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A NEW PRO BONO FRONTIER: CALIFORNIA'S COURT OF APPEAL

by Fellow Robin Meadow

Although there are never enough pro bono lawyers to fill the need, there have long been many ways for indigent litigants to find legal representation in California's trial courts. But not in California's vast state appellate system – until now.

The experiment is happening in California's Second District, which covers Los Angeles and several other counties. The Court's 32 justices issue some 5,000 opinions annually, making it by far the state's largest and most active appellate district. Fortunately for the subject of this article, it is also home both to a Court of Appeal justice with a career-long commitment to equal access to justice, and to Public Counsel, the country's largest pro bono legal services organization. And now it is home to what is likely the first appellate pro bono program of its kind anywhere.

It began in May 2005, when the Second District's Justice Laurie Zelon convened a small group to brainstorm how to deliver pro bono legal services to unrepresented appellate litigants. In addition to Justice Zelon (who among many other activities has been a long-time member and past chair of the California Commission on Access to Justice), the group included Joseph Lane, the Clerk of the Court; Marilyn Alper, immediate past chair of the Los Angeles County Bar Association's Appellate Courts Committee; Richard Nakamura, the current chair; Dan Grunfeld, then President of Public Counsel; and me.

There was no California state-court precedent for this program. Nor could we use the Ninth Circuit's program as a model, because it involved funding and staffing that were not available to the Second District, as well as a level of court supervision with which the Second District was not comfortable. So we assumed the program would have to be operated largely, if not entirely, by volunteers.

The first task was to try to imagine what the program would look like. What kind of clients would we take? What kind of cases? How would we decide – or should we even try to decide – whether the cases had sufficient merit to warrant the effort to find a pro bono lawyer? And, perhaps most difficult, how would we connect clients and lawyers?



The first two questions were fairly easy, at least in concept. Public Counsel has well-established procedures for determining indigency. We also decided very quickly to limit cases to those involving only a few subjects – family law, housing, benefits, and consumer issues – and involving only one self-represented party.

Merit was a tougher question. Self-represented litigants (*in propria persona*, or *pro per* in California parlance) frequently file meritless appeals. It would be hard to generate enthusiasm if the pro bono lawyer were to open the file and immediately discover that there was no possible basis for the appeal.

We decided to enlist the County Bar's Appellate Courts Committee. Once Public Counsel identified a potential client and case, a member of the Committee would conduct a preliminary review of the case to determine whether there were arguably meritorious issues. The goal would not be to determine the chance of success, but just to screen out obviously frivolous appeals. There would be no attorney-client relationship at this point; the Committee member would work in the background.

Then, if the case passed this test, Public Counsel would seek a volunteer attorney through its usual channels. Since the volunteer would likely be a junior lawyer with little or no appellate expertise (and probably with little appellate expertise in his or her firm), a Committee member would be available as a mentor.

In sum, Public Counsel would provide pro bono expertise and the Appellate Courts Committee would provide appellate expertise. The Appellate Courts Committee enthusiastically signed on. But where were the clients? This proved to be a more difficult problem.

The initial approach was to have Public Counsel staff reach out to potential clients. The Clerk of the Court would identify candidates via the Civil Case Information Statement that every California appellant must file, and forward the names to Public Counsel. Public Counsel would then call the parties to conduct an indigency screening and to learn basic information about the case.

The effort fell flat. As perhaps we should have realized, potential clients were turned off by getting cold calls from someone they didn't know asking if they needed a lawyer. We needed a better way to connect with them.

The breakthrough came in 2006, when Public Counsel obtained a Partnership Grant from the State Bar of California's Equal Access Fund, administered by the Bar's Legal Services Trust Fund Program. This allowed Public Counsel to dedicate a staff member to the project, who would run a clinic using space in the State Office Building provided by the Court of Appeal. The staff member was another breakthrough: Lisa Jaskol, an experienced appellate lawyer who was previously a partner at Horvitz & Levy. In addition to providing walk-in help, she would screen cases and coordinate volunteers.

The clinic opened in February 2007, with Lisa at the helm. Here is how the program works now:

- When a *pro per* appellant files a notice of appeal, the Clerk's initial mailing to that party includes a notice that describes the program. In addition,

the court's website includes a comprehensive description of the program, with a permanent navigation link to it. (The link appears on a special page of resources for self-represented appellate litigants – see www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/selfhelp.htm.) Finally, Public Counsel sends letters inviting *pro per* litigants to submit their cases to Public Counsel for screening to determine whether they qualify for placement in the program. One way or another, interested litigants end up at Public Counsel, which screens them for financial eligibility.

