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Bridging the Justice Gap: Judicial Promotion of Pro Bono

Jodi Nafzger

The United States is facing a civil legal aid crisis. With the recent economic recession, more and more people have fallen into poverty and now face a multitude of legal problems. According to the United States Census Bureau's Annual Social and Economic Supplement, 14.8 percent of the population (roughly 48 million people) is living in poverty. As poverty rates have increased, public and private funding for civil legal aid has dramatically declined. Increasing numbers of low-income and modest-means individuals and families are unable to afford legal counsel or secure pro bono representation. Meaningful access to justice for these individuals requires lawyers and judges to take a more proactive approach to bridging the gap.

The civil legal aid crisis has also left court dockets across the country overburdened with *pro se* litigants. In 2012, for example, nearly 60 percent of civil legal cases filed in Idaho had at least one *pro se* party.¹ To tackle this problem, the judiciary, the private bar and the public interest community have implemented numerous initiatives to attempt to bridge the justice gap. But these efforts have not been enough to make significant headway in curing the problem. As a scholarly team noted:

Referral by the courts to legal services providers has not solved the problem, because of the providers' limited resources. Referral to private, pro bono attorneys has been only sporadically successful. Other remedies, though imaginative and earnest, have not effectively eliminated the problem. Past and current efforts to remedy the pro

The State of Poverty in Idaho			
Poverty and Employment		Education, Housing and Federal Programs	
Poverty Rate	15%	4-Year College Degree	26%
Asset Poverty Rate	30%	Aged 16-19 (No School/Work)	11%
Children	21%	Grandparents raising grandchildren	20,594
Women	16%	Less Than 30% of Income on Housing	36,127
Single-Parents	40%	Homeless	2,104
Working Poor	39%	SNAP (Food stamps - children)	109,000
Food Insecurity	15%	TANF (Welfare - adults and children)	2,939
Uninsured	18%	WIC (Nutrition program)	43,292
Low-Wage Jobs	29%	LIHEAP (Home Energy)	50,186

se problem have fallen short. Self-help centers, family law facilitators, pro se clinics, and enhanced technology have helped, but not enough. At the conclusion of these services, the pro se litigant is still pro se.²

This is the reality in our state as well. Though Idaho's Statewide Court Assistance Offices (CAOs) served 51,944 people in 2015, the CAOs are prohibited from providing legal advice and representation to *pro se* litigants and therefore are only able to provide basic information and template forms. Moreover, although more than 20 percent of Idaho's residents are eligible for civil legal aid, due to funding restrictions Idaho Legal Aid Services, which has fewer than 20 attorneys across the entire state, is only able to offer assistance to a limited number of individuals and families facing a limited scope of legal issues.

Likewise, though 800 Idaho attorneys donated more than 16,000 hours of pro bono time in 2015 to underserved communities, due to a lack of funding and volunteers the Idaho Volunteer Lawyers Program (IVLP) has reduced its services in domestic violence cases, foreclosures, and housing. As a result, the follow-

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ing story is now an all too common example of the access to justice gap in Idaho.

Having faced ethnic persecution in their native country of Bhutan, a landlocked country in South Asia at the eastern end of the Himalayas, a family was forced to flee and resettled in Idaho. Working through a re-

settlement agency, the family rented an apartment in an affordable complex in Boise. The father works at the airport, and the mother worked at the Boise International Market until it was destroyed in a fire. The couple has two young children who attend the elementary school just behind their apartment complex. One child suffers from a physical disability, and the school provides special services. Last week, the couple received a 30-day notice to evict their apartment. Unfortunately, the rental market in Boise isn't keeping up with the demand. The couple has nowhere to go. Details about the property surface including stories of pest infestations, mold, and holes in the roof. The couple can't afford an attorney and the local legal aid organizations can't take any more cases. The couple obtained some paperwork for a demand letter from a legal advice clinic and sent the letter to the landlord. Now the couple is in court but, even with an interpreter, they cannot fully understand the proceedings to defend the eviction notice. They just need more time to relocate, again.

