Pro Se Litigation and the Costs of Access to Justice

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**PRO SE LITIGATION AND THE COSTS OF ACCESS TO JUSTICE**

Dan Gustafson, Karla Gluek, and Joe Bourne†

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I. INTRODUCTION

Legal services are expensive to provide. Attorneys’ fees alone are expensive: the average attorney’s hourly billing rate in the United States is $295.¹ This rate may vary significantly depending on a number of factors, including the attorney’s experience level, practice area, and legal market.² In addition, out-of-pocket costs in a litigation matter that proceeds to trial (such as filing fees, expert

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witness fees, depositions, and travel expenses) may easily add up to tens or hundreds of thousands of dollars. While law firms representing plaintiffs may sometimes use contingency fee arrangements, in which the firm advances attorneys’ fees and costs and recovers them only as part of any recovery by the client, this places the risk on the firm. As a result, a firm’s decision whether to represent a plaintiff on a contingency basis often depends on the firm’s expectation that the case will pay. This can result in firms being unwilling to take contingency cases—even when those cases appear to have some merit—if the firm’s anticipated investment in the case is greater than its expected recovery. Meanwhile, defendants generally cannot benefit from contingency fee arrangements because they do not stand to recover from being sued, even when their defenses are successful. Due to the high cost of legal services in litigation matters, many litigants appear pro se.

In some instances, due process and other constitutional law, statutes, or regulations may require that counsel be provided to litigants who cannot afford counsel. For example, criminal defendants are guaranteed the right to publicly funded trial counsel when they cannot afford it, and that right continues on direct appeal. Similarly, civil commitment respondents have the statutory right to appointed counsel in civil commitment proceedings. Although the United States Supreme Court has not expressly decided the question, federal and state case law suggest that due process should also guarantee the right to appointed counsel in civil commitment proceedings. The Supreme Court

4. Id.
6. See id. ("[Contingency fees] discourag[e] attorneys from presenting claims that have negative value . . . .").
has long recognized that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” The Court has also held that due process requires the provision of court-appointed counsel to indigent parties in civil matters in which their liberty is at stake for many of the same reasons: even in informal proceedings—especially when the proceedings resemble an adversarial trial—a party will struggle to “make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it” without the assistance of counsel.

There are some areas other than deprivation of physical liberty when due process may require the appointment of counsel. These include cases involving the termination of parental rights. In other areas, such as civil rights cases, the legislature has provided statutory attorneys’ fees, which are designed to encourage contingency fee representation for plaintiffs with civil rights and other kinds of claims.

But the need for the assistance of counsel holds true in civil litigation more broadly, such as cases in which a party’s monetary claim or defense is at stake. Despite this need, there is no general right to appointed counsel in civil litigation. A recent survey of the chief judges of the U.S. district courts shows that common problems civil pro se litigants face are pleadings that cannot be understood, untimely or incomplete pleadings or submissions, lack
of knowledge about legal decisions, failure to know when to object to evidence, problems examining witnesses, problems with discovery, and service errors. Additionally, settlement conferences or mediations are less common in pro se cases. This suggests that pro se litigants are likely to struggle to settle—and especially to successfully settle—their cases, especially when considering that they may be unaware of the strengths and weaknesses of their own and their adversaries’ cases, or that they may be unable to adequately present those strengths and weaknesses even if aware.

Although attorneys’ fees and litigation costs may preclude many litigants from being able to afford counsel, some groups find it especially difficult to obtain counsel on a fee-paying basis. In 2010, 15.1% of all persons in the United States lived in poverty. The numbers are more stark for certain subgroups. For example, 27.4% of African Americans and 26.6% of Hispanics fall below the poverty line, compared to 12.1% of Asians and 9.9% of non-Hispanic whites. Similarly, 31.6% of households headed by single women fall below the poverty line, compared to 15.8% of households headed by single men and 6.2% of households headed by married couples. And 26.7% of foreign-born noncitizens live in poverty, compared to 19.9% of foreign-born residents overall and 14.4% of residents born in the United States. In Minnesota, 10% of the white population falls below the poverty line, compared to 48% of the black population and 35% of the Hispanic population.