- The clinic is open several days a week. As of this writing, there have been 93 clinic sessions and the clinic has assisted 144 qualifying litigants. Most have a pending or potential appeal in the Second District, and most are appellants. A few have matters in the Los Angeles Superior Court's Appellate Division (mostly cases involving less than \$25,000). The appeals involve a wide variety of subjects, without the limitations in the initial version of the program.
- In addition to the litigants who qualified for assistance, the clinic has given referrals to or turned away some 50-60 others, such as people with criminal matters, with incomes over the IOLTA (Interest on Lawyers Trust Accounts) guidelines, or with trial court matters.
- Lisa can often determine from her initial informal screening that there is no possible merit – where, for example, the notice of appeal is late, or the litigant wants to challenge a factual determination based on disputed evidence. But in about 30-40 cases, she has needed to request further information, which the litigants supply about half the time. Lisa either conducts the further screening herself or refers it out to members of the Appellate Courts Committee. The further screening can range from simply reviewing additional record materials to substantive legal research. (One of my associates recently screened a case that required research on a rather exotic question of judgment finality/appealability. Unfortunately, though, later information made clear that there was no possible merit to the appeal.)

- So far, Lisa has placed four cases with pro bono counsel, all with large firms. In addition, at the request of a staff lawyer for another Court of Appeal district, she found pro bono representation solely for a mediation. The mediation was successful, and the experience suggests expanding the program to include mediated cases.
- One reason for Public Counsel's success in marshaling pro bono lawyers is that it provides training in areas that its pro bono lawyers may not be familiar with but want to learn about. That certainly describes appellate law, especially for junior big-firm lawyers who often can't get any appellate experience or training at their firms. Although *pro per* appeals don't generally involve complex issues of appellate practice, pro bono lawyers still need to know the basics. But unlike trial court litigation, the potential pool of trainers is limited. Here, too, we expect the Appellate Courts Committee to provide the trainers.

I took on the first training with one of my associates. We spent about two hours giving a group of big-firm first-years a road map of the appellate process, along with a promise to answer questions that might arise in their pro bono cases. They were interested and eager, and asked good questions. As part of the process, we developed a basic outline that can serve as a guide for future training.

The program differs from the Ninth Circuit's in almost every detail, as one quickly sees from reviewing the Ninth Circuit's handbook (available at the Ninth Circuit's website at www.ca9.uscourts.gov/ca9/probono.nsf). Among the important differences:

- The Ninth Circuit's program is staffed and funded by the Court.
- The handbook does not identify any indigency requirement and there does not appear to be any financial screening process. Rather, the program focuses on "only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument." Pro Bono Handbook, at 1. One of the reasons the Court looks for cases that involve

oral argument is to provide an incentive for volunteers. In contrast to the Ninth Circuit, in which oral argument is at the court's discretion, in California's appellate courts oral argument is a matter of right, so every volunteer who completes briefing has the chance to argue.

- The Ninth Circuit program generally kicks in after briefing, when staff personnel review the case to determine whether further briefing or oral argument would be helpful.
- Ninth Circuit pro bono counsel are appointed by order of the Court and can seek reimbursement of out-of-pocket costs from the court.

Another California program bears watching. Under the leadership of Justice Maria P. Rivera and **Fellow Paul Fogel**, the First District, which covers the San Francisco Bay Area, launched a program in April 2007. It differs from the Second District's program in two major respects: There is no staffed clinic, and cases do not enter the program until after the record is filed. Otherwise, the basic sequence of events is essentially the same. The *pro per* litigant is contacted and asked whether he or she might want counsel. If so, Bay Area Legal Aid screens the litigant for financial eligibility, and a volunteer lawyer screens the case for potential merit (on the basis, as in the Second District, that the case need not be a winning one, but must rise above frivolous). Then volunteer counsel steps in.

These are exciting experiments. Beyond serving indigent appellate litigants – who so far have had nowhere to turn for pro bono counsel – they will improve the appellate decision-making process through better briefing. And they will provide unusual opportunities for young lawyers to get a taste of appellate practice while performing an important public service. ♦

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