OF APPOINTMENT AND ORAL ARGUMENT**

The order of appointment provides that pro bono counsel will be appointed to represent the appellant for purposes of this Appeal only. Accordingly, the appointment includes only the handling of the Appeal and the drafting of a motion to reconsider where requested by the client, but does not include the preparation and filing of a petition for review by the Arizona Supreme Court or any other proceedings in any other court or agency unless specifically ordered by this court or separately agreed upon between the pro bono counsel and the client.

In most cases, every attempt will be made to appoint pro bono counsel from the same Division in which the Appeal will be argued.

The Court of Appeals does not reimburse parties or pro bono counsel for attorneys' fees or any expenses incurred in participating in the Pro Bono Program. Shifting of attorneys' fees and taxable costs may be available to prevailing parties and pro bono counsel under applicable statutes and rules to the same extent as retained counsel, provided procedural requirements for such requests are met.

## **CONTACT INFORMATION**

- **Division One Pro Bono Attorney Coordinator:**

Kimberly A. Demarchi, Esq.  
Lewis Roca Rothgerber LLP  
201 East Washington Street, Suite 1200  
Phoenix, Arizona 85004  
(602) 262-5728  
Email: [KDemarchi@LRRLaw.com](mailto:KDemarchi@LRRLaw.com)

- **Division Two Pro Bono Attorney Coordinator:**

Andrew M. Jacobs, Esq.  
Snell & Wilmer, L.L.P.

One South Church Avenue, Suite 1500  
Tucson, Arizona 85701-1630  
(520) 882-1207  
Email: [ajacobs@swlaw.com](mailto:ajacobs@swlaw.com)

Appendix 1A – Placing Case In Pro Bono Program (Not Yet Briefed)

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION X

[plaintiff/appellant name], ) Court of Appeals  
) Division X  
) No. X CA-CV XX-XXXX  
Plaintiff/Appellant, ) **PRO BONO**  
) \_\_\_\_\_ County  
v. ) Superior Court  
) No. XXXX  
[defendant/appellee name], )  
) **ORDER PLACING CASE IN**  
) **COURT'S PRO BONO PROGRAM**  
Defendant/Appellee. ) **AND STAYING APPEAL**  
\_\_\_\_\_ )

Upon review of the record, the Court has determined that the appointment of pro bono counsel in this appeal would benefit the Court's review. The Court by this order expresses no opinion as to the merits of this appeal. Accordingly,

**IT IS ORDERED** appointing pro bono counsel to represent \_\_\_\_\_ for purposes of this appeal only. If an objection is made to the appointment of pro bono counsel in this appeal, such objection shall be filed in writing within 14 days after the filing date of this order.

**IT IS FURTHER ORDERED** that, within [45/\_\_\_] days after the filing date of this order, pro bono counsel shall file a notice of appearance.

**IT IS FURTHER ORDERED** staying this appeal pending further order of the Court.

Appendix 1B – Placing Case In Pro Bono Program (Previously Briefed)

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION X

[plaintiff/appellant name], ) Court of Appeals  
) Division X  
) No. X CA-CV XX-XXXX  
Plaintiff/Appellant, ) **PRO BONO**  
) \_\_\_\_\_ County  
v. ) Superior Court  
) No. XXXX  
[defendant/appellee name], )  
) **ORDER PLACING CASE IN**  
) **COURT'S PRO BONO PROGRAM**  
Defendant/Appellee. ) **AND STAYING APPEAL**  
\_\_\_\_\_ )

Upon review of the record and briefing, the Court has determined that the appointment of pro bono counsel in this appeal would benefit the Court's review. The Court by this order expresses no opinion as to the merits of this appeal. Accordingly,

**IT IS ORDERED** appointing pro bono counsel to represent \_\_\_\_\_ for purposes of this appeal only. If an objection is made to the appointment of pro bono counsel in this appeal, such objection shall be filed in writing within 14 days after the filing date of this order.

**IT IS FURTHER ORDERED** that pro bono counsel shall consult with \_\_\_\_\_ to determine whether (1) replacement briefing or (2) supplemental briefing will be submitted in this appeal. The Court encourages the submission of replacement briefing rather than supplemental briefing. Within [45/\_\_\_] days after the filing date of this order, pro bono counsel shall file a notice of appearance that also states whether replacement briefing or supplemental briefing will be submitted. If the

notice of appearance does not address the issue, replacement briefing will be ordered.

**IT IS FURTHER ORDERED** staying this appeal pending further order of the Court.

Appendix 2 – Appointing Specific Pro Bono Counsel

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION X

[plaintiff/appellant name], ) Court of Appeals  
) Division X  
) No. X CA-CV XX-XXXX  
Plaintiff/Appellant, ) **PRO BONO**  
) \_\_\_\_\_ County  
v. ) Superior Court  
) No. XXXX  
[defendant/appellee name], )  
) **ORDER APPOINTING**  
) **PRO BONO COUNSEL**  
Defendant/Appellee. )  
\_\_\_\_\_ )

Pursuant to the Court's prior Order Placing Case In Court's Pro Bono Program And Staying Appeal, and given the notice of appearance filed \_\_\_\_\_, [which also states that replacement briefing will be submitted] [which also states that supplemental briefing will be submitted].

**IT IS ORDERED** [pro bono attorney], Esq., is hereby appointed to represent \_\_\_\_\_ for purposes of this appeal only.

**IT IS FURTHER ORDERED** that the Clerk of Court shall amend the record to reflect that [pro bono attorney], Esq. of [law firm name/address/phone], is pro bono counsel of record for \_\_\_\_\_.

**[FOR CASES WHERE NO BRIEFING HAS OCCURRED: IT IS FURTHER ORDERED** that briefing shall proceed as follows: the opening brief is due [date 1]; the answering brief is due within 40 days after service of the opening brief; and the optional reply brief is due within 20 days after service of the answering brief.]

**[FOR CASES WHERE BRIEFING HAS OCCURRED BUT REPLACEMENT BRIEFING WILL BE SUBMITTED: IT IS FURTHER ORDERED** striking the briefs previously filed.

**IT IS FURTHER ORDERED** that replacement briefing shall proceed as follows: the opening brief is due [date 1]; the answering brief is due within 40 days after service of the opening brief; and the optional reply brief is due within 20 days after service of the answering brief.]]

**[FOR CASES WHERE BRIEFING HAS OCCURRED BUT SUPPLEMENTAL BRIEFING WILL BE SUBMITTED: IT IS FURTHER ORDERED** that supplemental briefing shall proceed as follows: the supplemental opening brief is due [date 1]; the supplemental answering brief is due within 40 days after service of the opening brief; and the optional supplemental reply brief is due within 20 days after service of the answering brief.]<sup>1</sup>

**IT IS FURTHER ORDERED** that the parties shall state on the cover pages of their briefs whether they are replacement briefs or supplemental briefs and that pro bono counsel shall appear at oral argument.

**IT IS FURTHER ORDERED** that, upon the completion of briefing, the court will issue a separate order lifting the stay previously issued by this court in the Order Placing Case In Court's Pro Bono Program And Staying Appeal and setting oral argument.

---

<sup>1</sup> Briefing schedule to be modified if pro bono counsel is appointed to represent the appellee, given that a new opening brief would not be required.

Appendix 3 – Lifting Stay and Setting Oral Argument

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION X

[plaintiff/appellant name], ) Court of Appeals  
) Division X  
) No. X CA-CV XX-XXXX  
Plaintiff/Appellant, ) **PRO BONO**  
) \_\_\_\_\_ County  
v. ) Superior Court  
) No. XXXX  
[defendant/appellee name], )  
) **ORDER LIFTING STAY AND**  
) **SETTING ORAL ARGUMENT**  
Defendant/Appellee. )  
\_\_\_\_\_ )

Pursuant to the Court's prior Order Placing Case In Court's Pro Bono Program And Staying Appeal, and Order Appointing Pro Bono Counsel, and as [supplemental] [replacement] briefing is complete,

**IT IS ORDERED** lifting the stay previously issued by this Court in the Order Placing Case in Court's Pro Bono Program and Staying Appeal.

**IT IS FURTHER ORDERED** that the clerk set this case on the next available calendar, with oral argument. Counsel will be notified of the date and time set for oral argument

## Appendix 4: Sample Representation Letter

[DATE]

**[VIA HAND DELIVERY/ELECTRONIC MAIL (if applicable)]**

[NAME]

[ADDRESS]

Re: [case identifier/description]

Dear [NAME]:

We have agreed to provide limited representation to you in this appeal on a *pro bono* basis. This letter is to confirm the terms of our engagement in that regard. Please carefully review this letter and sign and return it to acknowledge your agreement with these terms.

The terms of our representation of you will be as follows:

### **Scope of Engagement**

We will represent you in your appeal from [decision in case, with case number and date of decision]. We will prepare and submit briefs and argue your appeal in the Court of Appeals. We will not represent you in any further levels of appeal to higher courts or on remand to the Superior Court after the Court of Appeals has decided your case unless we separately agree to do so in the future, in writing.

### **General Terms of Representation**

We will not charge you attorneys' fees for our representation. We also will not charge you for reasonable costs and expenses that we incur in connection with our representation of you, such as charges for telephone calls, postage, facsimile transmissions, messengers, overnight deliveries, photocopying, and computerized research. However, if we are able to recover attorneys' fees or costs related to this

representation, you agree that we may keep those amounts as reimbursement for our pro bono time or for costs incurred on your behalf.

**Staffing**

I will be the primary attorney handling this matter. I may use other attorneys and paralegals to assist in the matter as appropriate.

**Initial Steps and Conduct of Representation.**

I will meet with you to discuss the case and your potential arguments on appeal. I will review the records of the Superior Court and any briefing submitted to the Court of Appeals already and will, based on that information, write a brief arguing for reversal of the judgment. I will also file any other necessary paperwork, including a statement of items to be included in the record and a notice of appearance on your behalf.

We are happy to represent you in your appeal. Please sign the enclosed copy of this letter and return it to me to confirm your acceptance of the terms of our engagement. In addition, please let me know if you have any questions or if there is anything that you want to discuss.

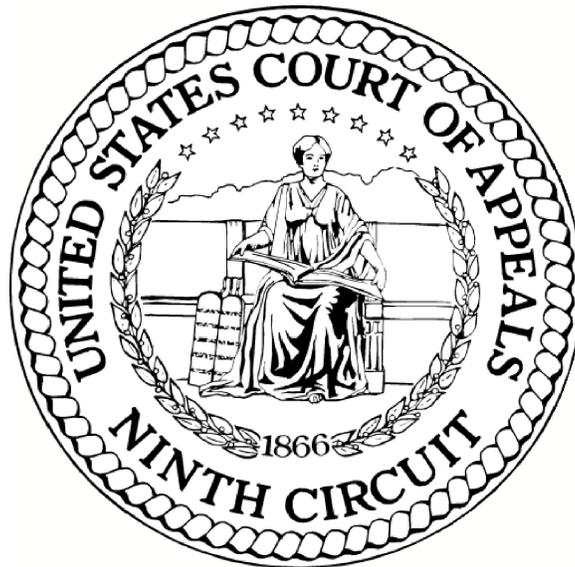
Sincerely,

LAWYER NAME

TERMS OF ENGAGEMENT APPROVED AND AGREED TO BY:

By \_\_\_\_\_

# United States Court of Appeals for the Ninth Circuit



## Pro Bono Program

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## PROGRAM OVERVIEW

The Ninth Circuit Court of Appeals established its pro bono program in 1993 to provide pro bono counsel to pro se parties with meritorious or complex appeals, to provide a valuable learning experience to young attorneys and law students, and to assist the court in processing pro se civil appeals more equitably and efficiently.