17. Id. at 21.
19. Id.
20. Id.
21. Id.
II. FEDERAL JUDICIAL CENTER SURVEY

The Federal Judicial Center for the Judicial Conference Committee on Court Administration and Case Management conducted a study that considered how the federal district courts deal with *pro se* litigants.\(^{23}\) The study surveyed district court clerks and district court chief judges about the impact of *pro se* litigants on judges and chambers staff, the measures the judges have taken to meet the demands of these cases, and the programs, services, and materials the courts offer to assist both *pro se* litigants and staff.\(^{24}\)

The district courts have developed various measures to deal with *pro se* litigants. A significant number of courts attempt to provide counsel to *pro se* litigants in at least some circumstances, whether through appointment for the full case or for limited circumstances (such as mediation or trial), or through providing access to *pro bono* representation.\(^{25}\) Of these courts, about half pay for costs incurred, and about a quarter pay at least some attorneys’ fees.\(^{26}\) A majority of courts have created a *pro se* law clerk position to assist with *pro se* litigation.\(^{27}\) The most common survey responses from clerks’ offices indicate that staffing arrangements and providing information to *pro se* litigants are among the most effective responses that the courts have taken.\(^{28}\) The information provided is often similar to the resources offered by the District of Minnesota through its “Representing Yourself (Pro Se)” webpage, which is discussed in more detail below.\(^{29}\)

From the perspective of the clerks’ offices, the major issues posed by *pro se* litigation are the lack of access to electronic filing and demands on court staff, with the nature of the pleadings a close second.\(^{30}\) Clerks’ offices also identify the increase in *pro se* filings, the volume of filings, frivolous filings, difficult or unstable litigants, and the lack of counsel as important issues.\(^{31}\)

The survey responses of the chief judges indicate that the district courts have widely adopted a set of measures to deal with

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\(^{23}\) STIENSTRA ET AL., *supra* note 16.

\(^{24}\) *Id.* at v.

\(^{25}\) *Id.* at 4.

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 12–13.

\(^{28}\) *Id.* at 15.

\(^{29}\) See *infra* text accompanying notes 77–79.


\(^{31}\) *Id.*
pro se litigants. These include the use of broad standards in construing pleadings and other submissions, appointment of counsel when the merits of the case warrant it, the use of broad standards in requiring compliance with deadlines, referring pretrial matters to magistrate judges, and judges taking a more active, personal role than in fully represented cases (such as by providing more explanation about procedures).\(^{32}\) In the judges’ opinions, the most effective procedures that help judges and chambers staff are specially designated staff and assignment of cases to pro se law clerks, as well as active management of pro se cases (including giving clear, specific instructions in court orders and ruling promptly on pro se matters).\(^{33}\) The most effective measures used in chambers that help the pro se litigants are managerial measures (including detailed instructions and standardized forms), appointment of counsel, and liberal standards for construing claims and for granting extensions of time.\(^{34}\)

The judges identified a number of issues presented by pro se litigants. By far the most common issues presented for judges and chambers staff were the poor quality of pleadings and submissions and the pro se litigants’ lack of knowledge and skills to litigate their cases.\(^{35}\) The next most common issues were frivolous cases, repeat filers, a rising caseload, and the demand pro se cases place on the courts.\(^{36}\) The most common problems for the litigants themselves are unnecessary, illegible, or incomprehensible pleadings and submissions; problems with responses to motions to dismiss or for summary judgment; lack of knowledge about legal decisions or other information that would help their cases; failure to know when to object to testimony or evidence; failure to understand the legal consequences of their actions; failure to timely file pleadings or other submissions; problems examining witnesses; problems with discovery; and problems with service of process.\(^{37}\)

The last group of issues is distinctly an access to justice problem. A sizeable majority of judges reported that there are potentially meritorious claims in at least the occasional pro se case.\(^{38}\)

Problems with the quality of the pleadings—including the filing of
numerous unnecessary materials—can create a risk that the judge might miss meritorious claims. Failure to adequately gather and present evidence or to object to improper evidence can hamper a litigant’s ability to tell his or her story effectively to the fact-finder. Perhaps for this reason, the judges consistently indicated that there is a “great need” for counsel at trial. They also consistently indicated that there is a “great” or “moderate” need for counsel in the preparation of dispositive motions, preparation of answers to an opponent’s filings, participation in settlement negotiations, preparation of initial pleadings, participation at hearings, and preparation and execution of discovery. Viewed as a whole, the judges’ responses suggest that both substantive and procedural problems are common in pro se cases. All of these implicate the need for counsel. In an adversarial system such as ours, when only one party is represented by counsel, the pro se party is at a severe disadvantage—even when the pro se party has potentially meritorious claims or defenses.

