

Pro Bono Mediator and Limited-Purpose Counsel Training

Phoenix, Arizona - August 2014

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Sandra Day O'Connor U.S. Courthouse

ETHICAL ISSUES OUTLINE

Objective: Volunteer Attorneys will be able to identify four (4) unique ethical issues involved in prisoner litigation and mediation. Participants will be able to explain the significance of the candy bar.

1:15 Small Things Make a Big Impact!

1:20 What are the Surprises in Prisoner Litigation?

1:30 Competence in Representing Inmates and Mediating Cases.

1:40 Informed Consent in Limited-Purpose Appointments.

1:45 Avoid Paternalism in Structuring Remedies.

1:50 Explain the Mediator's Role.

2:00 Hypothetical Brainstorm.

2:10 Summarize

Ethical Issues in Pro Bono Prisoner Litigation Appointments
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“[T]here is one way in this country in which all men are created equal— there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. . . . Our courts have their faults, as does any human institution, but in this country, our courts are the great levelers, and in our courts all men are created equal.”

(Atticus Finch, closing argument to the jury;
Harper Lee, To Kill a Mockingbird 188 (Lippincott 1960)).

I. Background on Prisoner Filings in Federal Court

The Pro Se Prisoner filings throughout the District Courts and in the Ninth Circuit continue to increase each year. Currently, the Pro Se filings in most District Courts represent 35-45% of the overall yearly filings. The Ninth Circuit Task Force on Self-Represented Litigants was convened to address the challenges inherent in handling Pro Se cases, and it issued several recommendations relating to the management of self-represented cases, including the following:

- A. District Courts should encourage the development of mediation, early neutral evaluation, and other alternative dispute resolution methods in pro se cases;
- B. District Courts should adopt a formal program for the appointment of pro bono counsel with features such as limited-purpose appointments, advisory counseling, settlement assistance, and reimbursement of litigation expenses from the court’s attorney admission funds; and
- C. District Courts should convene a meeting of representatives from state correctional departments for the purpose of exploring the use of new case management strategies, mediation in prisoner cases, and development of ombudsman programs.

Final Report, Ninth Circuit Judicial Council Task Force on Self-Represented Litigants (2005).

A. Early Intervention in Prisoner Civil Rights Cases

The Court must review prisoner actions to determine whether the plaintiff is entitled to proceed with his or her claims. *See* 28 U.S.C. § 1915 (e)(2); 28 U.S.C. § 1915A; and 42 U.S.C. § 1997e. The first step is to determine whether the inmate is eligible for indigent filing status. If the inmate has filed three or more frivolous lawsuits, his or her name will appear in the National Pro Se Three-Strikes Database. The database is found on the Ninth Circuit intranet site at

<http://nprose.circ9.dcn>. Inmates with three strikes no longer qualify for indigent filing status, unless they fall within the imminent danger exception.

Once it is determined that the inmate is eligible to proceed, the Court may use the following case management strategies in combination with appointment of counsel for developing a record upon which to determine the appropriateness of dismissal.

1. A *Spears* Hearing to Explore the Factual Basis of the Claim.

Some Courts use a hearing conducted either at the inmate's prison facility or telephonically to determine whether the plaintiff's allegations can survive the screening standards. The hearing process is described in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319, 324 (1989), and is in the nature of a motion for more definite statement. A representative from the Attorney General's office participates in the hearing with the inmate and a judicial officer. The hearing can be held before or contemporaneously with the filing of a response from the state. *See also Julian v. Gusman*, 2011 WL 1399694 (E.D. La.).

Other courts refer to this process as a triage hearing or conference. The inmate plaintiff and a representative from the Attorney General's office attend a telephonic conference at which a judge or staff attorney discusses the deficiencies in the plaintiff's complaint, narrows the number of defendants, creates a case management plan, and pursues potential settlement scenarios.

