PRO BONO REPRESENTATION: A PRIMER

INTRODUCTION

For over one hundred years, the district courts have been authorized to request counsel to represent indigent litigants in non-frivolous actions. *See* 28 U.S.C. §1915(e). In reality what this means is that for over one hundred years, the courts have relied upon local attorneys to volunteer their ever more precious time on cases few attorneys would otherwise accept.

Although approximately 1,000 *pro se* cases are filed each year in New Jersey, the court appoints counsel in only about 10% of those cases. This is not because most cases lack merit, but rather because the court recognizes that volunteer lawyer time is an extremely valuable commodity. As such, the court has traditionally not appointed counsel under §1915(e) indiscriminately. A majority of the cases are constitutional, arising under federal and state civil rights acts, and brought by indigent, incarcerated litigants. The legal issues commonly involve the Fourteenth, Fifth, Fourth, and Eighth, and sometimes the First Amendments to the United States Constitution.

You may ask yourself why you would want to volunteer to take on a case so apparently fraught with complexity. Each such appointment contains many reasons for acceptance, ranging from the altruistic to the opportunistic. For the new lawyer just beginning a career, each case provides the opportunity to develop the skills necessary to be a successful attorney: everything from case strategy to discovery, from depositions to trial testimony, from conferences to hearings. Moreover, as the issues are most often of constitutional dimension, they are intellectually challenging. Such experience is frequently difficult to amass, especially for the new associate at a large law firm.

Also, and not to be underestimated, the judges greatly appreciate *pro bono* counsel's donation of time and energy. As a consequence, the judges will look favorably on you personally and typically give special consideration to any scheduling issues you may have throughout the pendency of the case.

Finally and most importantly, however, is the contribution you can make to our system of justice. Without effective representation on both sides, lawsuits can not be resolved efficiently and, often, fairly and justly. As officers of the court, there are few more significant contributions we can make both to the system and to individuals.

Thus, we encourage you to consider accepting a *pro bono* representation. To aid in this decision, as well as in the task, you will find below some general guidelines for *pro bono* representation and some sources for additional and more specific information.

PRETRIAL and TRIAL PROCESS

MOST OF THE RULES AND FORMS DISCUSSED IN THIS SECTION CAN BE FOUND ON THE WEB SITE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY AT:
http://www.njd.uscourts.gov

I. Discovery

Once appointed to represent a *pro se* litigant, the pretrial process is like any other case. Follow the Federal Rules of Civil Procedure (Rules 26 through 37) and the Local Civil Rules for the District of New Jersey (Rules 26.1 through 37.2) for interrogatories, document requests, depositions, and requests for admissions.

Keep in mind that if your client is in prison, leave of court must be obtained in order to take his or her deposition, as well as those of other prisoners who may be witnesses. See Fed. R. Civ. P. 30(a)(2).

Discovery disputes must first be brought to the Magistrate Judge's attention informally (*i.e.*, through telephone call or letter) before any formal discovery motion is filed. See Local Civil Rule 37.1.

The court will generally approve motions by an appointed attorney or stipulations designed to reduce discovery expenses, including taking depositions by other than use of stenographic transcript (*i.e.*, by telephone or tape recorder). See Local Civil Rules, Appendix H.8(a); Fed. R. Civ. P. 30(b)(7).

Video conferences are encouraged to reduce costs. The federal court is equipped with full video conferencing capabilities. Indeed, this court allows pro bono counsel to utilize the video conferencing facilities here at the courthouse for client interviews, as all State institutions, as well as FCI Fairton, have such capabilities. This can be a significant cost cutting measure for pro bono counsel. You may contact the Supervisor In-Court Activities in the appropriate vicinage to arrange a conference and reserve the video conferencing room.

In addition, an appointed attorney may apply to the judge during the litigation "or within a reasonable period thereafter for reimbursement of costs reasonably incurred in connection with the litigation, not including attorneys' fees," to be paid from the *Pro Bono* Fund and the Attorneys' Admission Fee Account. Local Civil Rules, Appendix H.8.