The program was adopted by the court in June 1993 and has been fully implemented since November 1993. (*See Appendix 1.*) The goal of the program is to provide pro bono counsel to pro se parties in civil appeals in which briefing and argument by counsel would benefit the court's review. All appeals selected for inclusion in the program have been pre-screened by a staff attorney, the appellate commissioner, and/or a panel of judges for a determination of the propriety of its inclusion. Only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument, are selected for the appointment of counsel under the program. Since the selected appeals are generally more complex than the average pro se case presented by staff attorneys to oral screening panels, counsel is needed to assist the court to ensure that pro se cases receive the same attention as other cases of similar complexity.

The program is based in large part on the cooperation and volunteer efforts of the private bar, and on the court's commitment to providing a valuable learning experience to participating attorneys and law students. Panels of private volunteer attorneys in each district of the circuit are coordinated and maintained by an attorney in each district serving as district coordinator for the program. The court's pro bono coordinator works with and relies heavily upon the district coordinators in locating counsel for each appeal and for recruiting volunteers for the program. With the potential exception of some of the amicus curiae appointments and those appointments specifically for purposes of mediation, the court has committed to hearing oral argument in all cases selected for the program, which should further enhance the experience of participating attorneys and students.

The pro bono program offers attorneys and law students a valuable learning experience while providing pro se litigants with meritorious or complex appeals access to quality representation, and benefits the court in the increased efficiency and effectiveness of its review of such cases.

## APPEALS SELECTED

Approximately forty percent of all new appeals filed in the Ninth Circuit have at least one party who is proceeding pro se. All new pro se civil appeals (including habeas petitions) are reviewed at the outset by court staff for jurisdictional defects and are dismissed early on if no jurisdiction exists. Still others are dismissed for failure to prosecute or otherwise summarily disposed of during the course of the appeal. Many of the remaining pro se appeals (primarily those determined after the completion of briefing by staff and/or judges to meet the criteria set forth in 9th Cir. Rule 34-4 to be submitted without oral argument) are processed on the merits by staff attorneys through presentation to oral screening panels.

The remaining pro se appeals (primarily those determined by staff attorneys or judges to warrant further briefing and/or oral argument) are reviewed for a determination whether counsel should be appointed. Appeals that have been initially referred or submitted to oral screening panels are sometimes considered to be too complex for the oral screening process or require further briefing and/or oral argument for some other reason. These appeals are "kicked" from the screening process by staff attorneys or oral screening panels and referred to the coordinator for inclusion in the program and supplemental briefing. Still other appeals are referred by motions panels or staff attorneys prior to the initial briefing and inventory process on the basis of a motion for appointment of counsel and/or a review of the district court or agency record.

Cases selected for inclusion in the program include a broad range of legal issues. While a significant percentage of the cases are prisoner civil rights appeals or immigration petitions, many other civil cases are included, such as labor and employment cases, discrimination, bankruptcy, social security, Indian law, mining law, contract and civil forfeiture appeals. Direct criminal (and most habeas corpus) appeals are not included in the program because the appellants are entitled to paid counsel under the Criminal Justice Act and because any such appellant proceeding pro se is probably doing so out of choice. However, habeas corpus appeals presenting issues of first impression, complex issues of fact or law, or raising meritorious claims warranting further briefing are selected for inclusion in the program.

Due to the complex and changeable nature of immigration law, the court has posted an immigration law outline on the website to assist attorneys in immigration cases. In addition, pro bono attorneys appointed by the court may request assistance from the Immigrant Legal Resource Center (ILRC), by calling 415/255-9499. (Let them know you are pro bono counsel for a Ninth Circuit petition for review and are seeking mentor assistance.) Links to both the ILRC website and the court's "Immigration Outline" are on the court's website at [www.ca9.uscourts.gov/probono](http://www.ca9.uscourts.gov/probono).

In summary, program cases are generally (though not exclusively) selected after briefing and inventory have been completed. This allows staff to more fully evaluate the merits of the appeal and allows the court to assure participating counsel that only meritorious or otherwise deserving cases will be selected for the program. One

measure of the usefulness of the court's pre-screening process, and of the success of the program generally, is that the success rate for the pro bono attorneys and law students participating in the program has been approximately 50% (at least partial reversal or other termination favorable to pro bono client) since the inception of the program.

## PROCEDURES FOR APPOINTING COUNSEL

Once an order has been filed placing an appeal in the pro bono program, the court's coordinator contacts the district coordinator for the district in which counsel is to be appointed and forwards copies of any briefs or case materials that are not available electronically via Pacer, so that counsel has access to all previous filings in this court as well as the district court or agency record. The district coordinator then locates available counsel, who will have the opportunity to familiarize themselves with the issues on appeal, the history of the case, and the parties involved before committing themselves to the appointment. Pro bono counsel must be a member of the bar of the Ninth Circuit.

If no attorney is available for a given appeal in a given district, the court's coordinator will contact a district coordinator from another district or will solicit a participating law school clinic within the circuit to handle the appeal. Occasionally, attorneys outside the circuit are appointed as pro bono counsel. If a volunteer attorney reviews the briefs and/or other materials and determines that no arguable basis exists for the appeal, the court coordinator will contact the authorizing judges or Commissioner and discuss the propriety of vacating the order selecting the case for the program.

Once willing and available counsel has been located for an appeal, the court's coordinator works with him or her to formulate a mutually acceptable briefing schedule. The court's coordinator will then enter a Clerk's order appointing the attorney as counsel of record and establishing a briefing schedule. The coordinator also sends counsel an email confirming the appointment and setting forth the relevant aspects of the program. Pro bono counsel is advised to send a letter to the client outlining the terms of the representation agreement and to obtain the client's written consent. *(See Appendices 2 and 3 for examples of orders placing a case in the Pro Bono Program, an appointment order, and a sample representation letter.)*

The court's Pro Bono Coordinator will work with appointed counsel in all respects to assist them in substituting into the appeal and to process all further motions in the appeal, including requests for modification of the briefing schedule, motions to withdraw as counsel, and cost reimbursement requests. Where appropriate, counsel may request that the appeal be included in the court's mediation program.

## DISTRICT VOLUNTEER PANELS

Each of the districts in the circuit have a district coordinator who recruits volunteer attorneys for the program, maintains the current list of volunteers, and locates individual attorneys to accept specific appointments. The district coordinator is generally the chair of that district's delegation of attorney representatives to the Ninth Circuit Judicial Conference or is someone named by that person. (A list of the district coordinators and their contact information is provided with the attorney sign-up form, which is available on the court's website at [www.ca9.uscourts.gov/probono](http://www.ca9.uscourts.gov/probono).)

The district coordinators recruit volunteers through a variety of methods. Advertisements or announcements in local bar association newsletters or at local bar events have proved very successful in recruiting volunteers. Word of mouth works well in smaller legal communities. Another important resource is the annual class of new lawyer representatives to the Ninth Circuit Judicial Conference, who can be recruited to volunteer for appointments and/or to recruit their colleagues to do so.

The Ninth Circuit Lawyer Representatives, together with the Ninth Circuit Senior Advisory Board, have made a commitment to participation in the program, both in terms of volunteering to accept appointments and assisting in the recruitment of other volunteer attorneys. The Lawyer Representatives Coordinating Committee and the Senior Advisory Board sponsored a joint resolution urging circuit-wide participation in the program by the private bar, which was adopted by the Ninth Circuit Judicial Conference in August, 1993. (*See Appendix 1.*)

The limited scope of the representation of a litigant on appeal is very attractive as a manageable pro bono commitment. In addition, the commitment to hearing oral argument in these cases, the reimbursement of qualifying expenses and the pre-screening of the appeals selected for the program provide strong incentives for participation. Because of the overwhelming support of and participation in the program circuit-wide, there are more volunteer attorneys than there are cases in the program.

## LAW SCHOOL CLINIC PARTICIPATION

The Ninth Circuit has historically worked in cooperation with certain law school clinics in the circuit to appoint law students under the supervision of a professor to represent pro se litigants. Pursuant to 9th Cir. R. 46-4, law students supervised by an attorney admitted to this court may appear on behalf of any client with the written consent of that client. This program began solely as a learning experience for the students without much regard to the need for counsel in specific appeals, but is now an integral part of the pro bono program and includes the same, carefully screened cases selected for the program as those handled by the private bar.

With the expansion of the pro bono program, the court has recruited additional law schools to participate. Cases are sometimes referred to these law schools for appointment either because they have been difficult to place in the district of origin for some reason or because the school has requested a specific number of cases of a particular type.

When a law school is appointed, the same procedures are followed as described above, except that the court's coordinator deals directly with the law school rather than enlisting the aid of a district coordinator. The law school must obtain the written consent of the litigant to representation by a law student under the supervision of a professor. In addition, the student, supervising attorney, and dean must individually certify that the requirements for law student participation are met. ("Requirements for Student Practice" and the requisite consent and certification forms, are available on the court's website at [www.ca9.uscourts.gov/forms](http://www.ca9.uscourts.gov/forms). Forms must be electronically filed, in the "Forms/Notices/Disclosures" filing category.)

## **SCOPE OF APPOINTMENT AND ORAL ARGUMENT**

The order of appointment provides that pro bono counsel will be appointed to represent the appellant "for the purposes of this appeal only." Accordingly, the appointment includes only the handling of the appeal and the drafting of a petition for rehearing where requested by the client, but does not include the preparation and filing of a petition for certiorari in the Supreme Court or any other proceedings in any other court or agency unless specifically requested by this court or agreed upon between the attorney and the client.

If circumstances arise that require counsel to withdraw as counsel for appellant, such a motion may be based on any of the established grounds for doing so. A motion to withdraw will not generally be disfavored solely on the basis that it would result in further delay unless such delay would severely prejudice the litigants.

In most cases, every attempt will be made to appoint counsel from the same district in which the appeal will be argued. The court has committed to hearing oral argument in all cases in which pro bono counsel is appointed through the program. See 9th Cir. Gen. Order 3.8. (In cases where appointment is for mediation purposes or as amicus curiae, the court may not guarantee briefing or argument. Counsel may withdraw if mediation is not successful.) When counsel is appointed, court staff implement several internal court procedures designed to notify the merits panel of the appeal's inclusion in the program.

## REIMBURSABLE EXPENSES

Attorneys appointed by the court to represent pro se appellants pro bono may (but are not required to) seek reimbursement for certain necessary and reasonable costs incurred in their representation. Because the court has limited funds to reimburse eligible costs in these appeals, counsel are requested to consider absorbing some or all of their eligible costs where feasible.

Attorneys' fees and certain costs are available to prevailing pro bono counsel under applicable statutes and rules to the same extent as retained counsel. If you prevail in the Ninth Circuit, you are strongly encouraged to seek reimbursement of qualifying costs from the opposing party under Fed. R. App. P. 39 and accompanying local rules. The court must be reimbursed for any expenses paid by the Pro Bono Program that are subsequently recovered from the opposing party.

Requests for reimbursement of costs must be submitted to the program coordinator and include supporting documentation and receipts. (A reimbursement request form is provided on the court's website at [www.ca9.uscourts.gov/probono](http://www.ca9.uscourts.gov/probono).) Requested costs may not exceed actual out-of-pocket costs, and the court will not reimburse any portion of attorneys' fees. If you anticipate that you will incur additional costs not listed below for which you will seek reimbursement, you must contact the Pro Bono Coordinator, at (415) 355-8049, before you incur them. All cost reimbursement requests must be approved according to these guidelines unless specific exceptions are made in advance.

Expenses covered by the program include the following:

1. Airfare for travel (within the circuit) to oral argument for one attorney, or if a law school is appointed, for the supervising attorney and one student. **Attorneys must contact the Clerk's Office at (415) 355-7873 to obtain a letter authorizing travel at government expense before making any travel arrangements, and must then use the government travel agent to arrange for airline ticketing.** (These tickets are billed directly to the government.) **Out-of-circuit attorneys must make their own travel arrangements and airfare is not reimbursable.**
2. Other reimbursable expenses related to travel for oral argument include reasonable accommodations where necessary due to distance, reasonable ground transportation to and from the airport, parking, and meals. In many cases, the travel authorization letter can be used to obtain reduced government rates for hotel accommodations and car rentals. The total for all lodging and meal expenses should not exceed government per diem rates for the particular area in which the argument is held. Costs for alcoholic beverages or entertainment are not reimbursable.
3. Miscellaneous reimbursable expenses incurred during the course of representation include the following:

- Photocopying and/or necessary printing costs for briefs and excerpts of record, motions, and a petition for rehearing. (See 9th Cir. R. 39-1.2 and 39-1.3.)
- Computer assisted legal research costs, not to exceed \$1000.
- PACER fees incurred for accessing the district court record of the case on appeal, not to exceed \$1000.
- Documented long-distance telephone toll calls to the client.
- Postage and delivery.

