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Volunteer Pro Bono Appeals in the Federal Courts

By Ian Barker and M.C. Sungaila – December 6, 2016

Opportunities to increase experience in the appellate courts are few and far between. Oral argument experience in particular is difficult to come by because overburdened federal appellate courts are deciding more and more cases on the briefs. This situation particularly affects newer lawyers, but more seasoned appellate lawyers may also want to expand their experience in the federal appellate courts. For both the newer lawyer and the experienced lawyer, volunteering to handle an appeal on a pro bono basis presents an opportunity to expand appellate experience and at the same time provide a valuable service to the court and self-represented litigants.

To assist ABA members in navigating the process of volunteering for and handling pro bono appeals in the federal courts, the Professional Opportunities and Pro Bono Subcommittee of the ABA Appellate Practice Committee has prepared a comprehensive compilation of pro bono opportunities in the U.S. courts of appeals. To prepare the compilation, Professional Opportunities and Pro Bono Subcommittee members Michael Bentley, Thomas Burch, Jehmal Hudson, Charles E. Miller, and Jennifer Lynn Peters, together with the chairs, researched court rules and policies and spoke with court staff to detail not only the manner in which each circuit connects worthy unrepresented litigants with volunteer pro bono counsel but also the types of opportunities typically available in each court. The compilation is published alongside this article and also will be available on the ABA website.

The compilation shows that pro bono opportunities vary widely across the circuits, from the Ninth Circuit's decades-old program, which delegates appointment of counsel to five district coordinators and assigns approximately 160 cases per year, to smaller circuits where the clerk's office simply maintains an informal list of potential volunteers. Some circuits feature pro bono programs specifically geared to particular practice areas, such as immigration (Fifth Circuit), government employees (Federal Circuit), veterans (Federal Circuit), or patents (Federal Circuit). Some courts require a minimum commitment (one case per year in the Sixth Circuit); other courts draw volunteers for civil cases from their Criminal Justice Act panel, which typically requires a multiyear commitment (three years in the Fourth Circuit).

As pro bono volunteers typically outnumber eligible cases, prospective pro bono attorneys usually should be prepared for a significant wait for an appointment. For instance, the Ninth Circuit advised that new volunteers may wait one to three years for an opportunity to take a

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case. In light of the scarcity of appointments, attorneys may consider volunteering to take cases outside of their home circuit. Although some courts will consider prospective pro bono attorneys for appointment before they are admitted to the court (Eighth and Tenth Circuits), many require admission in advance. In the Federal Circuit, in addition to admission to practice before the Federal Circuit, admission to the Federal Circuit Bar Association is required. Some circuits reported that appointments primarily or solely go to counsel practicing in or near the circuit (Fourth, Eighth, and D.C. Circuits).

Counsel specifically seeking to increase their oral argument experience should ensure that they understand a court's oral argument practices before volunteering. Although some courts commit to hearing oral argument in volunteer pro bono cases (Ninth Circuit), this is not always the case. One court noted that a significant portion of cases involving pro bono appointments are submitted *without* oral argument (Tenth Circuit).

While expense reimbursement is sometimes available for pro bono volunteers (Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits), pro bono attorneys often must be prepared to pay their own way. Before taking a case, volunteers also need to be aware of the scope and duration of the commitment. Typically, the representation ends after proceedings before the court of appeals are complete, but some courts require volunteers to sign on for all stages of appellate proceedings, including a petition to the U.S. Supreme Court for a writ of certiorari if warranted (Sixth and Tenth Circuits).

Before dedicating time and resources to a pro bono appeal, volunteers should educate themselves about the pro bono practices of a given court. During the course of this project, court staff proved eager to share information about their respective programs, and prospective volunteers should avail themselves of this resource. Ultimately, these programs present attorneys with invaluable opportunities to grow professionally and to achieve the unique sense of fulfillment that comes from lending one's talents to those in need.

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