III. PRO SE PROJECT BACKGROUND AND OVERVIEW

Court rules—including rules of procedure, local rules, and rules of evidence—can be tricky. These difficulties are compounded for pro se litigants, who are often relatively unsophisticated, lack resources, and lack training and experience in the law. At the same time, the federal courts are increasingly busy. Locally, the District of Minnesota has been one of the busiest districts in the country; it had the eighteenth highest weighted caseload per judge in the country in the year ending September 30, 2011, and in each of the five previous years it finished in the top seven districts in the country as measured by weighted filings per judge. It is also the busiest district in the

39. Id. at viii.
40. Id. at 26.
41. Id.
42. Id.
Eighth Circuit. 45 Each judge’s weighted caseload is over 600, which is 20% higher than the national average of about 500 weighted cases per judge and far exceeds the 430 weighted cases threshold, which is a key factor in determining when additional judicial resources may be needed. 46 Busy courts and heavy caseloads have a cost to the court system and to taxpayers who fund the courts. 47 And pro se cases, in particular, require extra time and attention from the courts (both judges and staff). 48 The District of Minnesota has seen about 100 to 200 civil, nonprisoner pro se cases each year. 49

The Minnesota Federal Pro Se Project (“Pro Se Project”) was founded on May 1, 2009, as a joint initiative by the United States District Court for the District of Minnesota and the Minnesota Chapter of the Federal Bar Association (“FBA”) after Chief Judge Michael J. Davis approached the Minnesota Chapter of the FBA in the summer of 2008 to initiate discussions about how to provide pro bono representation to pro se litigants. 50 At its core, the Pro Se Project is about access to justice. 51 The Pro Se Project is designed to help address both of these issues: the disadvantage and difficulties pro se litigants face in our adversarial system, and the strain on the courts.

45. Kanski, supra note 44, at 1.
46. Id.
The Pro Se Project has four enumerated goals:

- Provide every civil pro se litigant in the District of Minnesota the opportunity to consult with counsel and, where appropriate, to be represented by counsel;
- Improve access to justice in the Minnesota District Court;
- Decrease the number of civil pro se litigants in the District; and
- Communicate effectively with the Court regarding the status of cases referred to the project.

Ideally, the Pro Se Project would enable every civil litigant to be represented by counsel, even when those litigants cannot afford counsel.

The Pro Se Project’s process begins after a pro se plaintiff files a case or a pro se defendant makes an appearance in the District of Minnesota. Initially, the court must refer the pro se litigant to the Project, which occurs by the court writing a letter to the pro se litigant advising her that she should contact the Pro Se Project Coordinator if she would like to arrange a consultation with a volunteer attorney.

There are no fixed, formal criteria for determining whether or when the court should refer the case to the Pro Se Project. Instead, the court makes this determination on a case-by-case basis. The court may consider any factor that is appropriate in a given case, including whether pairing the pro se litigant with a volunteer attorney will aid the court in processing the case, whether the pro se litigant appears to complain of a genuine injury (even if the claim would not ultimately have legal merit), whether an attorney could help the party understand his or her options, whether a political agenda is apparent from the pleadings, and whether the litigant is a so-called “frequent filer.”

Another issue that may influence the timing of a referral is when the court first has personal interaction with the party, such as at a pretrial scheduling conference before the magistrate judge or at a motion hearing (which could be before either the magistrate judge...
or district judge, although the magistrate judge is involved earlier in the case).

After the court refers the pro se litigant to the Pro Se Project, if the party contacts the Pro Se Project Coordinator, the Coordinator contacts a law firm or lawyer and requests a consultation with the pro se litigant (the referral is made, in part, based on the attorney’s practice area).56 After conducting a conflicts check, determining that no conflict exists, and agreeing to accept the referral, the attorney informs the Coordinator and arranges a meeting with the litigant for a consultation and case evaluation.57

The volunteer attorney then meets the pro se client and discusses the case, reviews the case file, researches issues as necessary, and performs an initial case analysis.58 Depending on whether the attorney believes the pro se client has a viable claim or defense, the attorney and client may take one of two paths. If the attorney does not believe the client has a viable claim or defense, the attorney advises the client of this conclusion and of his or her options.59 The attorney may seek the assistance of a volunteer mediator if the pro se client wishes to proceed in the matter.60 If, on the other hand, the attorney believes the client has a viable claim or defense, the attorney may enter an appearance and pursue the viable claims or defenses (either by providing full representation or entering a special appearance).61 The attorney also has the option to decline to provide further service to the client.62 At this stage, the attorney informs the Pro Se Project Coordinator whether additional service will be provided to the client, and if not, whether he recommends referring the case to another volunteer attorney.63 Ideally, the pro se client’s claims will have merit, the attorney will agree to represent the client, and together they will resolve the matter through the litigation process (whether in court, out of court, or both).