## CONTACT INFORMATION

For questions about the program, please contact Susan Gelmis at:

[Susan\\_Gelmis@ca9.uscourts.gov](mailto:Susan_Gelmis@ca9.uscourts.gov)  
(415) 355-8020

Appendix 1  
1993 Resolution No. 3

1993 Resolution No. 3

Encourage Ninth Circuit Attorneys to  
Participate in the Pro Se Representation Project

Submitted by

The Ninth Circuit Lawyer Representatives Coordinating Committee  
and  
The Ninth Circuit Senior Advisory Board

WHEREAS, the number of appeals filed in the United States Court of Appeals for the Ninth Circuit which involve pro se litigants has reached unprecedented levels; and

WHEREAS, the court of appeals' consideration of complex nonfrivolous pro se appeals would be greatly assisted in many cases by the appointment of pro bono counsel for the litigant;

WHEREAS, the court of appeals is in the process of establishing a comprehensive Pro Se Project to provide for the appointment of pro bono counsel in complex civil appeals where a party is proceeding pro se; and

WHEREAS, the Pro Se Project will depend upon the participation, active involvement, and contribution of the private bar in order to succeed; and

WHEREAS, the Senior Advisory Board has endorsed the project and offered its support for the project's successful implementation; and

WHEREAS, members of the Lawyer Representatives Coordinating Committee have committed themselves to support the proposed Pro Se Project and to assist in coordinating the project in their districts;

NOW, THEREFORE, BE IT RESOLVED THAT:

All lawyer representatives and all other members of the Ninth Circuit bar:

1) Assist the United States Court of Appeals to develop, carry out, and coordinate an effective Pro Se Project to provide counsel in complex, nonfrivolous civil appeals where a party is proceeding pro se; and

2) Become involved with the Pro Se Project in their districts; and

3) Personally encourage their colleagues toward the goal of pro bono representation sufficient to meet the needs of the project.

## Statement of Reasons

More than one third of all new appeals filed in the United States Court of Appeals for the Ninth Circuit (2,783 of 7,979 appeals filed in 1992) have at least one party who is proceeding pro se. All new pro se civil appeals are reviewed at the outset by court staff; many of these are dismissed for jurisdictional or procedural defects, or are simple or frivolous appeals disposed of on the merits without the need for assistance of counsel. The remaining pro se appeals are generally more complex and/or meritorious, and require more of the court's time and resources to resolve. Often, the court's consideration of the appeals would be greatly benefitted by the assistance of pro bono counsel to ensure that these pro se appeals receive the same attention as other case of similar complexity.

To this end, the court is in the process of establishing a Pro Se Project by which the court will appoint pro bono counsel in the more complex and meritorious civil pro se appeals, including habeas corpus appeals. To the extent possible, counsel will be appointed in the districts in which the cases arise. The pro bono lawyers in each district will be coordinated by the chair of that district's lawyer representatives (or his or her designee), who will work in conjunction with the court's Coordinating Staff Attorney. The court has committed itself to hear oral argument in all cases in which counsel is appointed through the project. Funds are available, if needed and requested, to reimburse reasonable and necessary out-of-pocket expenses.

The court anticipates, based on available statistics regarding pro se appeals, that over 100 pro se civil appeals each year will warrant the appointment of counsel. The court is planning to enlist the aid of law school clinics throughout the circuit to provide representation in some of these cases, but the court must rely on participation by the private bar for the majority of the appeals. The lawyer Representatives Coordinating Committee and the Senior Advisory Board have pledged their support, and they have begun to solicit the assistance of the private bar.

## Appendix 2 Sample Orders

- Placing Case in Program - Not Briefed
- Placing Case in Program - Previously Briefed
  - Appointing Counsel

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

[*plaintiff/appellant name*],

Plaintiff - Appellant,

v.

[*defendant/appellee name*],

Defendant - Appellee.

No. [*xx-xxxxx*]

PRO BONO

[*district court case # & district*]

OR

[*agency/alien #*]

ORDER

Before: [*appellate commissioner name*], Appellate Commissioner

Upon review of the record, this court has determined that the appointment of pro bono counsel in this appeal would benefit the court's review. The court by this order expresses no opinion as to the merits of this appeal. The Clerk shall enter an order appointing pro bono counsel to represent appellant for purposes of this appeal only.

Pro bono counsel shall prepare briefing that will be submitted to the judges deciding this appeal, and shall appear at oral argument. The Clerk shall establish a revised briefing schedule. The appeal is stayed pending further order of this court.

If appellant objects to the court's appointment of counsel in this appeal, appellant shall file a written objection within 14 days after the filing date of this order.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

<p>[<i>plaintiff/appellant name</i>],  Plaintiff - Appellant,  v.  [<i>defendant/appellee name</i>],  Defendant - Appellee.</p>	<p>No. [<i>xx-xxxxx</i>] PRO BONO  [<i>district court case # &amp; district</i>] OR [<i>agency/alien #</i>]  ORDER</p>
---	--

Before: [*appellate commissioner name*], Appellate Commissioner

Upon review of the record and the briefing, this court has determined that the appointment of pro bono counsel in this appeal would benefit the court's review. The court by this order expresses no opinion as to the merits of this appeal. The Clerk shall enter an order appointing pro bono counsel to represent appellant for purposes of this appeal only.

Pro bono counsel shall consult with the client to determine whether: (1) replacement briefing; or (2) supplemental briefing and appellant's previously filed brief will be submitted to the judges deciding this appeal. The court encourages the submission of replacement briefing rather than supplemental briefing. Both parties shall state on the cover pages of their briefs whether they are replacement briefs or supplemental briefs. Pro bono counsel shall appear at oral argument. The Clerk shall establish a revised briefing schedule. The appeal is stayed pending further order of this court.

If appellant objects to the court's appointment of counsel in this appeal, appellant shall file a written objection within 14 days after the filing date of this order.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

<p>[<i>plaintiff/appellant name</i>],</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>[<i>defendant/appellee name</i>],</p> <p>Defendant - Appellee.</p>	<p>No. [<i>xx-xxxxx</i>] PRO BONO</p> <p>[<i>district court case # &amp; district</i>] OR [<i>agency/alien #</i>]</p> <p>ORDER</p>
---	--

Pursuant to this court's [*date*] order appointing pro bono counsel, [*pro bono attorney*], Esq., is hereby appointed to represent appellant for purposes of this appeal only. The Clerk shall amend the record to reflect that [*pro bono attorney*], Esq. of [*law firm name/address/phone*], is pro bono counsel of record for appellant.

Within 14 days after the date of this order, pro bono counsel shall register on the court's website for electronic filing/noticing with the Case Management/Electronic Case Files (CM/ECF) system, if counsel has not already done so.

Briefing shall proceed as follows: the opening brief is due [*date 1*]; the answering brief is due [*date 2*]; and the optional reply brief is due within 14 days after service of the answering brief.

For the Court:

MOLLY C. DWYER  
Clerk of the Court

By: [*deputy clerk name*]  
Deputy Clerk

Appendix 3  
Sample Representation Letter

[Firm's Letterhead]

[date]

Re: CA No. [appeal number and title]

Dear [Client]:

We are pleased to accept the opportunity to represent you with regard to the above-referenced appeal. The purpose of this letter is to set forth the basic terms upon which we will represent you, including the anticipated scope of our services and the nature of our pro bono representation.

1. Scope of Engagement. The undersigned have been appointed as pro bono counsel by the United States Court of Appeals for the Ninth Circuit (the "Court") to represent you in the above referenced appeal. Our appointment is limited and includes only the handling of this appeal and the drafting of a petition for rehearing if requested by you, but does not include the preparation and filing of a petition for certiorari in the Supreme Court or any other proceedings in any other court.

2. Pro bono Representation. Please be advised that we are representing you as participants in the Court's pro bono project. We will seek reimbursement from the Court for reasonable and necessary costs incurred in our representation of you in the appeal. In addition, we may seek an award of statutory attorney's fees from appellees if appropriate. You will not be responsible for any attorney's fees or costs incurred in our representation of you.

3. Errors and Omissions Coverage. Under California law, all lawyers are required to advise their clients whether they maintain errors and omissions insurance coverage applicable to the services to be rendered. We confirm that we do maintain such insurance coverage applicable to the services which we anticipate rendering in connection with this matter.

4. Other Issues. For all engagements undertaken by our firm, our firm performs a conflict check, i.e., a review of its records to determine whether or not the firm is currently involved in the engagement. We have performed the requisite conflict check and wish to advise you of its results. The check revealed that a former principal of our law firm, while still a principal of our firm, filled out paperwork on February 24, 1990, indicating that he would be representing the management of ABC Corp. in conjunction with a corporate acquisition. Our records indicate that such representation was never undertaken. We do not believe that a conflict of interest exists with regard to our representation of you in this matter; however, we make the foregoing disclosure so that you may have all relevant facts before you in determining whether or not to go forward with this engagement. Should we learn any additional information that leads us to believe that a potential or actual conflict of interest does exist, we will of course inform you promptly of that fact in writing.

For best results, we look forward to a high degree of cooperation from you. Although we will endeavor to achieve a satisfactory result and to keep you apprised of the status of these matters, no guarantees of any kind can be made concerning the outcome of any litigation, or of any other legal services in which the voluntary consent or action of another party is involved.

While we would prefer to confirm the terms of our engagement by a less formal method than a written letter such as this, in certain instances attorneys are required by California law or firm policy to memorialize these matters in writing. Accordingly, we ask that you review this letter carefully and, if it is acceptable to you, please so indicate by returning a signed copy at your earliest convenience. Enclosed is an additional copy of this letter for your files.

We look forward to working with you on this engagement. Please do not hesitate to call either of us if you have any questions.

Very truly yours,

ACCEPTED AND AGREED:

\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_




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## Pro Bono Counsel Plan

The United States Court of Appeals for the Second Circuit hereby adopts this Plan to govern the appointment of pro bono counsel to pro se appellants with meritorious or complex appeals who are ineligible for representation pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and to assist the Court in processing pro se civil appeals more equitably and efficiently.

### Statement of Policy

The goal of this Plan is to provide pro bono counsel to pro se parties in civil appeals in which briefing and argument by counsel would benefit the Court's review. Pro bono counsel may be appointed on an appellant's motion for the appointment of counsel or sua sponte by the Court, but all cases selected for the appointment of pro bono counsel must be reviewed by a panel of judges for a determination of the propriety of such appointment. Only cases presenting issues of first impression, complex issues of fact or law, or raising potentially meritorious claims or otherwise warranting further briefing and oral argument will be selected for the appointment of counsel.

Cases for which pro bono counsel are appointed include a broad range of legal issues. While a significant percentage of the cases are prisoner civil rights, many other civil issues are included, such as those involving labor and employment, discrimination, social security, immigration, and tax law. The Court recognizes that because the Plan does not provide for compensation or reimbursement attorneys serving on the Pro Bono Panel are rendering a public and social service of the greatest importance. The program depends upon the cooperation and volunteer efforts of the private bar, and on the Court's commitment to providing an opportunity for service to participating attorneys.