A good resource for general directives on the pretrial process in federal court in Camden is *Basic Elements of Civil Practice in the Camden Vicinage*, written by many of the presently sitting judges, and available on the District Court's website, http://www.njd.uscourts.gov/, in the "Rules" directory.

II. Court Conferences

The appointed attorney will be expected to attend all scheduling and status conferences before the Magistrate Judge or District Judge. See Rule 16, Federal Rules of Civil Procedure, and Local Civil Rule 16.1 for directives on pretrial conferences. Because of the lay filing of the complaint, you may see additional causes of action or necessary amendment to the pleading. It is important to review the substance and procedural history of the case prior to attending your *first* conference with the judge, as it is at this conference that the judge and the other parties will be most amenable to requests for additional discovery time or an amendment to the pleadings.

For cases in which an attorney is appointed and the client is in prison, the court will generally try to accommodate requests to have proceedings in which the client is participating conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility. See Local Civil Rules, Appendix H.8(b).

The appointed attorney shall participate in any court-ordered settlement conferences and shall enter into good faith settlement negotiations. Obligations to the client during settlement negotiations are the same as those for any other case and are grounded in the Rules of Professional Conduct -- see specifically RPC 1.2 (Scope of Representation) and RPC 1.4 (Communication).

Bear in mind that all methods of alternative dispute resolution are also available, although not mandatory, in *pro bono* cases, and often provide a prompt and satisfactory resolution to the litigation.

III. Trial

In most of the cases to which attorneys are appointed to represent *pro se* litigants, the parties are entitled to and have requested a jury trial. Such a trial would proceed in accordance with Rules 38 through 53 of the Federal Rules of Civil Procedure and Local Civil Rules 48.1 and 48.2.

POST-TRIAL

I. Prevailing Party Fee Applications -- Otherwise Entitled, "What Fees and Costs May I Be Entitled To Collect?"

Under 42 U.S.C. §1988, in §1983 and all federal civil rights actions, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The Prison Litigation Reform Act of 1995, as amended Pub. L. No. 104-134, 110 Stat. 1321 (1996), however, limits the extent to which an attorney representing a prevailing incarcerated litigant may be compensated. Specifically, the PLRA caps legal fees at 150% of the judgment amount, 42 U.S.C. §1997e(d)(2), and caps the hourly rate

for legal fees at 150% of the hourly rate payable to Criminal Justice Act counsel (currently $90/hour for both in and out of court work), 42 U.S.C. §1997e(d)(3). Thus, the current hourly rate for appointed counsel in a civil case is capped at $135.00. While the constitutionality of this limitation remains unresolved, the majority of the courts confronting the issue have found that the limitation passes constitutional muster. See Foulk v. Charrier, 262 F.3d 687, 703-04 (8th Cir. 2001) (collecting cases). The Third Circuit has not yet resolved the issue. See Collins v. Montgomery County Board of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999) (en banc), cert. denied, 528 U.S. 1115 (2000) ((1) dividing equally on the issue of whether the limitation of the fees to 150% of the judgment is constitutional and, consequently, affirming the order of the district court to the extent that it upheld that provision and (2) declining to decide the constitutionality of the hourly rate limitation).

Federal Rule of Civil Procedure 54 requires a prevailing party to file a motion for attorneys' fees no later than 14 days after entry of judgment," unless a statute or an order of the court modify the time. The Local Civil Rules modify the 14-day time requirement to 30 days and state that an attorney must file an affidavit with the motion.

The first step in determining whether a *pro bono* attorney representing a client in a civil rights action may recover a fee is to determine whether the plaintiff qualifies as a "prevailing party." To qualify as a prevailing party, the plaintiff must demonstrate that he or she received at least some relief on the merits of the claim. A party can be a prevailing party where a settlement is reached or where judgment is entered against him or her on certain elements of a claim, as long as some of the relief requested is obtained. Whether a plaintiff is a prevailing party is a question to be resolved by the court.

If he or she qualifies, the second step is the calculation of the "lodestar," which involves multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation. The fee applicant must prove, with satisfactory evidence, that both the requested fee and the hourly rate are reasonable. The district court has broad discretion in determining the amount of an award. The court can adjust the award as necessary based on the facts of each case. Where the rates or hours claimed seem excessive or lack the appropriate documentation, a court may calculate the award based on its own experience, knowledge, and observations.