The Pro Se Project has a fees, costs, and expenses policy that comes into play after the initial case consultation and the pro se client retains the attorney’s services. As a general rule, the party is

56. Pro Se Project, supra note 51, at 3.
57. Id.
58. Id. at 4.
59. Id.
60. Id.
61. Id.
62. Id.
63. See id.
“required to pay the costs and expenses actually incurred.”\textsuperscript{64} Of course, a \textit{pro se} litigant may be indigent and unable to afford reimbursing costs and expenses. In that instance, several options must be explored. The attorney should seek to limit costs as much as possible, including by trying to obtain free services from professionals and process servers.\textsuperscript{65} Some legal services programs already have existing arrangements with programs that provide these free services, such as \textit{pro bono} court reporting services for indigent litigants.\textsuperscript{66} If the court has not issued a scheduling order, the attorney should also seek to limit costs by requesting an early settlement conference with the magistrate judge or by requesting limits on discovery.\textsuperscript{67} Costs may be reimbursed from an attorneys’ fees award.\textsuperscript{68} When costs and expenses must be incurred and the client is indigent and cannot afford them, “\textit{[t]he FBA will endeavor to pay costs and expenses actually incurred for incidentals that are not reimbursed.}”\textsuperscript{69} The \textit{Pro Se} Project does not guarantee that the FBA will reimburse, or will be able to reimburse, out-of-pocket costs and expenses actually incurred; it guarantees only that the FBA will “[r]eview and consider[]” them.\textsuperscript{70} In fact, due to a number of factors (including the generosity of \textit{Pro Se} Project participants), the \textit{Pro Se} Project’s cost-reimbursement policy has never been tested. As a result, even the \textit{Pro Se} Project Coordinator does not know how reimbursement will work in practice when a request is made.

The \textit{Pro Se} Project has taken other steps to encourage and facilitate participation.\textsuperscript{71} In 2010, the Project sought and obtained designation from the Minnesota Board of Continuing Legal Education as an approved legal services provider.\textsuperscript{72} As a result,

\begin{itemize}
  \item \textsuperscript{64} Id. at 5.
  \item \textsuperscript{65} See id.
  \item \textsuperscript{66} For example, the Minnesota Association of Verbatim Reporters and Captioners has a \textit{Pro Bono} Committee that provides guidelines to and works with the Minnesota State Bar Association and other organizations to provide \textit{pro bono} court reporting services to indigent litigants. \textit{See About Us: Committees, MN. ASS’N VERBATIM REPS. & CAPTIONERS}, http://www.mavrc.org/about/committees.php (last visited Oct. 17, 2012).
  \item \textsuperscript{67} \textit{PRO SE PROJECT}, supra note 51, at 5.
  \item \textsuperscript{68} See id.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} See id. at 6.
\end{itemize}
attorneys participating in the Pro Se Project may now obtain Continuing Legal Education ("CLE") credit for time spent on pro bono representation undertaken through the Pro Se Project. This may encourage attorneys to participate in the Project because CLE requirements are mandatory for Minnesota lawyers. In 2011, the Pro Se Project began working with the Minnesota Justice Foundation ("MJF"). Law students participating through MJF may volunteer to work with attorneys on their cases referred by the Pro Se Project. This creates legal experiences for law students who can provide additional resources to Pro Se Project cases and is intended to encourage attorneys to participate in the Project by providing them with law clerks to help with those cases.

The District of Minnesota has also taken steps outside of the Pro Se Project to facilitate pro se litigation. These steps are intended to assist pro se parties in litigating their cases and enhance the efficiency of the cases as they proceed through court. The District of Minnesota launched a “Representing Yourself (Pro Se)” webpage in December of 2009. The “Representing Yourself (Pro Se)” webpage contains answers to frequently asked questions, a pro se civil guidebook, information sheets, forms, case initiation assistance, a glossary of legal terms, the federal rules, the local rules, resources for finding an attorney and for legal research, specific information tailored to prisoner litigants, and contact information for the clerk’s office and for electronic case filing. As the Honorable Franklin L. Noel aptly put it, this effort helps pro se
litigants “get their foot in the courthouse door,” and, once there, the Pro Se Project can continue to assist those who would benefit from meeting with an attorney.\textsuperscript{79}

IV. EXAMPLES OF EXPERIENCES IN PRO SE PROJECT CASES

The following are a few sample cases in which counsel was appointed to represent pro se litigants either through the Pro Se Project or through referrals by federal judges before the Project came into existence. This is far from an exhaustive list of cases in which the Pro Se Project has found counsel to represent a pro se litigant. Instead, they are examples that illustrate different areas in which the Project operates and some strengths and weaknesses of this system to date.