### Pro Bono Panel

#### **A. Maintaining the Pro Bono Panel List**

The Director of the Office of Legal Affairs, under the direction and supervision of the Chief Judge or the Chief Judge's designee, shall maintain the list of the Pro Bono Panel members. The list of Pro Bono Panel members shall include the name of each attorney and the current business and e-mail addresses and telephone number of the attorney. Attorneys accepted for service on the Pro Bono Panel must notify the Director of the Office of Legal Affairs, in writing, within 48 hours of any changes in business address, business telephone number, e-mail address, or employment.

#### **B. Panel Appointments**

Appointments to the Pro Bono Panel shall be made by the Court upon appropriate recommendation from the CJA and Pro Bono Committee of this Court.

#### **C. Applications**

##### **1. Submission Requirements**

All private attorneys seeking to be included on the Pro Bono Panel must submit to the Director of the Office of Legal Affairs an application, a resume, and three writing samples, preferably appellate briefs on which the attorney was the prime author. Applicants must be admitted to and members in good standing of the Bar of the Second Circuit and have at least three years of appellate experience. Applications for membership shall be submitted on the Court's form for Application for Appointment to the Pro Bono Panel, available on the Court's website. The Court will set and publicize an annual application period for appointment to the Pro Bono Panel.

##### **2. Term of Appointment**

## EXHIBIT F

Pro Bono Panel members shall serve for a term not to exceed three years, but may be removed by the Court prior to the expiration of their term (See Section D, Removal). Appointments to the Panel shall be made so that the terms of approximately one-third of the Panel members expire at the conclusion of each Term of Court. Upon expiration of the term of a Pro Bono Panel member, the Pro Bono Panel member must reapply for membership if he or she wishes to continue as a member of the Pro Bono Panel. Panel members will be selected on the basis of demonstrated qualification, skill and dedication. Because of the limited size of the Pro Bono Panel, the Court will not be able to appoint every qualified applicant to the Panel, but the Court will make an effort to rotate membership on the Pro Bono Panel in order to ensure that new applicants are given an opportunity to serve.

#### **D. Removal**

1. A Pro Bono Panel member may be removed from the Pro Bono Panel whenever the Court, in its discretion, determines that the member has failed to fulfill satisfactorily the obligations of Panel membership, including the duty to afford competent counsel, or has engaged in other conduct that renders inappropriate his or her continued service on the Pro Bono Panel. The Court may remove a Pro Bono Panel member for refusing three times to accept a pro bono appointment during the membership term.

2. A Pro Bono Panel member will be suspended automatically if the member is disbarred or suspended by any state or federal bar or arrested for, charged with, or convicted of a crime. The Panel member has an affirmative obligation to notify the Clerk of Court, in writing, within 24 hours, of any such suspension, disbarment, arrest, filing of criminal charges or conviction.

#### **E. Non-Panel Member Appointments**

When the Court determines that the appointment of an attorney who is not a member of the Pro Bono Panel is appropriate in the interest of justice, judicial economy, or some other compelling circumstance warranting such appointment, the attorney may be admitted to the Pro Bono Panel pro hac vice and appointed to represent the pro se client.

#### **F. Pro Bono Appointment Procedure**

Once the Court has entered an order directing that pro bono counsel be appointed, counsel will be selected from the Pro Bono Panel by the Director of the Office of Legal Affairs. Once counsel accepts appointment in the case, an order will be entered appointing the Panel member as counsel of record, and the attorney may then remove the record from the Clerk's Office for his or her use until the appellant's brief is filed.

#### **G. Duties of Appointed Counsel**

Pro Bono Panel members must be reasonably available to accept assignments. Upon assignment to represent a client, a pro bono attorney shall provide representation in accordance with the Canons of Professional Responsibility and the provisions of this Plan.

Although Pro Bono Panel members may allow associates or law students to conduct research and perform other work on the assigned case, the attorney on the Panel to whom the case is assigned will remain the attorney of record and his or her name must appear on the appellate brief. This attorney must assume the ultimate responsibility for the brief submitted to the Court and all other aspects of the assigned case.

The Pro Bono Panel member assigned to the case shall appear for oral argument unless excused by the Court. Presentation of oral argument by an associate attorney or student not appointed under the Plan will be allowed only with permission of the Court except as provided in [Local Rule 46.1](#).

If circumstances arise that require counsel to withdraw as counsel for the pro bono client, such a motion may be based on any of the established grounds for doing so.

The pro bono appointment includes only the handling of the appeal and the drafting of a petition for rehearing where requested by the client, but does not include the preparation and filing of a petition for certiorari in the Supreme Court or any other proceedings in any other court unless specifically requested by this Court. However, in the event of a decision on appeal adverse to the client, counsel shall promptly transmit to the pro bono client a copy of the Court's decision, and advise the client in writing of the right to file a petition for writ of certiorari with the United States Supreme Court and the procedures for filing a petition for a writ of certiorari pro se.

#### **H. Fees, Costs and Expenses**

Although pro bono counsel appointed by this Court are not compensated by the Court for fees, statutory attorneys' fees and costs are available to pro bono counsel to the same extent that they are available to retained counsel.

Generally, costs and expenses are not reimbursable for cases accepted by pro bono counsel. Where costs and expenses, however, create an undue hardship for assigned counsel, counsel should contact the Director of Legal Affairs prior to incurring any such cost or expense. Some limited reimbursement might be available for pro bono counsel for whom undue hardship exists under the Court's Plan for Administration of Attorney Admission Fee Fund.

The application for appointment to the pro bono panel is [here](#).

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# MONTANA

**EXHIBIT G**

## The Montana Appellate Pro Bono Program

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## **1. Overview**

By Order dated May 22, 2012, the Montana Supreme Court established an Appellate Pro Bono Program (APBP or Program), which became effective July 1, 2012. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator (Coordinator) and the Court's Pro Se Law Clerk (PSLC).

The Program is designed to offer the assistance of appellate counsel to "qualified litigants." A "qualified litigant" is a self-represented litigant: (1) who meets the financial criteria established by the Montana Legal Services Association (MLSA)<sup>1</sup>, and (2) whose case, while under review by the Supreme Court, requires supplemental briefing or oral argument.

Once the Court requests supplemental briefing or oral argument, the PSLC and the Coordinator begin the process of matching a qualified pro bono attorney with a participating self-represented litigant. The parties to the appeal are notified of the Court's request and if the self-represented party wishes to participate in the Program, the MLSA determines if he or she meets the necessary financial criteria. Upon satisfaction of the financial criteria, the qualified litigant is provided a volunteer attorney to assist him or her in continuing the appeal before the Supreme Court.

If there are multiple parties to the appeal that are qualified litigants, the Coordinator will offer each of them an opportunity to participate in the Program and be assigned pro bono counsel. Additionally, except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

## **2. Recruiting Volunteer Attorneys**

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<sup>1</sup> Montana Legal Services Association or MLSA is a 501(c)(3) nonprofit organization providing legal information, advice and other services free of charge to low-income Montanans.

The Coordinator will engage in on-going recruitment efforts to enlist pro bono appellate lawyers who are willing to take on the cases that have been selected for participation in the APBP. When an attorney accepts a case through the Program, the attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. The Coordinator will make every effort to recruit attorneys from varied and wide-ranging areas of the law as well as seasoned attorneys to mentor younger lawyers and law students to assist the volunteer attorneys who are participating in the Program.

Recruited volunteer attorneys must complete and submit the APBP Attorney Registration Form, attached as **Exhibit A**. The detailed information derived from the registration and application forms allows matching attorney with appropriate cases.

### **3. Placing the Case with Pro Bono Counsel**

#### **a. Case Qualifications for Participation in Program**

The criteria for participation in the APBP are: (1) after initial briefing, the Court determines there are one or more issues in which the Court could benefit from additional briefing and possibly oral argument; and (2) the self-represented litigant is financially eligible. Financial eligibility occurs when the MLSA confirms that the self-represented party would qualify, or be eligible, for use of MLSA's services.

#### **b. Case Selection and Referral Process**

##### **i. Referral of individual cases**

Once the Court has identified a case for participation in the Program, the Court will direct the PSLC to notify the self-represented party in writing, **Exhibit B**. The following information should be provided:

- The case has been initially selected for participation in the Program.

- Participation in the APBP is purely voluntary and is contingent upon financial eligibility, which requires the litigant to submit a MLSA application and obtain a Certificate of Eligibility. The letter shall include specific instructions for submitting and returning the MLSA application.
- It is possible that placement of the case with a volunteer lawyer will include posting minimal, publicly available facts about the case through the Internet, exclusively for the purpose of placing the case.
- The self-represented litigant may decline to participate in the APBP by indicating so on the Application and returning the completed Request to Decide the Appeal form to the PSLC.

The PSLC will include with the notification letter: (1) an APBP “Application for Appointment of Pro Bono Counsel,” **Exhibit C**, (2) a MLSA Application for Assistance, **Exhibit D**, and (3) a “Request to Decide the Appeal,” **Exhibit E**. As indicated above, the “Request to Decide the Appeal” is for the litigant’s use when declining participation.

**ii. Self-represented party acceptance or rejection**

If the self-represented litigant is interested in participating in the Program, the litigant must complete and return the APBP litigant application and the MLSA Application for Assistance within fourteen (14) of the date of the letter. The PSLC will notify them of acceptance into the Program.

The self-represented litigant may decline to participate in the APBP by indicating so on the Application and returning the completed Application and Request to Decide the Appeal forms to the PSLC.

**iii. Determination of financial eligibility**

The self-represented litigant must complete the MLSA Application for Assistance, **Exhibit D**. This form may be completed and submitted electronically. Alternatively, the self-represented litigant may complete the hard copy of the form included in his or her information packet from the PSLC and return it to MLSA by mail. Boxes 3 and 7 of the Application need

not be completed by the self-represented litigant. In Box 8, the litigant need only request that MLSA determine financial eligibility for the APBP. After MLSA determines financial eligibility, MLSA will notify the PSLC who will, in turn, notify the self-represented litigant and the Coordinator. If the litigant meets the financial qualification requirements, the Coordinator will begin selection of counsel.

#### **iv. Putting pro bono counsel in place**

The Coordinator will review the applications and select an attorney for placement of the case. A mentor or law student may also be selected. To facilitate efficient case and client control, the mentor shall not be included in any formal appointment papers. When a self-represented party becomes a qualified litigant, the Coordinator will disseminate a “Request for APBP Attorney Volunteer,” **Exhibit F**, to the existing pool of volunteer attorneys. Limited case-specific information, prepared by the PSLC, including party names, issues presented, urgency of proceedings, and other information the Court determines necessary to appropriately place the case will be provided to the attorney pool.

Attorneys interested in pursuing placement on the case will respond by completing a brief online or hard copy form entitled “APBP Volunteer Attorney Notice of Case Interest,” **Exhibit G**. The Notice will confirm the lack of conflicts and will indicate the desired role in the appeal, i.e., lead attorney, mentor, etc. A law student wishing to participate in the case as well may complete the form.

When a volunteer attorney has been selected, the Coordinator will notify the attorney in writing using the Attorney Referral Letter at **Exhibit H**, instructing the selected attorney to contact the self-represented litigant. The letter to counsel will include contact information for

the new client as well as a copy of the client's Application for Appointment of Pro Bono Counsel and a sample Engagement Letter, attached as **Exhibit I**.

After the selected attorney has had the opportunity to meet with the litigant and/or file a notice of appearance in the case, counsel shall return an "Attorney Confirmation of Acceptance of APBP case," **Exhibit J**, to the Coordinator. The Coordinator will provide a copy to MLSA, which triggers provision of malpractice insurance through MLSA.

If an objection is made to the selection of a volunteer attorney, if financial eligibility cannot be confirmed, or if a volunteer match cannot be made for any reason, the Coordinator will notify the PSLC, who will in turn notify the Court. The PSLC will also notify the self-represented litigant by letter that placement of the case was unsuccessful. This allows the case to continue from that point forward as a self-represented litigant case.

#### **4. Post-Placement Procedures**

##### **a. Notice of Appearance**

After consulting with the client and obtaining necessary documentation relating to the representation, the selected attorney should file a Notice of Appearance, **Exhibit K**, with the Court. The Notice should indicate the appointment is under the APBP.