Generally, the market rate prevailing in the relevant legal community will be the reasonable hourly rate. (Although for counsel representing an incarcerated person, the rate will be capped at $135.00, see above). The court will usually take into consideration the attorney's skill, experience, and reputation and also the attorney's usual billing rate. The fee applicant has the burden of demonstrating that the requested rate is consistent with the rate in the prevailing legal market.

Counsel must exercise billing judgment. Thus, the attorney must exclude excessive, redundant and unnecessary hours from their fee, just as the lawyer would bill a client in private practice. The court will require adequate documentation of the appropriate number of hours billed. The court will exclude inadequately documented time.

Finally, the court will also determine whether it should adjust the lodestar to take into consideration items that have not yet been accounted for in the computation, including how the results obtained relate to the work performed and whether the attorney has had an inordinate delay in the receipt of a fee.

Costs are also recoverable to prevailing parties. Typically a clerical act completed by the Clerk pursuant to the general costs statute, 28 U.S.C. §1920, courts also have discretion to review the clerk's assessment of costs. Fed. R. Civ. P. 54(d)(1). You may include your application for costs with your §1988 application for attorneys' fees; however, separate rules apply to recovery of costs. The court's discretion to award costs is limited to those costs items allowed by statute. Thus, where §1920 does not provide for an item, counsel must supply the court with alternative statutory basis for that item. For example, pursuant to 28 USC §1821(b), costs for witnesses are not allowable in excess of $40.00 per appearance. This limit applies to both fact and expert witnesses, *except* where the expert witness is court-appointed under 28 USC § 1920(6). See Crawford Fitting v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). (This illustrates the importance of utilizing the opportunity to apply to the court for expert assistance.) The Civil Rights Act of 1991, amending, inter alia, 42 U.S.C. §1988, also affects the apportionment of costs, now permitting expert witness fees as taxable items to the prevailing party in suits arising under 42 USC § 1981 and §1981a. Moreover, suits brought under Title VII, 42 USC §2000e-5(k), amended in 1991, now allow expert witness fees, in addition to attorney's fees, as taxable items to the prevailing party. We mention the examples referenced here for your general information, this is not an exhaustive reference.

One last note, §1988 is available to both prevailing plaintiffs and prevailing defendants. A prevailing defendant may file a motion for fees against a prisoner proceeding *in forma pauperis*; however, the prisoner will most likely be judgment proof and, you will not be otherwise responsible for any outstanding fee judgment.

II. Post-trial, Appeals, Continuation of Representation

Unless an attorney is relieved from his or her appointment by the court in accordance with section 5 of Appendix H, the representation continues until the entry of final judgment and efforts are exuded to enforce the judgment. The last duty owed under an appointment by the district court is to file a notice of appeal with the Third Circuit, if the client wishes you to do so.

This is not to say that you may not continue to represent your client following the conclusion of the action before the district court. The matter may be remanded to an administrative forum, your client may wish to appeal, or your client's adversary may appeal. Under these circumstances, you are encouraged, but not required, to continue the representation. If you do choose to continue the representation through an appeal, the Third Circuit Administrative Funds guidelines include a provision of up to $1,000 to reimburse out-of-pocket expenses of attorneys performing *pro bono* appellate services in civil cases.

TERMINATION OF REPRESENTATION

If you accept an appointment of counsel, you need not feel that you may not request a withdrawal from the case. A conflict of interest, for example, may develop during the course of the litigation. Appendix H.5. contains the grounds upon which such an application may be appropriate. You may make an *ex parte* request by letter to the Judge assigned to the litigation. See L. Civ. R., Appendix H.5.d. You also may choose to terminate the representation upon conclusion of the district court proceedings. In either event, when terminating the representation, you should take all steps that you would take with any other client to ensure that your client knows that you no longer represent him or her. With a *pro bono* representation, it would also be helpful to notify the court at the same time: copying the court on a client termination letter is a simple, effective way to accomplish this task.