A. Prisoner Civil Rights and Religious Freedom

A state prisoner filed multiple amended complaints and conducted significant motion practice while proceeding pro se, raising claims under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)\textsuperscript{80} and under 42 U.S.C. § 1983 for violation of his First and Fourteenth Amendment rights.\textsuperscript{81} He alleged numerous claims that prison policies unlawfully infringed his right to practice Islam, only one of which survived summary judgment: that the prison failed to provide halal meals, thereby causing him to consume food in violation of his sincerely held religious beliefs.\textsuperscript{82}

In its order denying summary judgment with respect to that claim (and granting summary judgment with respect to the others), the district court referred the plaintiff to the Pro Se Project.\textsuperscript{83} The referral specifically contemplated “representation limited to assisting Plaintiff in reaching a settlement of his claim or continuing with an evidentiary hearing to resolve the factual issues, which remain regarding the provision of halal meals.”\textsuperscript{84} The Pro Se Project Coordinator referred the matter to a volunteer lawyer; the


\textsuperscript{82} Id. at *1.

\textsuperscript{83} Id. at *10.

\textsuperscript{84} Id.
lawyer entered an appearance and was able to help negotiate a settlement that provided that the Minnesota Department of Corrections would make clearly designated halal-certified food available at the prison during all regularly scheduled meals.

Although it is impossible to say for certain what the result would have been without attorney involvement, after the referral from the Pro Se Project, the plaintiff was able to settle his RLUIPA and First Amendment religious freedom claims and make a change that may more broadly help Muslims in Minnesota correctional facilities exercise their religious beliefs. The limited scope of representation contemplated by the court enabled counsel to focus on the claim with merit and to settle it. The court did not have to deal with filings relating to any claims that were without merit, and ultimately the settlement meant that an evidentiary hearing did not need to be held. The volunteer attorney also benefited by gaining experience—including primary responsibility for negotiating a settlement and appearing at two settlement conferences—that an associate could otherwise struggle to get. The limited scope of representation also assured that counsel did not risk taking on more than bargained for. Limited representation can be a useful tool to encourage counsel to volunteer to take on cases through the Pro Se Project, and the ability of firms to get involved in a limited way means that more pro se litigants should have the opportunity to receive representation.

B. Civil Rights and the Fourth Amendment

One pro se plaintiff brought a § 1983 action against a number of peace officers, who were members of a drug task force, and against other governmental defendants. The plaintiff alleged violations of various constitutional rights centered on a search of two stores he owned. Members of the task force searched the plaintiff’s stores and his residence pursuant to search warrants; the search warrants were later determined to lack probable cause with respect to his businesses. The district court granted the defendants’ motions for summary judgment, except regarding the

86. Id.
87. Id.
claim that the searches of the stores, which caused a mess and damaged his property, were executed unreasonably.88

The plaintiff litigated his case pro se for more than two years before the case was referred to the Pro Se Project, which found volunteer lawyers to enter appearances on the eve of trial. Following additional discovery and pretrial motion practice, the volunteer lawyers tried the case to a jury, which ultimately reached a verdict in favor of the remaining defendants. The volunteer lawyers benefitted from their involvement in this case. Multiple attorneys received valuable experience, including various “firsts,” such as being first chair at trial, examining witnesses at trial, taking a deposition, and arguing pretrial motions. The plaintiff and the court also benefitted from the lawyers’ involvement in the case. Trial is the most difficult part of the adversarial process for a pro se litigant to navigate, and the assistance of counsel resulted in the skillful presentation of evidence by attorneys who understood the legal claims and defenses at issue. In other words, the plaintiff had a fair chance, which is all that a party can ask for, and which a court is supposed to ensure (although there is potential tension with the court’s neutrality, which the court must maintain).