2. A *Watson* Questionnaire Directed to the Prisoner Plaintiff.

Some District Courts use a questionnaire such as the one described in *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976) to determine the adequacy of the inmate's allegations. The questionnaire can be incorporated into the court record as a basis for either dismissing the complaint or authorizing plaintiff to proceed with specific claims.

3. A *Martinez* Report from the Institutional Defendant.

Many courts have found it useful to require the correctional institution to file a report, supplying information about the prisoner's claims. The purpose of the report is to identify and clarify the issues plaintiff raises in his or her complaint. The basis for this case management technique is derived from *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978) and recognized by the Ninth Circuit Court of Appeals in *In Re Arizona*, 528 F.3d 652 (9th Cir. 2008). Telephone evidentiary hearings before a judge may be used in place of a written report. *Gee v. Estes*, 829 F.2d 1005, 1007 (10th Cir. 1987). In certain circumstances, the court may consider the *Martinez* report to be part of the pleadings for purposes of Fed. R. Civ. P. 12(b). *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991). If plaintiff is given notice and an opportunity to respond, the *Martinez* report can be used as a basis for summary judgment. *Id.* at 1112-13.

B. Alternative Means of Resolving Prisoner Complaints

Many District Courts are using ADR Programs as a case management technique for Prisoner Pro Se cases. Successful prisoner ADR programs include three prongs: (1) a uniform screening mechanism to determine the appropriate form of ADR; (2) a determination regarding appointment of pro bono counsel; and (3) the use of mediators or settlement judges who have experience resolving inmates' claims.

District Courts using ADR as a case management strategy have experienced excellent results. Individual inmate cases have been settled in a variety of creative ways, including commissary credits, access to a medical specialist, an apology from a prison official, and delayed assessment of the Court's filing fee. Systemic issues have also been addressed through the use of ADR options in prisoner cases, including the creation of a new protocol for diagnosis and treatment of offenders with hepatitis C, improvement of living conditions for physically disabled offenders, and creation of a mental health treatment protocol for severe psychiatric illnesses. Numerous prisoner cases involving religious accommodation requests and claims for adequate medical treatment have also been resolved through mediation and the use of confidential settlement agreements.

C. ADR Programs in Prisoner Cases

- The District Courts of Arizona, Idaho, Montana, Nevada, and all of the California District Courts are currently using different mediation models and settlement conferences for pro se prisoner cases. The cases referred to mediation have been screened for merit and typically include prisoner civil rights claims. ADR options include: Early Mediation, Pre-Answer Mediation, Triage Hearings, Mid-Litigation Mediation, and Settlement Conferences.
- Some District Courts have instituted Pro Bono Programs which provide for appointment of counsel. The appointment can be either for the limited purpose of representing the pro se litigant at the mediation or for all purposes. The attorney's litigation costs are paid through the attorney-admission fund.
- Other Districts have convened settlement weeks for prisoner cases, and used either visiting judges to conduct settlement conferences or pro bono mediators for mediation sessions. Some Courts enlist the settlement skills of magistrate judges to conduct settlement conferences with pro se prisoners and prison officials at the correctional facilities.
- District Courts have also used an experienced staff attorney to conduct mediation sessions at the correctional facilities. Another Court has recruited a Prisoner Mediation Panel, and a coordinator for the District refers cases to the pro bono mediators who conduct sessions with pro se prisoners and jail officials.

Once the Court determines whether the pro se case warrants appointment of counsel, it

decides whether a full purpose or limited-purpose appointment is the best option. As a way to conserve the resources of a Court's Pro Bono Program, Judges are focusing the appointment of counsel on specific portions of the case. In the state court system, this practice is referred to as "unbundled" legal services for pro se litigants, and it is being used in a greater number of federal court pro se cases.