##### **b. Obtaining the Record**

To expedite access to the District Court record, and avoid costs associated with printing and postage, the Coordinator will facilitate volunteer attorney's access to the record directly from the District Court, electronically when possible.

##### **c. Extensions of Time**

The Court will Issue a Scheduling Order setting forth the dates when supplemental briefs are due. Any requests for extension of time must be submitted to the Clerk of the Supreme Court via motion in substantial compliance with the Montana Rules of Appellate Procedure.

**d. Oral Arguments**

There is no guarantee that any participating case will be invited to present an oral argument to the Court; however, should volunteer counsel request oral argument, the Court will consider the preferences of counsel as well as the nature of the case to determine whether oral argument is necessary or appropriate. If the Court chooses to hear oral argument, it will issue an Order scheduling the argument and specifying the time allowed to each party in accordance with its Internal Operating Rules.

**5. Continuing Role of Coordinator and Pro Se Law Clerk**

The Coordinator will maintain contact with the volunteer attorneys for administrative purposes. The Coordinator will assist in directing the volunteer attorney to practice resources and information to facilitate a positive pro bono experience and serve as the point of contact between the volunteer attorneys and the Court.

The PSLC will serve as contact for the litigant should an issue arise with the volunteer attorney. The PSLC will monitor the case progress via C-Track, or other similar Court-sanctioned program. The PSLC and Coordinator will confer as necessary.

**6. Substitution of Pro Bono Counsel**

Although it is anticipated that an APBP-selected attorney will handle accepted pro bono appeal cases until completion, it is recognized there are times when an attorney who accepts representation must withdraw due to circumstances beyond the attorney's control. In these situations, the Engagement Letter will govern this process and the volunteer attorney shall advise

the Coordinator. If the Court deems it appropriate to permit withdrawal, the Coordinator will attempt to place the client with a new volunteer attorney. Placement is not guaranteed and the circumstances necessitating the withdrawal of previously assigned volunteer counsel may be considered by the Coordinator and the PSLC when determining reassignment.

**EXHIBIT A**  
**Montana Appellate Pro Bono Program (APBP)**  
**Attorney Registration Form**

Attorney Full Name: \_\_\_\_\_

Attorney Montana Bar No.: \_\_\_\_\_ [OR] I am a \_\_\_\_ year student at the UM School of Law

Employer: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_, MT Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

**Check One:**

- I regularly check and respond to my e-mail
- I do not regularly check my e-mail and prefer not to receive correspondence or requests by this method.

**Indicate your participation preferences by checking all applicable boxes below and listing any areas of practice in which you would be willing to take or mentor an appellate pro bono case:**

- I prefer to serve as a mentor only
- I am willing to take a case or mentor another attorney
- I prefer only to take a case
- I am a law student
- I may be interested in being paired with an experienced mentor or a junior attorney
- I have a mentor who can assist me within my own firm

**Areas of Practice:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Briefly describe your previous appeals experience within Montana and any other jurisdictions:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Please provide any additional information you feel would be helpful in matching you with a pro bono client and/or mentor:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## **Montana Appellate Pro Bono Program (APBP)**

### **Attorney Participation Information and Form**

By Order dated May 22, 2012, the Montana Supreme Court established an Appellate Pro Bono Program (APBP). The APBP is designed to provide the assistance of appellate counsel to qualified litigants in cases in which the Court has determined that supplemental briefing would be beneficial to the Court. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Pro Se Law Clerk. The APBP became effective July 1, 2012.

Only selected self-represented litigants who meet Montana Legal Services Association's (MLSA) financial criteria are eligible to receive pro bono legal services from the APBP volunteer attorneys. Upon MLSA's acceptance and the attorney's confirmation of representation, the volunteer attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. The Program offers an opportunity to volunteer as the appellate attorney, a mentor to the lead attorney, or as a law student willing to assist in the appeal under the supervision of the lead attorney.

Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

If you are an attorney licensed in the State of Montana and are **interested in participating as a volunteer attorney in the Appellate Pro Bono Program (APBP)**, please complete the online Attorney Registration Form by following the link below or visiting the State Bar of Montana website and downloading, printing and mailing or e-mailing your Registration Form to the following:

Patricia Fain  
Statewide Pro Bono Coordinator  
P.O. Box 21304  
Billings, MT 59104-2103  
Email to [pfain@mt.gov](mailto:pfain@mt.gov)

[Register for the APBP Online](#)

For more information about the program, visit the State Bar of Montana website and click on the Appellate Pro Bono Program link.

Registration information SCT/plf

**EXHIBIT B**  
**Participant/Client Letter**

Date

Name

Address

Re: Montana Supreme Court Cause Number: DA-\_\_\_\_\_

Dear \_\_\_\_\_ :

The above appeal was fully briefed and has been submitted to this Court for a decision. You have represented yourself in filing the briefs and perhaps motions and other documents. Five of the seven justices have reviewed the briefs and determined that supplemental briefing would be beneficial to the Court in deciding this case.

The Court has an Appellate Pro Bono Program (APBP) through which counsel may be appointed to represent eligible litigants to prepare and file supplemental briefs and if the case is classified for oral argument, to argue the case before the Court. Enclosed is an information packet that includes the Application for Appointment of Pro Bono Counsel. You must complete the application in order to apply for appointment of a pro bono attorney.

Also enclosed is an Application for Financial Qualification from the Montana Legal Services Association (MLSA). It contains instructions for accessing this form electronically. You must complete this form and submit it electronically or, alternatively, you may complete the enclosed hard copy and return it to MLSA by mail. **It must be returned within 10 days of the date of this letter.** MLSA will review the Application for Financial Qualification, and you will be advised if you qualify and are eligible for the APBP. By completing and signing the Application for Financial Qualification, you agree to the MLSA reviewing the application and making a determination whether you are eligible to participate in the APBP.

Please complete the Application for Appointment of Pro Bono Counsel and mail it to the Court's Pro Se Law Clerk within 10 days to the following:

Sally Johnson  
Pro Se Law Clerk  
Montana Supreme Court  
215 N. Sanders, Room 414  
Helena, Montana 59620

You may submit the completed Application for Appointment of Pro Bono Counsel personally by delivering it to staff in the office of the Clerk of Supreme Court, 215 N. Sanders, Room 323 here in Helena, who will ensure their delivery.

The PSLC will inform you if you qualify for the APBP. You will be contacted directly by the pro bono counsel who has agreed to represent you in preparing and submitting supplemental briefing.

The attorneys and law students who have generously volunteered to be appointed as pro bono counsel receive no compensation, but you will be responsible for any costs incurred such as the copying and binding of the supplemental briefs. If you qualify for the APBP, the Court will issue an Order setting a supplemental briefing schedule. After the supplemental briefs from all parties are filed, the case will be reviewed and classified by the Court. Your pro bono counsel will be notified whether the case is classified for oral argument. If oral argument is ordered, your pro bono counsel will present the argument which you may attend at your own expense.

If you choose not to participate in the APBP program, please sign the Request to Decide the Appeal, and the Court will decide this appeal without supplemental briefing. **This form must be submitted to the Court's Pro se Law Clerk at the above address within 10 days of date of this letter.**

If you have questions, you may call or e-mail me, and I will attempt to answer them and assist you in participating in this program.

Sincerely,

Sally Johnson  
Pro Se Law Clerk  
Phone: 406 444-1412  
e-mail: [sjohnson2@mt.gov](mailto:sjohnson2@mt.gov)

**EXHIBIT C**  
**APPLICATION FOR APPOINTMENT OF PRO BONO COUNSEL**  
**IN A CIVIL APPEAL**

I, \_\_\_\_\_, am representing myself as  
the appellant or appellee in Cause No. \_\_\_\_\_,

\_\_\_\_\_  
*[caption of appeal]*

This case is fully submitted to the Supreme Court and ready for a decision.

I have been informed by the Supreme Court that I may be eligible for the appointment of counsel under the Appellate Pro Bono Program (APBP). In the event that I qualify financially for pro bono appellate representation, counsel will be appointed to represent me in this appeal.

I **DECLINE** to participate in the APBP. (Skip to signature and complete and sign the enclosed **Request to Decide Appeal** and return to the address below.)

I **AGREE** to appointment of pro bono counsel through APBP. I have provided my contact information and have read and initialized each statement below:

My Full Name: \_\_\_\_\_

Street Address: \_\_\_\_\_

City, State, Zip Code: \_\_\_\_\_

Telephone: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

Email: \_\_\_\_\_

After reading each of the following provisions, please signify your agreement by putting your initials in the blank line at the left.

\_\_\_\_ I understand this representation will consist of filing additional briefs relating to the issues the Court identifies and oral argument in the event the Court classifies this case for oral argument.

\_\_\_ I understand that my appointed pro bono counsel has agreed to act as a volunteer, without any compensation and that the Court has waived its fees.

\_\_\_ I understand that I am responsible for any additional costs incurred.

\_\_\_ I agree to provide timely, accurate financial information to determine my eligibility under Montana Legal Services Association (MLSA) guidelines.

\_\_\_ I agree to communicate and cooperate with my pro bono counsel until the case is finally disposed of by the Montana Supreme Court.

\_\_\_ I understand that the appointment of pro bono counsel will then be terminated and my pro bono counsel shall have no further responsibilities to me or my cause.

\_\_\_ I understand that once pro bono counsel is appointed to represent me in this appeal and has filed a Notice of Appearance, I may not file any documents in this appeal and only counsel will be allowed to file briefs, other documents, or present oral argument, if applicable, in this appeal.

\_\_\_ I understand the Clerk of the Supreme Court will return any document I might attempt to file directly, and the Court will not consider these documents in deciding this case.

\_\_\_ I understand the brief or briefs I filed prior to the appointment of pro bono counsel will be considered in deciding this appeal, together with the supplemental briefs.

\_\_\_ I agree to complete the Financial Qualification form and submit it to Montana Legal Services Association as instructed on the Form.

\_\_\_ I agree to sign a letter of engagement provided by my pro bono counsel.

\_\_\_ I understand all of these provisions of the APBP.

DATED this \_\_\_ day of \_\_\_\_\_, 20\_\_\_.

---

*[Signature]*



## Montana Legal Services Association Application for Assistance

### HOW TO APPLY FOR HELP:

1. You can call MLSA's HelpLine at:

**1-800-666-6899**

The HelpLine is answered Monday – Friday from 7:30 am to 6:00 pm. Sometimes you may have a hard time getting through on the phones. We want to hear from you, so please keep trying. The fastest way to apply is by calling the HelpLine.

OR

2. You can submit an application online. To submit an application online you need to go to our website, <http://www.mtlsa.org>, click on the “Get an Application” link located under the “Quick Links” area on the left of the homepage and, on the following page, click on the “fill out online and submit online” link to begin the online application process.

OR

3. You can complete this form to apply for our help. To submit this paper application you can:

Mail or fax this form to the Montana Legal Services Association (MLSA).

#### Our mailing address is:

Montana Legal Services Association  
616 Helena Avenue, Suite 100  
Helena, MT 59601

#### Our fax number is:

(406) 442-9817

4. We will contact you. Please call MLSA at the number below, if you do not hear from us within 3 days.
5. If you need help filling out this application, or if you want to apply over the phone, please call the Montana Legal Services Association's HelpLine Number at 1-800-866-6899.



Montana Legal Services Association  
Application for Assistance

Complete the application to the best of your ability. All the information you provide in this application is strictly confidential.