This case also highlights some of the difficult aspects of the Pro Se Project. This was not a frivolous or meritless case—it had enough merit to survive two years of litigation while the plaintiff proceeded pro se, and there was enough evidence supporting the plaintiff’s Fourth Amendment claim to withstand summary judgment. It is fair to say that the plaintiff was disadvantaged in the discovery and pretrial litigation process because he lacked counsel until shortly before trial. Had he been represented from the start, the case may have been more likely to settle. Litigation of difficult issues is always uncertain, and when parties reach settlement agreements, more parties can be satisfied with the result. This type of case can pose a dilemma for the Pro Se Project because it requires a significant commitment on the part of the volunteer lawyer.89 Additionally, the volunteer attorney may be brought in after the close of discovery or rulings on significant motions and therefore may be limited in the evidence or legal arguments that may be available.

88. Id.
89. By contrast, Rule 6.1 of the Minnesota Rules of Professional Conduct sets an aspirational goal for each lawyer to provide fifty hours of pro bono legal services per year. MINN. RULES OF PROF’L CONDUCT R. 6.1 (2005).
C. Due Process Rights in a Treatment Facility

A civilly committed sex offender filed a pro se civil rights suit alleging that staff members at the treatment facility to which he was committed lied by reporting that he threatened staff members in order to get the patient sent back to jail, in violation of his due process rights. At the request of a federal judge, volunteer lawyers agreed to represent the plaintiff, and they represented him from February 2008 through a jury trial in June 2010. The jury awarded the plaintiff both compensatory and punitive damages, and the court ultimately entered an order requiring the state to change its policies. Counsel sought attorneys’ fees as the prevailing party in a civil rights action pursuant to 42 U.S.C. § 1988(b). The court approved the firm’s request for over $370,000 in attorneys’ fees, representing over 1200 attorney and staff hours, portions of which were donated to the Pro Se Project and to the Volunteer Lawyers Network.

This case is an example of pro bono attorneys facilitating access to justice by providing legal representation to a pro se litigant who otherwise could not afford it. In the case, the firm was compensated for its time. But the case also raises some difficulties. Although attorneys’ fees are available in civil rights cases, they are not available in all categories of cases. And many cases may involve complex litigation issues, but do not offer the prospect of a large enough damages award to make a contingency fee retention sensible from a cost perspective. Finally, cases that are tried to juries frequently could go either way, and firms may flinch at the prospect of volunteering hundreds of thousands of dollars’ worth of attorney and firm time that could be spent on fee-paying billable matters.

91. Plaintiff’s Motion for an Award of Attorney’s Fees at 1, Holly v. Konieska, No. 04-CV-1489 (JMR/FLN) (D. Minn. Aug. 16, 2010), ECF No. 249.
92. Id.
93. Id.
D. Employment Discrimination

A pro se plaintiff filed an employment discrimination complaint against her former employer, alleging that she was terminated because of her race and in retaliation for complaining about being mistreated by her colleagues. Before the case was referred to the Pro Se Project, the plaintiff tried but was unable to find a lawyer to represent her on a contingency basis. After referral, a volunteer attorney entered an appearance on her behalf; this occurred before the first status conference and before any dispositive motions were filed. The parties began the discovery process, including interrogatories and production of documents, and depositions were taken of the plaintiff and of her immediate supervisor. They ultimately reached an agreement to settle the matter at a settlement conference, which successfully resolved the plaintiff’s claims without the delay and uncertainty of further litigation and relieved the court of the burden of presiding over any further proceedings or motion practice.

The volunteer attorney was able to develop important litigation skills by taking and defending depositions and conducting discovery and settlement negotiations. The main difficulty presented by this case related to costs. The pro se litigant was granted in forma pauperis (IFP) status by the court because of her financial status, which meant the court would waive filing fees but not remove all costs of litigation. The plaintiff was able to obtain pro bono court reporting services for the deposition of her supervisor, but it only covered up to two hours and seventy-five pages. The deposition required more time than that, and how the Pro Se Project’s reimbursement policy will operate in regard to the volunteer lawyer’s request for reimbursement remains to be seen.