II. Pro Bono Limited-Purpose Appointment Procedure.

Pro Se Staff Attorneys (sometimes referred to as pro se law clerks) review the pro se complaints and make the recommendation to the assigned judge for a limited-purpose appointment. In some districts, the pro se staff attorneys meet as a group and discuss cases on which to recommend the use of limited-purpose appointments. The staff attorneys also make recommendations about consolidating cases for the purpose of a settlement conference or mediation session and appointing counsel to assist the pro se litigants with this process. The recommendations to appoint counsel are contained in the draft initial review order or in a subsequent case management order.

A. Notify Litigants → Record in CM/ECF → Issue Order Describing Duration

Once the recommendations are reviewed, the Judge issues a notice of intent to appoint counsel for a limited purpose, and provides a brief period of time within which the parties can file an objection. After the objection period has passed, the Court issues the order appointing counsel. It is important for the clerk's office to maintain the pro se litigant on the cm/ecf notices during this process. After the objection period has passed and the final order appointing counsel is adopted, the pro se litigant can be terminated from the cm/ecf notices. The order appointing counsel specifies the beginning and ending of the pro bono appointment, either through an expiration date or the completion of a discrete task. A note should be made in cm/ecf, stating that the appointment of counsel will expire at a future date.

B. Link the Limited Purpose Appointment to an ADR Proceeding.

The Court can use limited purpose appoints of counsel to (1) prepare a response to a dispositive motion, (2) prepare a complaint, or (3) prepare for and attend a settlement conference. Other examples of limited purpose appointments include a request that the attorney investigate the allegations of the complaint and submit a report to the Court, and a request that the attorney represent a litigant at a meet and confer session regarding a discovery dispute. Any of these limited-purpose appointments can be linked to an ADR proceeding. For example, an attorney could help the pro se litigant respond to a summary judgment motion, and then represent the litigant at a settlement conference while the motion is pending. Or the pro bono attorney could assist the litigant with an investigation and represent him or her at an early mediation session. The limited-purpose appointments can be as creative and focused as the court needs them to be.

C. Terminate/Continue the Appointment → Evaluate the Participants' Experience

The Court does not need to issue a withdrawal of counsel order because it expires upon the terms set forth in the initial order. It is still advisable to have the Pro Se Staff Attorneys contact the Clerk's office to ensure the attorney's termination in cm/ecf. A high percentage of the attorneys appointed for limited purposes stay on as counsel for the pro se litigant after the termination of the appointment. Pro bono counsel appreciate the choice of remaining involved in the case, or relying upon the Court's discrete parameters for the appointment. The Court's Pro Bono Program coordinator contacts the attorney at the end of the limited-purpose appointment to inquire about the desire to continue as pro bono counsel and coordinate the payment of out-of-pocket expenses. If the attorney elects to stay on as pro bono counsel, the Court issues an order extending the pro bono appointment. A survey instrument can be used at this point to measure the satisfaction level of the attorney and pro se litigant during the limited-purpose appointment. Insights from the survey can be used to improve the pro bono program and expense reimbursement mechanism.

D. Create a Roster of Limited-Purpose Attorneys.

In the Eastern District of California, a survey was sent to pro bono panel members, requesting their input on serving as limited-purpose counsel. Several pro bono panel members indicated their willingness to accept limited-purpose appointments. Limited-purpose appointments are also an excellent way for law student clinical programs to participate in civil rights litigation. The attorneys and law students who have served as limited-purpose counsel have expressed their satisfaction with the process and typically volunteer to be part of a roster for pro bono counsel. The pro se litigants have expressed satisfaction with the legal advice counsel provided through the limited-purpose appointments and feel that they have been afforded greater access to the courts. The procedures set forth above apply equally well to prisoner and non-prisoner pro se cases.

Finally, district courts should consider including the CJA panel attorneys as part of the pro bono limited-purpose appointment roster. CJA panel attorneys can be appointed to help settle cases, investigate factual allegations, and represent inmates at parole and medical release hearings as part of a settlement agreement.