**1. What type of problem do you need help with?**

- |  |   |  |                                      |
|--|---|--|--------------------------------------|
| <input type="checkbox"/> Garnishment           | <input type="checkbox"/> Eviction                   | <input type="checkbox"/> Custody             | <input type="checkbox"/> Medicaid    |
| <input type="checkbox"/> Collection Lawsuit    | <input type="checkbox"/> Housing Subsidy/Voucher    | <input type="checkbox"/> Divorce             | <input type="checkbox"/> TANF        |
| <input type="checkbox"/> Collection Harassment | <input type="checkbox"/> Return of Security Deposit | <input type="checkbox"/> Order of Protection | <input type="checkbox"/> Food Stamps |
| <input type="checkbox"/> Repossession          | <input type="checkbox"/> Mobile Home Issues         | <input type="checkbox"/> Other _____         | <input type="checkbox"/> Employment  |
| <input type="checkbox"/> Foreclosure           |   |  |                                      |

**2. Applicant Information:**

First name: \_\_\_\_\_ Middle initial(s): \_\_\_\_\_

Last name: \_\_\_\_\_

Other names you have gone by: \_\_\_\_\_

SSN: XXX – XX - \_\_\_\_ \_ (last 4 digits only)

Date of Birth: \_\_\_\_\_ Age: \_\_\_\_\_

Sex:  Male  Female Email Address (optional): \_\_\_\_\_

*If case involves domestic violence, please provide MLSA with safe contact information:*

Street address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP Code: \_\_\_\_\_

Best phone number to reach you at (MLSA will try to call you, it is important that you provide MLSA with a reliable number to reach you):

Area code: \_\_\_\_\_ Number: \_\_\_\_\_ Type of phone: \_\_\_\_\_

Another phone number to reach you at:

Area code: \_\_\_\_\_ Number: \_\_\_\_\_ Type of phone: \_\_\_\_\_

Please indicate best time to call you back: \_\_\_\_\_

Is it safe to contact you using the phone number(s) / address above?  Yes  No

Do you need an Interpreter?  Yes  No

If you answered "Yes", what language? \_\_\_\_\_



**5. Household Income Information:** Please list all sources of income where applicable.

Type of Income	You	Other Party
Employment		
Food Stamps (SNAP)		
SSI		
Soc. Sec. Disability		
Soc. Sec. Retirement		
Child Support		
TANF (Welfare)		
Veteran's Benefits		
Unemployment		
Worker's Compensation		
Other:		
Other:		

**6. Asset Information:**

If "Yes", please list the item, what it is worth, and how much you owe on it if anything.

Item	Do you have?	Amount in account?	
Checking	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Savings	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Item	Do you have?	How much did you pay for it?	How much do you owe on it?
Car 1	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Car 2	<input type="checkbox"/> Yes <input type="checkbox"/> No		
House 1	<input type="checkbox"/> Yes <input type="checkbox"/> No		
House 2	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Stocks, bonds, CDs	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other:	<input type="checkbox"/> Yes <input type="checkbox"/> No		

**7. Hearings and Deadlines:**

- Have you been served with court documents?      Yes      No

If yes, what date were you served with papers? \_\_\_\_\_

- Are there any deadlines that you know of?      Yes      No

If yes, what is the deadline? \_\_\_\_\_

- Is there a hearing scheduled?      Yes      No

If yes, what is the date and time of the hearing? \_\_\_\_\_

Please **ATTACH** copies of critical documents containing important dates.

**8. Specific Problem:**

Please tell us what problem you need help with:

What do you want Montana Legal Services Association to do for you?

**9: Feedback:**

Is there any feedback you would like to leave regarding this application? Did any terms, words or questions not make sense to you? Let us know so we can improve the process in the future.

**EXHIBIT E**  
**REQUEST TO DECIDE THE APPEAL**

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA \_\_\_\_\_  
\_\_\_\_\_

Plaintiff and Appellee,

v.

REQUEST TO DECIDE  
THE APPEAL

Defendant and Appellant.  
\_\_\_\_\_

I acknowledge that I have been provided with an Appellate Pro Bono (APBP) information packet and informed by Supreme Court staff that I may be eligible for appointment of a pro bono counsel to provide supplemental briefing to the Court in this appeal. I have reviewed the packet and I choose not to participate in the APBP and request that this appeal be decided based upon the record and the briefs on file with the Court.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[signature]

Certificate of Service

I hereby certify that I have filed a true and accurate copy of the foregoing Request to Decide the Appeal with the Clerk of the Montana Supreme Court and that



**EXHIBIT F**  
**REQUEST FOR APBP ATTORNEY VOLUNTEER and CASE MEMORANDUM**

You are among a pool of attorneys who registered to volunteer for the Montana Appellate Pro Bono Program (APBP) sponsored by the Montana Supreme Court. We are seeking an attorney to assist with the case outlined in the attached Memorandum. If you require further information about the case, contact information for the Court's Pro Se Law Clerk can be found on the Memorandum.

If after conducting necessary conflict checks you wish to accept the appointment of this case, please complete the *Attorney Notice of Case Interest* online by following the link on the State Bar of Montana website at [www.mtstatebar.org](http://www.mtstatebar.org) or by completing the attached hard copy and mailing or e-mailing NO LATER THAN [DATE] to:

Patricia Fain  
Statewide Pro Bono Coordinator  
406/794-6693  
[Pfain@mt.gov](mailto:Pfain@mt.gov)

**Memorandum of Appellate  
Pro Bono Case**

To: Interested volunteer attorney

From: Sally Johnson, Pro Se Law Clerk  
Montana Supreme Court  
Phone: 406 444-1412  
e-mail: sjohnson2@mt.gov

Re: Cause No. 12- \_\_\_\_\_  
\_\_\_\_\_ v. \_\_\_\_\_

Date:

Summary of issues for supplemental briefing (*The Court will entertain briefing only regarding the issues described below*):

Case summary:

A copy of judgment/findings of fact and conclusions of law from which this appeal is taken is attached.

Copies of critical documents that are attached:

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

**EXHIBIT G**

**APBA Volunteer Attorney Notice of Case Interest**

Today's Date: \_\_\_\_\_

Attorney Name: \_\_\_\_\_

Case Caption: \_\_\_\_\_

APBP Client Participant: \_\_\_\_\_

I have performed the requisite conflict check and I do not believe that a conflict of interest exists regarding my possible representation in this matter. If after consultation with the client and/or lead attorney I discover a potential or actual conflict of interest, I will notify the Coordinator immediately.

I believe I currently have sufficient time to pursue or assist with this action.

I have reviewed the information provided by the Appellate Pro Bono Program regarding the above case and I am willing to provide the following services:

- Represent the above APBP participant as the lead attorney
- Serve as a mentor to the lead attorney for the above case
- Serve as a volunteer attorney to assist the lead attorney for the above case
- I am a law student and am willing to assist the lead attorney for the above case

I have read the APBP Overview and am willing to provide my pro bono services according to its provisions.

I understand more than one attorney may indicate interest in this case and selection is on a rotating basis and by random selection presuming equal experience and interest in the case type.

LEAD ATTORNEY VOLUNTEERS PLEASE MARK ALL THAT APPLY:

- I would be willing to provide oral arguments if the court requests.
- I would like to be paired with a mentor
- I would like the assistance of a junior attorney or a law student

\_\_\_\_\_  
Attorney Signature

Today's Date: \_\_\_\_\_

**EXHIBIT H – ATTORNEY REFERRAL LETTER**

[STATEWIDE PRO BONO COORDINATOR LETTERHEAD]

[DATE]

ATTORNEY NAME

ATTORNEY ADDRESS

Re: Representation of [CLIENT NAME]  
[CASE/CAUSE NUMBER]  
Client Address:  
Client Phone:  
Client E-mail:

Dear [ATTORNEY],

Thank you for responding to our request for pro bono representation through the Appellate Pro Bono Program (APBP). You have been selected to represent participant [PARTICIPANT/CLIENT] with [HIS/HER] appeal before the Montana Supreme Court. We ask that you contact the client at your earliest convenience.

The request for your pro bono commitment to this client through the APBP is limited to supplemental briefing and possible oral arguments, scheduled at the Court's discretion. Enclosed is a sample Engagement Letter you may wish to use or modify for your own purposes. You may use your firm's form engagement letter, but consider including language that clearly outlines the scope/limitations of your representation in this case if it does not already provide for the same. You may find more information about the best practices relating to limitations in scope of representation by visiting the Montana State Law Library website ([www.courts.mt.gov/library](http://www.courts.mt.gov/library)) and following the Limited Scope Representation link found on the main page.

Also enclosed is the APBP Opening Form. You should complete the Opening Form and return to the address on the form after you have met with the client and confirmed representation. The return of the Opening Form ensures coverage of malpractice insurance (primary or secondary) through Montana Legal Services Association (MLSA).

[OPTION 1] You indicated you wished to be paired with a mentor. [MENTOR NAME] has agreed to serve as your mentor on this case. [ATTORNEY NAME] can be reached at [CONTACT INFORMATION].

[OPTION 2] You indicated you would like the assistance of a junior attorney during your work on this case. [JUNIOR ATTORNEY] has agreed to assist you with this case. [JUNIOR ATTORNEY] can be reached at [CONTACT INFORMATION].

[OPTION 3] You indicated you wished to be paired with a law student during your work on this case. [LAW STUDENT] has agreed to assist you with this case. [LAW STUDENT] can be reached at [CONTACT INFORMATION].

I have requested an electronic copy of the district court file from the Clerk of Court. I can provide the file to you electronically or print a copy if you prefer. You will also be communicating with Sally Johnson, the Court's Pro Se Law Clerk, regarding this case. Sally can be reached at 406/444-1412 or [sjohnson2@mt.gov](mailto:sjohnson2@mt.gov). You should contact Sally if you have questions about filings, deadlines or issues directly related to the administration of the case with the Court.

If you encounter any problems with client cooperation or financial eligibility, or if I can be of any assistance, please do not hesitate to contact me immediately. Thank you [ATTORNEY] for offering your invaluable services. For your consideration, I remain

Very truly yours,

**EXHIBIT I**  
**Pro Bono Engagement Letter**

Date: \_\_\_\_\_

Client's Name  
Organization/Company (if applicable)  
Address  
City, State, Zip

Re: Montana Supreme Court Cause No. \_\_\_\_\_  
\_\_\_\_\_ v. \_\_\_\_\_

Dear \_\_\_\_\_:

I have been appointed as pro bono counsel under the Montana Supreme Court's Appellate Pro Bono Program (APBP) to represent you in the above-referenced appeal. My appointment is limited and includes only this appeal before the Montana Supreme Court. This letter confirms the terms of my engagement and clarifies the nature and extent of the professional services I will provide. If you find the arrangement acceptable, please sign and return one copy of this letter to me at your earliest convenience.

1. *Identification of the Parties.* This agreement is made between

\_\_\_\_\_ ("Client")  
and \_\_\_\_\_ ("Volunteer/Firm").

2. *General Nature of Assistance.* The Client was referred to Volunteer through the Montana Supreme Court's Appellate Pro Bono Program (APBP). The scope of representation is outlined as follows:

\_\_\_\_\_

The projected timetable for completing the appeal is: \_\_\_\_\_. Client and Volunteer may agree at a later time to extend representation to another matter. Any such extension will be the subject of a separate written agreement between the parties.

3. *Fees.* Volunteer agrees to undertake this representation on a pro bono basis, which means that the Volunteer will not charge professional fees in connection with this matter. However, Client agrees to assume responsibility for all agreed upon out-of-pocket expenses incurred during the project. The following fees/expenses are anticipated: \_\_\_\_\_.

4. *Client Responsibilities.* The Client agrees to cooperate fully with the Volunteer by:

- a. providing complete information or documents that volunteer deems useful or necessary for the representation during the project;
- b. assisting volunteer in obtaining information and documents from any other sources which volunteer deems useful or necessary for the representation during the project;
- c. promptly notifying the Volunteer of any changes in address, e-mail address, telephone number, or changes in the Client's situation that may impact the project;

- d. maintaining regular contact with Volunteer as is necessary to complete the project; and
- e. keeping and being on time for all appointments.

5. *Volunteer Responsibilities.* Volunteer will rely on the information and documents provided by Client. Volunteer agrees to:

- a. keep the Client informed about the status of the project;
- b. keep all sensitive information provided by the Client confidential unless authorized by the Client to disclose it; [or insert firm's privacy policy]
- c. consult with the Client before making any significant decisions about the project;
- d. return all original documents that were furnished by Client; and
- e. maintain Client's file for \_\_\_\_\_ years.

