

## **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).