So, in light of the circumstances above, the question becomes: can the magistrate judge appoint counsel in the eviction proceeding or, at a minimum, request assistance from a pro bono attorney through IVLP?

On the surface, the answer appears to be yes. The American Bar Association's (ABA) Model Rules of Professional Conduct Rule 6.2 requires lawyers to accept appointments by a tribunal unless the representation would compromise the attorney's ethical responsibilities or the attorney-client relationship. ABA Model Rule 6.1 also recognizes the deeply rooted requirement that lawyers provide pro bono service to underserved populations, encourag-

ing attorneys to dedicate at least 50 hours of pro bono service annually. Relatedly, the commentary to the appointment rules note that a lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.³

But, in most jurisdictions, judges are reluctant to appoint counsel in civil cases under the rationale that doing so may violate the ABA's Model Code of Judicial Conduct. In this article, I examine this rationale and propose a rule change that

A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.³

would permit judges to take a more active role in creating pro bono appointment systems for indigent civil litigants.

ABA Model Code of Judicial Conduct permits judges to encourage lawyers to engage in pro bono services

The Model Code of Judicial Conduct ("the Code"), adopted by the ABA House of Delegates in 1990, provides guidance to judges in their judicial and personal conduct and provides a basis for regulating that conduct. The Code consists of

four canons that provide the overall framework of judicial ethics and under which are numbered rules and comments explaining each rule.

Canon 3 of the Code provides that "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." In February 2007, the ABA House of Delegates amended Rule 3.7, which is entitled Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities. As a response to the increasing frequency of *pro se* representation in the courts, the House of Delegates added subsection (B), allowing judges to "encourage lawyers to provide pro bono publico legal services," and added a new Comment [5], which provides:

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

This new comment was designed to clarify that judges may encourage lawyers to engage in pro bono service generally, apart from situations in which judges may appoint counsel for indigent parties in individual cases.⁴ Examples of permitted judicial encouragement include letters to bar members, resolutions, recognition, and educational tools such as speeches, manuals, or videos.

Idaho Code of Judicial Conduct also permits judges to encourage pro bono activities

Canon 4 of Idaho's Code of Judicial Conduct ("the Idaho Code") requires judges to "conduct the judge's extra-judicial activities to minimize the risk of conflict with judicial obligations." Canon 4C(3), however, allows judges to serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law. It also provides, in a revision adopted by the Idaho Supreme Court in 2010, that Idaho state judges:

(iii) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, *provided that a judge may encourage participation by a lawyer or lawyers in pro bono activities as long as the encouragement is not coercive in nature.*⁵

In announcing this rule change, the Honorable Candy Dale, United States Magistrate Judge for the District of Idaho, wrote "judges are not holding out tin cups and asking for coins from lawyers but we have the opportunity- and obligation- to use our positions to promote and provide access to justice."⁶

Like the Code, the Idaho Code does not define what encouragement could be seen as "coercive." In a formal opinion issued in May 2015, the ABA Standing Committee on Ethics and Professional Responsibility found that it is permissible for a justice to sign a letter encouraging lawyers to seek out pro bono opportunities. In doing so, the Standing Committee recommended evaluating the totality of the facts to determine whether a judge's actions appear "coercive" under Rule 3.1(D) to

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a reasonable person. In other words, whether "the person solicited would feel obligated to respond favorably..." In the opinion, the Standing Committee concludes that a general appeal letter does not lead a person to feel obligated to perform pro bono services or that the lawyer who performs pro bono services is "currying favor with the justice," and is therefore not coercive.⁷

Adoption of Rule 3.7(B) leads to debate about judicial efforts to expand pro bono representation

States unfortunately do not have a consistent approach to the limits of judicial promotion of pro bono. Twenty-seven states have adopted Rule 3.7(B) verbatim or substantively similar language, often including examples of permissible pro bono activities for judges. Some states have placed the language of Rule 3.7(B) in the comments of their codes without substantively altering existing rules. Some states also include provisions dealing with pro bono service under different canons, including canons dealing with extrajudicial activities, fundraising, or solicitations. There is still debate, however, even among states that have adopted Rule 3.7(B), whether (and to what extent) judges can be involved in efforts to expand

pro bono representation without violating their states' codes of judicial conduct.⁸