V. Statistics on Pro Se Project Cases

We have access to statistics concerning the Pro Se Project for three time periods: May 2009 through December 2011; the year of 2011; and January through April 2012. These statistics

demonstrate a few trends. First, there is a great need for counsel in pro se cases. Many pro se litigants are poor and received IFP status. For example, between May 2009 and December 2011, the District Court of Minnesota referred 207 cases to the Pro Se Project.\textsuperscript{97} Of those cases, 152 pro se litigants applied for IFP status (73%).\textsuperscript{98} Excluding the twenty-eight cases that were dismissed prior to an IFP determination, the court granted IFP status in 112 of the 124 remaining cases (90%).\textsuperscript{99} Not only can these litigants not afford counsel, but it is clear that they want counsel. For example, in 2011, the court referred eighty-three cases to the Pro Se Project, and sixty-six of those pro se litigants sought to participate in the Project (80%).\textsuperscript{100}

Second, certain types of cases are the most common. Of the eighty-three cases referred to the Pro Se Project in 2011, thirty-seven were employment discrimination cases (almost 45%), thirteen were civil rights cases (16%), thirteen were social security disability insurance cases (16%), and the remaining twenty involved a mix of contract, consumer credit, ERISA, trademark, habeas corpus, immigration, personal injury and other claims (24%).\textsuperscript{101} Civil rights and employment matters are the overriding themes in the other years as well.\textsuperscript{102} The need for representation in these areas is particularly high, as employment, discrimination, and civil rights often involve complicated legal and factual issues.

Finally, the data suggest that the Pro Se Project is working—and improving—but there may still be work to do. The fact that all of the pro se litigants in 2011 who sought to participate were able to consult with volunteer attorneys is an important success for the Project and for those litigants. But the number of referrals and

\textsuperscript{97} IFP and Representation Status of Referrals, supra note 96.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} 2nd Annual Bar Summit, supra note 96.
\textsuperscript{101} Id.
\textsuperscript{102} See 2012 Referrals, supra note 96; Referrals by Nature of Suit, supra note 96.
consultations significantly outpaces the number of times that attorneys entered notices of appearance. In the 2009–2011 time period, an attorney entered an appearance in eighty-one of the 207 cases (39%).\textsuperscript{103} In 2011, an attorney entered an appearance in thirty-three of the sixty-six cases in which the pro se litigant consulted with a volunteer attorney (50%).\textsuperscript{104} The increase in appearances is a positive trend. It is likely that in some of these cases in which an attorney did not enter an appearance, the consultation revealed that the case lacked merit, and the pro se litigant agreed with the attorney that voluntary dismissal was in his or her best interests. It is possible that in some of those cases, the attorney was able to help the litigant negotiate a settlement before it became necessary to enter an appearance. But 50\% is still a significant number, and it suggests that in some cases, pro se litigants who wanted and may have been best served by the representation of counsel were not represented in court. Clearly, there remains work to be done.

VI. ASSESSING THE PRO SE PROJECT’S EFFECTIVENESS AND PROPOSED FUTURE STEPS

In many ways, the Pro Se Project is off to a successful start. Pro se litigants who wish to participate in the Project are able to consult with volunteer attorneys about their cases, and even if representation does not go beyond that point, there is real value in meeting with an attorney and discussing the case. The Pro Se Project’s partnership with MJF and work with the bar to allow participating attorneys to obtain free CLE credit provide useful incentives to participate in the Project. And the District of Minnesota’s parallel project, the “Representing Yourself (Pro Se)” webpage, which provides more information and access to services for pro se litigants, has helped pro se litigants navigate the court system on their own and get to the point where they can receive assistance from the Pro Se Project.

However, providing counsel to pro se litigants who cannot afford it is an ongoing struggle, and there is work to be done. Not all pro se litigants who have participated in the Pro Se Project have had attorneys enter notices of appearance on their behalf. Additionally, pro se litigants may receive counsel through the

\textsuperscript{103} IFP and Representation Status of Referrals, \textit{supra} note 96.
\textsuperscript{104} 2nd Annual Bar Summit, \textit{supra} note 96.
Project at various stages of litigation. Thus, even participating pro se litigants may be at a disadvantage at critical stages of the adversarial process. The availability of more lawyers to participate in the Pro Se Project could certainly help make it easier for pro se litigants to be represented by counsel and represented earlier in litigation. Earlier involvement could help resolve cases more quickly and provide more focused submissions, reducing the burden on the courts and potentially saving the government money. One place to start to encourage attorney participation may be to implement a firmer costs policy. With an untested, discretionary costs policy, attorneys and their firms cannot know if reasonable costs and expenses that they incur will be reimbursed.

Another area in which the Pro Se Project could benefit is from tracking and gathering or obtaining access to more quantitative information. There are unresolved questions. Why are some cases not resulting in attorneys entering appearances? Is there an optimal ratio of attorney appearances to consultations? Does the court clear cases faster when attorneys become involved through the Pro Se Project? Are they more likely to settle? Do they take up more or less court time? Do the pro se litigants receive better outcomes? Are attorneys getting involved early enough in the process? Although some of this information is subject to the attorney-client privilege and is therefore impossible to track, any additional information can only strengthen the ability to evaluate the Pro Se Project’s effectiveness and areas for improvement.