Volunteer cannot guarantee the success of any given matter, but will strive to represent Client's interests professionally and efficiently. For best results, I look forward to a high degree of cooperation from you. Although I will endeavor to achieve a satisfactory result and to keep you informed of the status of your case, I can make no guarantee of any kind concerning the outcome of this appeal.

6. *Uses of Document by Others.* Client authorizes the use by Volunteer of the documents drafted during the course of the project for use in assisting other clients. However, the Client may direct Volunteer to delete information in documents that Client deems confidential.

7. *Discharge of Volunteer.* Volunteer understands that Client may end this agreement at any time for any reason by notifying the Volunteer in writing. However, if Client is dissatisfied about the way in which professional services are being provided by Volunteer, the Client must first take his or her complaint or concern to the APBP. Client understands and hereby acknowledges that, in the event that Client discharges Volunteer, the APBP cannot and does not promise that Client will be referred to another Volunteer.

8. *Withdrawal of Representation by Volunteer.* Client understands that Volunteer reserves the right to withdraw from representing Client, after taking reasonable steps, including first giving Client notice of intention to withdraw. Volunteer may withdraw if in his or her judgment:

- a. Client does not cooperate with Volunteer or, by Client's conduct, makes it unreasonably difficult for Volunteer to carry out the representation effectively or efficiently; or
- b. Client insists that Volunteer engage in conduct that is contrary to the judgment and advice of Volunteer or is contrary to law; or
- c. Continued representation of Client would result in a violation of the rules of ethics and professional responsibility; for example, if a conflict of interest develops or is discovered; or
- d. Client is no longer financially eligible for professional services free of charge because of a material change in Client's resources or alteration in Client's objectives. Financial eligibility will be determined solely by the Montana Legal Services Association.

9. *Dispute Resolution.* Occasionally, volunteers and their clients have disputes arising from their relationship. If this happens, upon request of either Client or Volunteer, the dispute will be resolved by a neutral facilitator, acceptable to both parties, provided by the APBP.

10. *Disclaimer of Liability.* Volunteer will not be liable to Client for any loss or damage whatsoever, whether direct or indirect, which arises in contract, tort, by statute or otherwise in connection with professional services save only to the extent that fraud or bad faith are applicable.

11. *Complete Agreement.* Client has read this agreement in its entirety before signing it. Client understands the terms of this agreement and agrees that it will apply throughout the course the project. This writing represents the entire agreement between the parties.

I am pleased to have this opportunity to assist you and look forward to working with you.

Very truly yours,

Agreed to and accepted:

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

**EXHIBIT J**  
**ATTORNEY CONFIRMATION OF ACCEPTANCE OF APBP CASE**

**ATTORNEY NAME:** \_\_\_\_\_

**CLIENT NAME:** \_\_\_\_\_

**CASE TITLE AND NUMBER:** \_\_\_\_\_

**I have interviewed the aforementioned client and confirm I am able to represent the client pursuant to the guidelines of the Appellate Pro Bono Program.**

**DATE CASE WAS OPENED** \_\_\_\_\_

**I have interviewed the aforementioned client and have determined I am unable to represent the client** (please provide a brief description of circumstances below).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**I have been unable to make contact with the client within a reasonable amount of time** (please provide a brief description of circumstances below).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please return this completed form by mail or e-mail to:

Patricia Fain  
Statewide Pro Bono Coordinator  
Montana Supreme Court  
P. O. 21304  
Billings, MT 59104-1304  
[pfain@mt.gov](mailto:pfain@mt.gov)

**EXHIBIT K**  
IN THE SUPREME COURT OF THE STATE OF MONTANA

DA \_\_\_\_\_  
\_\_\_\_\_

Plaintiff and Appellee,

v.

NOTICE OF APPEARANCE

Defendant and Appellant.  
\_\_\_\_\_

\_\_\_\_\_ hereby appears as pro bono counsel through  
the Appellate Pro Bono Program for \_\_\_\_\_  
in the above-captioned cause. All pleadings, papers and briefs to be served  
hereafter in this matter shall be mailed to:

Attorney Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[Signature]

Certificate of Service

I hereby certify that I have filed a true and accurate copy of the foregoing Notice of Appearance with the Clerk of the Montana Supreme Court and that I have served true and accurate copies upon and each attorney of record and any other self-represented litigants as follows:

\_\_\_\_\_  
Counsel for \_\_\_\_\_  
*[designation of party]*

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Address and zip code

OR:  
\_\_\_\_\_

Self-represented \_\_\_\_\_  
*[designation of party]*

\_\_\_\_\_  
\_\_\_\_\_

Address and zip code

## Appellate Pro Bono Program Attorney Registration

[Exit this Registration Form](#)

### APPELLATE PRO BONO PROGRAM ATTORNEY REGISTRATION

By Order dated may 22, 2012 the Montana Supreme Court established an Appellate Pro Bono Program (APBP) designed to offer the assistance of appellate counsel to qualified litigants. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Self-Represented Law Clerk.

Only selected self-represented litigants who meet Montana Legal Services (MLSA) financial criteria are eligible to receive pro bono legal services from the APBP volunteer attorneys. Upon MLSA's acceptance and attorney's confirmation of representation, the volunteer attorney is eligible to receive primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation. There are opportunities to volunteer as the appellate attorney, a mentor to the lead attorney or as a law student willing to assist in the appeal under the supervision of the lead attorney.

Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibilities of the parties.

If you are an attorney licensed in the State of Montana and are interested in participating as a volunteer in the Montana Pro Bono Appellate Program (APBP), please complete this registration form and click submit at the end of the application. If you need additional information about the APBP before registering, click [HERE](#) to read an overview of the Program.

[Next](#)

# Appellate Pro Bono Program Attorney Registration

Exit this Registration Form

## ATTORNEY REGISTRATION

### \* 1. Attorney Full Name

First Name

Middle Initial

Last Name

### \* 2. Attorney Montana Bar Number

### 3. Contact Information

Address

City

Zip Code

Telephone

Fax

E-Mail

### 4. E-mail (Choose One)

I regularly check and respond to the E-mail account provided above.

I do not regularly check my e-mail and prefer not to receive correspondence or APBP requests by E-mail.

### 5. Please indicate your APBP participation preferences by checking all applicable boxes below and listing any areas of praactice in which you would be willing to take or mentor an appellate pro bono case.

I prefer to serve as a mentor only

I am willing to take a case or mentor another attorney

I prefer only to take a case

I am a law student

I may be interested in being paired with an experienced mentor

I have a mentor who can assist me within my own firm

**6. Please indicate the areas of practice/case type in which you are willing to accept a referral**

Case Type	<input type="text"/>

**7. Briefly describe your previous appeals experience within Montana and any other jurisdictions.**

**8. Please provide any additional information you feel would be helpful in matching you with a pro bono client and/or mentor.**



Prev

Submit

FILED

May 22 2012

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12-0028

FILED

MAY 22 2012

IN THE MATTER OF ESTABLISHING AN )  
APPELLATE PRO BONO PROGRAM )

ORDER *Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

On January 13, 2012, the Court entered an order calling for public comment on a proposal to establish an Appellate Pro Bono Program to further access to justice for civil litigants who lack financial means to retain counsel. Having now considered the comments submitted,

IT IS HEREBY ORDERED that there is established within this Court an Appellate Pro Bono Program (APBP) designed to offer the assistance of appellate counsel to qualified litigants in cases in which the Court has determined that supplemental briefing would be beneficial to the Court. The APBP will be developed and coordinated by the Montana Supreme Court's Pro Bono Coordinator and its Pro Se Law Clerk in accordance with the following guidelines:

**1. Volunteer counsel:**

The Montana Supreme Court's Pro Bono Coordinator will develop a volunteer database and registry for attorneys and law students who volunteer to assist pro se litigants in appeals pending before the Supreme Court. Each volunteer will fill out an on-line application which will include, among other information, areas of the attorney's or student's subject matter expertise and interest. Experienced appellate attorneys may volunteer to mentor less experienced volunteer attorneys in supplemental briefing and arguing the appeal, should argument be ordered. Law students under supervision of the UM Law School also may apply to participate as volunteer counsel in accordance with the Court's student practice protocol.

**2. Program Eligibility:**

Cases involving at least one self-represented party may be selected by the Court for participation in the program where the Court determines, after briefing has been completed, that the Court will benefit from additional briefing on one or more issues. The Court's staff and Law Clerks may bring appropriate cases to the Court's attention

during the briefing process on appeal or, in original proceedings involving self-represented litigants, during their review of motions or petitions.

Once the Supreme Court identifies an appeal where pro bono assistance may be beneficial to the Court, the Montana Supreme Court's Pro Se Law Clerk (PSLC) will provide the identified self-represented litigant with an application form for participation in the program, which explains eligibility requirements and the scope of representation. Should the litigant choose not to participate in the program, the case will be submitted on the litigant's pro se briefing.

Financial eligibility for the program will be determined in accordance with the criteria used to determine eligibility for services from the Montana Legal Services Association (MLSA). Appointment of pro bono counsel will be coordinated with MLSA's pro bono referral process to ensure proper financial eligibility screening for litigants and provision of malpractice insurance coverage for pro bono counsel who otherwise lack such coverage.

If the litigant applies and is approved for appointment of counsel under the Appellate Pro Bono Program, the Pro Bono Coordinator will circulate a case-specific confidential memorandum to a pool of volunteer attorneys for determination of conflicts of interest. The Pro Bono Coordinator will select an attorney from the qualified pool. The Pro Bono Coordinator will notify the volunteer attorney or student and the litigant of the attorney or student selected.

In the event multiple parties to the appeal are appearing pro se, volunteer counsel will be offered as described above for each qualified self-represented litigant.

**3. Volunteer counsel/student:**

The volunteer counsel will provide the litigant with an engagement letter and file a notice of appearance (noting the appointment is under the Appellate Pro Bono Program). The Court will set a briefing schedule and the Montana Rules of Appellate Procedure will apply as in all other proceedings.

**4. Supreme Court:**

Volunteer counsel shall advise the Court whether oral argument is requested. The Court will consider the preferences of counsel and whether the case is appropriate for oral argument in determining whether to classify the case for argument. The Court shall schedule the oral argument and determine the time allowed to each party in accordance with its Internal Operating Rules.

**5. Pro Bono Coordinator/Pro Se Law Clerk:**

The Pro Bono Coordinator and Pro Se Law Clerk will be cross-trained so that the appointment of counsel is not interrupted due to the temporary unavailability of either. Back-up staff may be trained as needs are identified.

The Pro Bono Coordinator will develop the database and access to attorneys and law student volunteers. A rotation or randomized system of selecting counsel will be established.

The PSLC will prepare the case-specific confidential memorandum for each case with review and oversight by the Court.

The PSLC and Pro Bono Coordinator will develop the forms required to support this program.

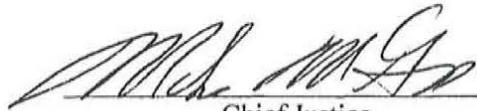
**6. Appeal Costs**

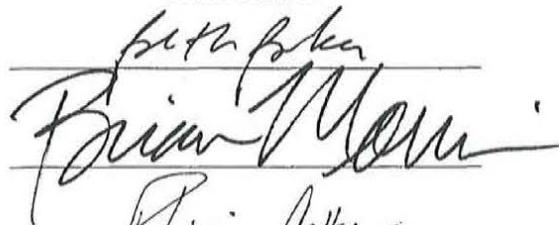
Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

IT IS FURTHER ORDERED that the Program will take effect July 1, 2012.

