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Supreme Court Advisory Committee P.O. Box 12248 201 W. 14th Street, Room 104 Austin, Texas 78701

Re: Order in Misc. Docket No. 11-9046; Supreme Court Uniform Forms

To the Honorable Members of the Supreme Court Advisory Committee:

I believe that the Justices of the Texas Supreme Court are acting outside their judicial authority by promulgating these forms and subjecting themselves to malpractice claims. In <u>Mireles v. Waco</u> 502 U.S. 9 at 11, the United States Supreme Court held that judicial immunity can only be overcome when (1) the judge engages in non-judicial actions and (2) when a judge acts in complete absence of jurisdiction. [Tab A: Mr. David A. Harris "The Judge Beyond Immunity: Countrywide and Statewide Perspective"].

By preparing pleadings for non-family members, the Justices are acting outside the Code of Judicial Conduct. Said rules clearly state: "G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family." Of course, cases in which people use these forms may be before them and, as such, the Justices may also be violating the Code of Judicial Conduct.

The promulgation of forms is neither judicial nor adjudicative. Forms can and are promulgated by private individuals and private agencies. As such they are not a necessary condition of the adjudicative system. There is no distinction between the act of the Texas Supreme Court promulgating forms and the act of Texas Law Help, Nolo Press or any individual attorney promulgating forms. As such, it is not an adjudicative act and is not protected under judicial immunity. See Tab B Forrester v. White 484 U.S. 219 (1988). At best, the promulgation of forms is an administrative act which is clearly not protected by judicial immunity. At best, the Court could argue the forms are administrative in nature and, as such, may fall under qualified immunity.

However, these forms are being promulgated by the Texas Supreme Court with no constitutional or other authority, as such, the acts are outside of the official role of the Justices and immunity cannot attach. I have read the Constitution of the State of Texas that sets forth the duties of the Texas Supreme Court. I find no reference that would even remotely support The Honorable Justice Wallace Jefferson's assertion that the Texas Constitution requires the court to establish "a judicial climate in which people who lack money to hire a lawyer have a reasonable

chance to vindicate their rights in a court of law." Such a reading of the Texas Constitution would give rise to the right to court appointed representation in Civil Cases hereinafter, "Civil Gideon."

It should be noted that many of the ABA leaders that support the movement towards promulgating forms have advocated the right of court appointed attorneys be expanded to child custody cases. Tab C "Civil Right to Counsel" by Michael Greco. Despite years of having uniform forms in California, or one may argue because of years of having uniform forms in California is overrun with pro se litigants. California has recently signed into law the Sergeant Shriver Bill that provides for Court appointed attorneys in some custody cases and other civil cases. Tab D California Bill Setting forth Civil Gideon in California. Despite having forms in Wisconsin since 2000, the self-represented litigant problem is not getting better it is getting worse. All of the items suggested here by the Texas Access to Justice were implemented in Wisconsin in 2000 and the courts are still having the same problems that we are identifying in Texas today. Tab E. Meeting the Challenge of Self-Represented Litigants in Wisconsin (December 2000). Wisconsin has since set aside funds for court appointed attorneys in divorces, but the Wisconsin budget cannot accommodate the need. Tab F: Judges' Views of Pro Se Litigants Effects on the Courts.

California and Wisconsin and a number of other states have all tried all the concepts proposed by the Texas Access to Justice and none of these "solutions" solved the problem so they are now moving to Civil Gideon. A process that is taking millions in tax payers' dollars to fund an entitlement to government assistances in Civil Cases created by simple forms a dozen of years ago. The Texas Access to Justice Commission is already fully aware the forms will not be enough. The Texas Access to Justice Commission set up a Civil Gideon Commission in May of 2009 as part of a five year plan. We are now in year three of that plan. Tab G. Miscellaneous Texas Equal Access to Justice Documents Discussing Civil Gideon.