Despite this debate, the judiciary in several states is taking a more active role to meaningfully affect change and provide civil legal services to the ever-increasing gap. In Oregon, for example, family law judges created the Pro Se Assistance Project in partnership with Legal Aid Services of Oregon where volunteer lawyers provide pro bono legal advice at the courthouse two afternoons a week to pro se litigants.⁹ The U.S. District Court for the District of Colorado created a civil pro bono panel of attorneys and law firms willing to accept appointments to represent pro se litigants of limited means in civil cases.¹⁰

In 2009, the California Judicial Council developed ten pilot projects in seven counties for appointment of counsel in civil cases including housing, domestic violence, child custody, and probate guardianship.¹¹ The District of Columbia Access to Justice Commission and Pro Bono Program have developed a Landlord-Tenant Court to match every litigant living in public or subsidized housing with counsel.¹²

State courts and bar associations are also pioneering technology to increase access to justice, including the

ABA Legal Answers, a website staffed by volunteer lawyers to answer questions from low-income individuals.¹³ Many courts are also using online document-assembly software to help litigants complete court-approved legal forms easily and in a manner acceptable to the courts, using software such as LawHelp Interactive, HotDocs Professional, and the Center for Access to Justice and Technology's A2J Author.

To date, Idaho is still, by most accounts, conservative in its view toward judicial promotion of pro bono, expressly permitting only general appeals letters and avocational activities by its judges.¹⁴ In partnership with the Idaho State Bar and IVLP, Idaho Courts could be a leader in this fight to close the justice gap.

Proposal to standardize judicial activities: Adoption of a New Rule 3.7(C)

While I recognize the challenges in proposing a change to the Model Code of Judicial Conduct, there is a need to standardize the ways in which judges may encourage or promote pro bono. In fact, the rules should not just permit judges to "encourage lawyers to provide pro bono," but rather the rules should permit judges to use their inherent authority to appoint attorneys to represent indigent clients without promise of compensation. The current landscape shows some states allowing only general appeals letters and other avocational activities, while other states permit judges to directly recruit volunteer attorneys.

In light of the ever increasing need for civil legal assistance for low-income individuals and the unavailability of resources and capacity, judges should be permitted to take a more active role in creating pro-

grams in their courts, in partnership with volunteer lawyers programs, to bridge the justice gap.

States should be encouraged to establish the right to pro bono legal counsel in certain discrete practice areas, as many states do in parental termination cases. In *Lassiter v. Department of Social Services*, the U.S. Supreme Court held that there was no absolute right to appointed counsel in parental termination cases but that due process might require counsel.¹⁵ The Court applied the due process test from *Matthews v. Eldridge*,

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in which the court weighs the state interest against the private interest.¹⁶ In *Matthews*, the Court was confronted with deciding to what extent due process requires an evidentiary hearing prior to the termination of disability benefits. The Court concluded that an evidentiary hearing was not required and the administrative procedures prescribed under the Act fully comport with due process.¹⁷

Though not every civil legal need will require a due process analysis under the Fifth Amendment, states could explore a comparable bal-

ancing test when making decisions about a person's right to pro bono legal counsel. Like in *Lassiter*, these cases could be decided case-by-case or state legislatures could provide the right to counsel in certain types of cases, such as housing, personal safety, and other areas involving basic necessities of life. Courts would use their inherent authority to appoint counsel in these cases pursuant to a pro bono appointment system.