Expanding the use of pro bono attorneys through limited-purpose appointments can significantly impact the court's prisoner civil rights docket. District Court's currently using limited-purpose appointments are willing to share forms, procedures and general orders as your district develops its program.

III. Specific Ethical Issues in Pro Se Prisoner Cases

A. Duty to Provide Pro Bono Service

• **Each lawyer has a professional responsibility to provide legal services to those unable to pay. (ABA Model Rule 6.1, Voluntary Pro Bono Service;**

Arizona – ER 6.1. Voluntary Pro Bono Publico Service

A lawyer should voluntarily render public interest legal service. A lawyer may discharge this responsibility by rendering a minimum of fifty hours of service per calendar year by one or a combination of . . . activities.

Arizona – ER 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (1) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (2) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (3) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Arizona – ER 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See ER 1.2.

B. Duty of Competence

• **Being ethically competent when asked to represent a pro se litigant in a civil rights case. (ABA Model Rule 1.1, Competence; Arizona ER 1.1)**

Arizona ER 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

C. Duty to Communicate with Client

Arizona ER 1.4. Communication

(a) A lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules.

- A pro bono attorney must abide by the client’s decisions regarding the objective of the representation and whether to settle the case. (ABA Model Rule 1.2, Scope of Representation; Arizona ER 1.2.)

- When a client is a prisoner or involuntary patient in a psychiatric hospital, the court may order that only certain discovery documents or information can be provided to the client. These considerations are based on security and privacy concerns. (ABA Model Rule 1.4, Communication, Withholding Information; Arizona ER 1.6.)

D. Duty of Confidentiality

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, (or it falls within an exception).

ER 1.14. Client with Diminished Capacity

When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

E. Duty of Court-Annexed Mediator

The attorney mediator should explain his or her role in the settlement process.

ER 2.4. Lawyer Serving as Third-Party Neutral

2. (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

F. Duty of Courtesy

- **Extending professionalism, respect and courtesy to pro se litigants. (ABA Model Rule 4.3, Dealing with Unrepresented Persons and Rule 4.4, Respect for Rights of Third Persons; Arizona ER 4.3.)**

Recommended Reading on Prisoner Litigation Topics

***In the Place of Justice* by Wilbert Rideau.**

After his release from prison in 2005, Wilbert Rideau penned a memoir, *In the Place of Justice*. It chronicles his personal transformation during his four decades in Angola and the evolution of the prison during that time from the nation's bloodiest to one of the safest. Now, he writes on subjects as diverse as the death penalty, solitary confinement, censorship, race in the South, Civil Rights figures, and faith.

***Newjack: Guarding Sing Sing* by Ted Conover.**

Ted Conover spent a year as a prison guard at Sing Sing. *Newjack*, his account of that experience, is a milestone in American journalism: a book that casts new and unexpected light on this nation's prison crisis and sets a new standard for courageous, in-depth reporting.

***Law Man: My Story of Robbing Banks, Winning Supreme Court Cases, and Finding Redemption* by Shon Hopwood.**

Shon Hopwood's unusual legal journey began not at law school, but federal prison, where he learned to write briefs for other prisoners. Two petitions for certiorari he prepared were later granted review by the United States Supreme Court, and the story of his legal success was the subject of articles in the New York Times, Omaha World-Herald, Peoria Journal Star, and Above the Law. His work has been published in the Harvard Civil Rights-Civil Liberties and Fordham Law Reviews. Shon is currently a Gates Public Service Law Scholar at the University of Washington School of Law. In September of 2014, Shon will serve as a law clerk on the District of Columbia Circuit Court.

***In this Place, Not of It: Narratives from Women's Prisons* edited by Ayelet Waldman and Robin Levi**

People in U.S. prisons are routinely subjected to physical, sexual, and mental abuse. While this has been documented in male prisons, women in prison often suffer in relative anonymity. *Women Inside* addresses this critical social justice issue, empowering incarcerated and formerly incarcerated women to share the stories that have previously been silenced.