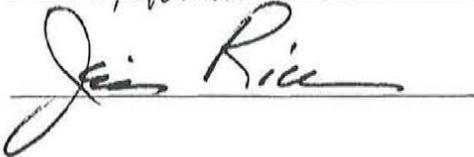
A copy of this Order will be posted on the Montana Supreme Court website. In addition, the Clerk is directed to provide copies of this order to the Chairs of the Equal Justice Task Force, the Commission on Self-Represented Litigants, and the State Bar's Access to Justice Committee; the Montana Law Library; the Montana Legal Services Association; the State Bar of Montana; and the University of Montana School of Law.

DATED this 22<sup>nd</sup> day of May, 2012.

  
\_\_\_\_\_  
Chief Justice

  
\_\_\_\_\_  
Brian Moran

  
\_\_\_\_\_  
Patricia Cotter

  
\_\_\_\_\_  
Jim Rice

\_\_\_\_\_

\_\_\_\_\_  
Justices

Justice James C. Nelson, dissenting.

I dissent from this Court's Order establishing the "Appellate Pro Bono Program" (APBP). While I do not impugn the good intentions of those promoting APBP, I suggest that the proposal is ill thought-out and will likely create more work and problems than it solves. Indeed, on the scant record presented, I suggest that the proposal is premature at best and, more likely, is not needed at all.

According to the materials circulated to this Court and to the public, APBP is envisioned to offer the assistance of pro bono appellate counsel to "qualified litigants." The Court's Order does not provide any concrete criteria for identifying which self-represented litigants will "qualify" to receive the special assistance of APBP and which self-represented litigants will not so "qualify." Evidently, the assistance will be provided to those self-represented litigants whose cases this Court, subjectively and arbitrarily, decides will "benefit" from additional briefing on one or more issues. Attorneys, as well as law students, are encouraged to offer their services to the program, and the Court will require oral argument in "appropriate" cases. The Court's staff and law clerks may bring "appropriate" cases to the Court's attention during the briefing process on appeal or, in original proceedings involving self-represented litigants, during their review of motions or petitions. Again, no criteria are provided as to what constitutes an "appropriate" case. If both parties are self-represented on appeal, both will be offered the benefit of APBP. There is a financial eligibility requirement and, apparently, the implicit requirement that attorneys and law students taking part in APBP will be referred through the Montana Legal Services Association so that such practitioners can take advantage of that organization's malpractice insurance coverage—assuming that the volunteer does not have his or her own errors-and-omissions insurance. There is, of course, more in the circulated materials and in the Court's Order—details that involve, among other things, labor and time-intensive coordination, possible mentoring and supervision of law students, and additional duties imposed on this Court's Pro Bono Coordinator and this Court's Pro Se Law Clerk. However, the above fairly sums up the proposal.

At the outset, I question the premise upon which this entire program is based—namely, that this Court is faced with a sufficient number cases involving self-represented

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litigants where “supplemental briefing” and oral argument would be “beneficial.” Indeed, I suggest that APBP is a solution in search of a problem. This much can be seen from the skeletal nature of the program outlined in the Court’s Order and the amorphous standards (rather than concrete criteria) articulated by the Court regarding the cases to which the program will apply. If there were truly a need for APBP, one would expect the Court’s Order to identify with some sort of specificity the cases to which it will apply—rather than just saying, somewhat vaguely, that we’re creating an appellate pro bono program and will apply it whenever we think it’s “appropriate” or “beneficial” to do so. Anecdotally—and that is about all there is to rely on here—I can recall one or maybe two self-represented cases in the last two years that, in my view, would have “benefited” from supplemental briefing.

And that is the fundamental problem. We are presented with no actual data or statistics demonstrating the depth and seriousness of the problem to which APBP is presumably directed. The gross numbers and anecdotal evidence reflecting the increase in cases involving self-represented litigants, generally, say nothing about the necessity to create APBP. Those numbers and conventional wisdom show that more and more people cannot afford to hire attorneys—or, at least, attorneys who are interested in representing them in their particular case. And, as I expect most of us would agree, self-represented cases, as a class, would all benefit from supplemental briefing by pro bono counsel. Typically, such cases are not well briefed in the first place, and very often the trial court record is equally inadequate for appellate review.

The Court has decided, however, that a select number of those cases should be entitled to the benefit of supplemental briefing by counsel or a law student. Resorting to my own conventional wisdom and anecdotal experience, I suggest that there are very few appellate cases where there is one or more self-represented litigants and where the case actually merits supplemental briefing, much less oral argument. In the couple of cases where additional briefing might have been helpful, there were other problems that no amount of supplemental briefing could have fixed.

In point of fact, cases involving self-represented litigants—especially those who represented themselves in the trial court—typically are burdened with serious procedural

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problems including: the failure to make and preserve an adequate record in the trial court; the failure to make contemporaneous objections; the failure to raise and argue appropriate theories and arguments supporting the objections that were made; the failure to produce and to get admitted the necessary testimonial and documentary evidence—the list goes on and on. In the face of these problems and shortcomings, our staff, our law clerks, and our Pro Se Law Clerk—most of whom already have sufficient other work to keep them busy—apparently will now be required to examine all self-represented appeals and original proceedings (the latter being even rarer than the former)—all of which theoretically *could* benefit from supplemental briefing—and ferret out those cases which, under this Court’s non-test, are “appropriate” and “will benefit” from supplemental briefing and oral argument. This, I assume, presupposes that in addition to “brief checking” (for procedural compliance with the Montana Rules of Appellate Procedure), which our law clerks already are required to do, they will also be expected to read the briefs, motions, and petitions filed by self-represented litigants and examine the adequacy of the district court record—a daunting task—so as to find “appropriate” cases (whatever those are) to bring to the Court’s attention. I suggest there are few, if any, clerks who have that kind of time.

Furthermore, by its terms, APBP is not just restricted to appeals. It obviously covers those, but also covers “original proceedings,” “petitions” (which encompasses a vast array of other proceedings including not only true “original proceedings” but also petitions for habeas corpus, supervisory control, mandamus, prohibition, and postconviction relief, all of which are “civil proceedings”), and the “motions” that self-represented litigants file. In short, if APBP operates as set out, it will quickly morph into one that this Court does not have adequate personnel or resources to administer.

But more to the point, what is it that supplemental briefing is supposed to accomplish? Is pro bono appellate counsel supposed to propose and argue new theories, issues, and errors that were not preserved in the trial court? If so, this flies in the face of caselaw prohibiting that very sort of practice by attorneys and by those self-represented

litigants whose cases apparently do not merit “supplemental briefing.”<sup>1</sup> Also, as for the costs of transcripts and the costs of transmitting the record on appeal to the Clerk of this Court, we know from the Court’s Order that those will remain the responsibility of the self-represented litigant. As we are all aware, however, self-represented litigants often cannot afford the costs of necessary transcripts, and the case comes to this Court without a sufficient record to review for legal error. If that is the sort of case which merits supplemental briefing—and this Court may determine that it is, absent the benefit of being able to first review the transcripts—then it seems to me that we are creating an untenable situation: engage pro-bono counsel who will be forced to argue the case without reference to the oral record or will be required to fund the cost of the transcripts himself or herself in order to do the briefing and oral argument properly—the latter being an unlikely possibility for law students. Moreover, by this Court’s assisting “qualified litigants” in setting forth their arguments on appeal and then deciding those same arguments, we are inviting ethical problems and setting the stage for violations of the right to an impartial tribunal.

For the foregoing reasons, if it is going to work at all, APBP must necessarily presume that the self-represented litigants on appeal were represented by counsel in the trial court proceedings. This is a necessary assumption if the record-preservation problems discussed above are to be avoided. That happens sometimes—trial counsel bails out before the appeal because he or she and the client had a falling out or, more likely, because the client has run out of money.<sup>2</sup> But, for a substantial number of self-

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<sup>1</sup> The well-established general rule is that this Court will not consider issues not raised before the trial court or new legal theories raised on appeal. *In re M.W.*, 2012 MT 44, ¶ 14, 364 Mont. 211, 272 P.3d 112; *State v. Montgomery*, 2010 MT 193, ¶ 11, 357 Mont. 348, 239 P.3d 929; *Whitehorn v. Whitehorn Farms, Inc.*, 2008 MT 361, ¶ 21, 346 Mont. 394, 195 P.3d 836; *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161; *State v. Courville*, 2002 MT 330, ¶ 5, 313 Mont. 218, 61 P.3d 749.

<sup>2</sup> It goes without saying that, with some notable exceptions (parental rights termination proceedings and commitment proceedings, for example), there is no general right to appointed counsel in civil proceedings. There is no “civil *Gideon* right.” There should be, but the fact is there is not, and it is highly unlikely that Montana’s legislative and executive branches will fund a civil *Gideon* program within the lifetimes of anyone currently involved in this matter.

represented cases, there will have been no representation in the trial court and the case will come to this Court burdened with the aforementioned procedural problems that nothing, short of a remand for retrial in the district court, will fix. That is certainly true for appeals, and is even more likely when we throw motions, original proceedings, and petitions for habeas corpus, supervisory control, mandamus, and prohibition into the mix.

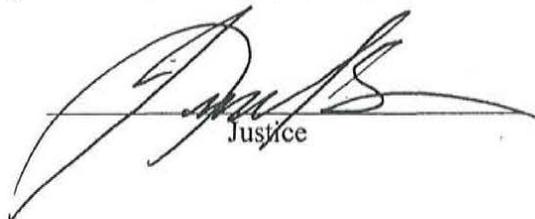
This brings me to the issue of fairness. On one hand, we pick and choose those few cases (although I expect that, since we now have a “program,” the number will mushroom exponentially) for which supplemental briefing will be beneficial and, at the same time, implicitly tell untold numbers of other self-represented litigants that they are stuck with their inadequate records, their inadequate briefs, their inadequate arguments, and, perhaps, their ineffective trial counsel. Rightly, those people should be heard to say, “Why not me? Why not my case?” Furthermore, in those cases where one party has counsel and the other does not, we will appear to be punishing the litigant who had the ability to hire an attorney: he or she will be required to pay for more briefing and, perhaps, a remand or an oral argument. The represented litigant may not be able to take advantage of inadequacies and mistakes made by the self-represented client. While this observation may strike some as harsh and unfair, it is part and parcel of what litigation is all about: making a good case for your client and taking advantage of your opponent’s mistakes. Assisting those who cannot afford counsel by encouraging, generally, pro bono service or by lobbying for legislation that would fund representation for a wider variety of cases is one thing. However, targeting certain self-represented litigants with certain cases and then offering and providing those individuals with the sorts of services that might well help them prevail against the other party is a wholly different matter. Doing so removes this Court from its proper position of arbiter and places it into the position of advocate instead.

Finally, besides the aforementioned structural problems, the seminal problem remains. We are presented with no actual data or statistics that would enable this Court to determine the actual number of cases involving self-represented litigants where an adequate record has been preserved for appellate review and where supplemental briefing would be beneficial and could be ordered without a remand—versus the number of cases

where that is not so. In short, the existence of a problem to which APBP is addressed has not been established with anything other than anecdotal evidence. Correspondingly, we are provided with no real structure to APBP and how the aforementioned problems inherent in the program will be adequately and fairly addressed and resolved. Furthermore, unless APBP contemplates that pro bono appellate counsel will simply be turned loose to create the proverbial silk purse of a supplemental brief from a sow's ear of a trial court record, I suggest that this lack of data, statistical evidence, and structure militates in favor of either dropping the idea altogether or, at least, putting it on hold until such time as adequate facts, data, statistics, structure, and criteria—as opposed to good intentions—are available for review.

The devil is always in the details; and, in that regard, I suggest that there are many important details in this proposal for which no actual data or evidence has been presented to this Court. I maintain that what we have before us does not demonstrate that there is actually a problem which mandates the solution proposed. Indeed, in my view—and assuming that we are still addressing the very few self-represented cases which come before this Court for which supplemental briefing might actually be beneficial—this Court can, as we already have done on occasion, contact the Pro Bono Coordinator and request that she attempt to locate an attorney willing to represent the self-represented litigant on a pro bono basis.

For the foregoing reasons, I decline to join this Court's Order. I dissent.



Justice