Appointments would be made by drawing from a list of active attorneys in that jurisdiction, following the lead of other successful federal court pro bono programs. As a licensed member of the state's bar association, attorneys would agree to pro bono representation in these discrete practice areas unless they are excused under Rule 6.2 or Rule 1.16. Legal services would be provided without compensation. Many scholars have addressed the constitutional limits of uncompensated appointments, which is an important discussion, but one that is beyond the scope of this article.¹⁸

The Model Code of Judicial Conduct should likewise make it expressly clear that it permits judges to take on a more active role by making pro bono appointments. I propose adding a subsection (C) under Rule 3.7, which would read as follows: "A judge may appoint lawyers to represent indigent individuals in civil cases pursuant to a state's pro bono appointment system." This rule change will provide much-needed clarity around the judiciary's role in appointing pro bono lawyers. It will empower states like Idaho to create a pro bono appointment system and will allow judges to use their inherent power to require attorneys to accept appointments to help bridge the justice gap.

Conclusion

It is well known that *pro se* civil litigants represent a burden on the court system. But more importantly, many *pro se* litigants, like the Bhutanese refugee family, are ill-equipped to navigate the complexities of the judicial system. As attorneys have a professional responsibility to provide pro bono legal services to disadvantaged communities, and as the judiciary is uniquely positioned to play a profound role in bridging the justice gap, a critical step toward resolving the legal aid crisis is an express articulation in the Model Code of Judicial Conduct and the Idaho Code of Judicial Conduct that judges are permitted to actively appoint attorneys to provide pro bono legal services to civil litigants. With articulated changes to state laws and the judicial canons, states can dramatically improve access to justice for some of our most vulnerable populations.

Endnotes

1. In 2012, 58% of civil cases (more than 89,000) had a pro se party. Access to Justice Idaho Campaign, available at https://isb.idaho.gov/ilf/aji_campaign/aji.html.
2. Hon. Mary E. Triggiano, John F. Ebbott, *Gideon's New Trumpet*, 82-JUN Wis.Law.5, Wisconsin Lawyer 2009, *Gideon's New Trumpet*.
3. MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. 1.
4. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct's Report, November 2006.
5. Idaho Code of Judicial Conduct 4C(3) b(iii) (2013)(emphasis added).
6. Hon. Candy Dale, *The What and Whys of the Pro Bono Survey*, 53-AUG Advocate (Idaho) 57 (2010).
7. Id. This opinion does not address the situation in which a judge asks a specific lawyer to accept appointment for a

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specific case. For those matters, see ABA Model Code of Judicial Conduct Rules 1.3, 2.13, 2.4, 3.1(D) and ABA Model Rules of Professional Conduct Rule 6.2.

8. Alabama Jud. Inquiry Comm'n Adv. Op. 04-847 (2004) (judges may send letters asking lawyers to participate in state bar operated pro bono programs); Maryland Judicial Ethics Committee, Op. 2013-29 (judges may solicit volunteers for pro bono service to indigent parties by writing to such attorneys individually); Alaska Comm'n on Jud. Conduct Adv. Op. 2004-01 (2004) (judges may not refer lawyers to a particular pro bono program); Kentucky Ethics Comm. of the Judiciary Op. JE-107 (2005) (judges may issue generic letters to the bar but a judge may not urge lawyers to volunteer with a specific pro bono organization); Michigan Stand. Comm. on Prof'l and Jud. Ethics Op. J-7 (1998) (a judge may not solicit individual lawyers to perform pro bono); Florida Supreme Court, Judicial Ethics Advisory Committee, JEAC Opinion 2012-26 (judges may convene meetings in order to solicit attorneys to

volunteer as attorneys ad litem for children in dependency cases).

9. Janine Robben, *Here Come the Judges*, Oregon State Bar Bulletin (2006).
10. Hon. William J. Martinez, *Introducing the District of Colorado's New Civil Pro Bono Panel*, The Colorado Lawyer (April 2014).
11. Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2015* (December 2015).
12. Id.
13. See http://www.americanbar.org/groups/probono_public_service/resources/free_legal_answers.html.
14. Idaho Code of Judicial Conduct, Canon 4(B) and (C).
15. 452 U.S. 18 (1981).
16. 424 U.S. 319 (1976).
17. Id.
18. Jerry Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscriptio*, 3 Geo. J. Legal Ethics 503 (1989-1990).

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