Although the Pro Se Project is an FBA and District of Minnesota project, it has achieved tangible results and positive outcomes, and lessons can be learned that can benefit state courts as well as other jurisdictions. At the same time, the Pro Se Project needs to continue to assess its successes and failures and strive to improve. The Pro Se Project is made possible through the collective efforts of the FBA and its members (as well as the efforts of the court). All of us, as members of the Minnesota bar, have an obligation to give back to the community and try to ensure that all residents (especially the poor and underserved) have access to justice and can effectively participate in the court system to vindicate their rights; we all should keep that in mind and evaluate whether there is something more or different that we can do. Specifically in regard to the Pro Se Project, we propose a public funding mechanism that would guarantee reimbursement of costs.
There are various possibilities that relate to improving access to representation for pro se litigants in federal court. One option would be to impose a mandatory system. Members of the Minnesota bar are currently required to report at least forty-five CLE hours over each three-year reporting period, at least three hours of which must be in ethics or professional responsibility and at least three hours of which must be in elimination of bias in the legal system and in the practice of law. They are also encouraged to provide at least fifty hours of pro bono legal service each year. Members of the bar could instead be required to provide a certain number of hours of pro bono legal services. Like the ethics and bias CLE requirements, there could even be a smaller subset of hours pertaining specifically to assisting pro se litigants. These requirements could apply each year, each three-year reporting period, or to any other time period. For example, New York is implementing a system in which new attorneys must provide fifty hours of pro bono service before joining the state bar.

However, we have concerns about a mandatory system in this area. Attorneys could be forced to practice outside of their practice areas, including areas in which they are not comfortable. This could result in reduced quality of service. The quality of service may also be worse under a mandatory system because volunteer attorneys are more likely to be enthusiastic about those matters than attorneys who feel that they have been conscripted into service. Mandatory pro bono service would also work a disproportionate hardship on solo practitioners, who do not have the same kind of excess capacity or the ability to spread the effect of providing pro bono services over a large number of lawyers. Under a mandatory system, attorney participants would include

109. Id.; see also Barnard, supra note 107 (“I worry about poor people with lawyers who don’t want to be there.”).
senior litigators, who would not reap the same kinds of experience benefits as younger lawyers.

We think the better course is to continue to use volunteer attorneys, but to publicly fund and guarantee reimbursement of their out-of-pocket costs. Softer incentives are already in place to convince attorneys to volunteer their time. The availability of CLE credit to attorneys participating in the Pro Se Project is one such incentive. A second is the public good that comes from assisting people and resolving these disputes. Federal judges and the FBA consistently recognize the efforts of volunteer attorneys in Pro Se Project cases and the effects these efforts have on access to justice. Finally, participation in the Pro Se Project provides lawyers with experience that they may otherwise struggle to obtain early in their careers. All volunteer lawyers interact with the pro se clients, and the client contact allows the lawyers to develop their skills in that area. Depending on the case, the attorneys may also conduct discovery, submit and argue motions, take and defend depositions, negotiate a settlement with opposing counsel, or even try the case to a jury or the court. Gaining this experience is a real benefit to young lawyers’ careers, as it helps them become better lawyers; in the same way, it helps their law firms by making them more valuable assets.

Public funding of costs would be an important compromise with real financial benefits to the system. It is one thing for a lawyer or law firm to volunteer time, but it is another to ask them to pay money out of pocket. Public funding and a firm costs reimbursement policy will remove the disincentive to participate that the prospect of out-of-pocket expenses creates. With that out of the way, the incentives discussed above will weigh even more strongly in favor of attorney participation in the Pro Se Project. Although this is an important issue concerning access to justice that independently justifies public funding of costs reimbursement, it is also possible that some of the funding may be recaptured through savings. As pro se litigants receive the assistance of counsel, the special demands and burdens that pro se litigants place on the court should be lessened. It is worth noting that these costs are likely self-controlling—even with reimbursable costs, attorneys are unlikely to devote uncompensated time to a matter when it will not benefit the client’s case—and they could easily be further contained through a reasonableness review as part of the reimbursement process. At the same time, because funding
attorneys’ fees does not appear to be necessary, this is a fair compromise that will limit the financial burden in publicly funding the Pro Se Project.