The Court can take one of two stances. The first is that the act of creating forms is outside the Texas Constitution and thus not protected by judicial immunity or any other form of governmental immunity. If however, the administration of justice requires the court to provide assistance to those that cannot afford an attorney in divorces with no children and no property, then the only logical step would be the right to court appointed counsel. Many of the poor do not have the capacity to read or write complex legal documents. If equal access to justice is required in all civil cases, including divorces, we are on a slippery slope to civil Gideon. Please note, I am NOT advocating Civil Gideon. I am stating that the stance that the Texas Constitution requires the Texas Supreme Court to provide Access to Justice for all Texans will lead us there.

I believe a careful reading of the Constitution of the State of Texas and the case law interpreting it makes it clear that the courts are not required to provide legal assistance in civil cases such as divorces. I believe the Constitution is clear that the Texas Supreme Court has no mandate to create such forms. I do not believe there is even authority to create such forms. As such, the Justices are not acting in their capacities as Justices nor are they agents of the State of Texas in creating these forms.

The forms do give detailed and incorrect legal advice. As I understand it, the Family Law Foundation has pointed out more than seventy deficiencies in the forms, so I will not go into each and every deficiency that I see with these forms. The forms give more detailed legal advice on the Petition than they do on the Waiver and Answer. As such, the forms favor the Petitioner.

Also, the instruction sheet refers people to the Texas Law Help website that contains forms on a number of matters. None of these forms have been vetted by any committee and some of them are wrong. These forms deal with very complex legal issues that far exceed the no children, no property issues. The divorce forms purport not to divide retirements, when the Texas Law Help Divorce Decree forms do, in fact, allocate retirements. Retirements are allocated in a manner that deviates from Texas Community Property Law. There are actual cases where people have accidentally and forever divested themselves of valuable retirements by using these forms, which purport not to divide retirement. By referring people to the Texas Law Help webpage for further forms, is the Texas Supreme Court liable? I would argue that the individual Justices that vote to promulgate the forms would be liable for any damage the forms may cause.

If the Texas Supreme Court is mandated to help the "poor" (a term not defined under the Texas Constitution) in divorces, is the Texas Supreme Court mandated to help victims of auto accidents, medical malpractice, legal malpractice, tenants, landlords and people in contract disputes? This is clearly not a mandate of the Texas Supreme Court.

All of the forms direct people to seek an attorney from the State Bar of Texas Lawyer Referral Service. I question the authority of a State Governmental Agency, such as the Texas Supreme Court, referring potential clients to any one group. While any attorney may join the Texas Bar Lawyer Referral Service, he or she must agree to give that service a 10% referral fee. Attorneys that handle simple, lower priced divorces simply would not join the referral service. Again, to have a governmental body make such a referral is questionable at best.

The concept that Family Law attorneys have a financial incentive to fight the do-it-yourself divorces is ludicrous at best. I can charge a client \$1,000.00 to \$1,500.00 for an uncontested divorce and ensure that all the paperwork is correct. I can have someone do their own divorce and pay me much more to attempt correct the mess they made. In the first instance, I have happy clients that have paid me and obtained the desired result. In the second instance, I often have an unhappy client that pays me a good deal of money with no guarantee of a good result. In fact, the odds are often against a party attempting to set aside an agreed divorce. The only person who wins when a client uses a do-it-yourself divorce kit, is the attorney hired to clean up the mess.

Consider this: over \$500,000.00 was diverted from legal aid to create the Texas Law Help forms. If they were acceptable, why would the Supreme Court of Texas have appointed a commission to create a new set of forms? Why has it taken this commission a year to create forms the State Bar of Texas does not find acceptable? I would suggest because divorces are never one size fits all. The forms manual the State Bar of Texas sells to Family Law attorneys is 5,186 pages for a reason. Even with these forms at my disposal, I still must draft custom language on a daily basis.

Thank you for taking time to consider my positions.

Sincerely

Patricia Baca

Attorney and Counselor at Law





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2010 Annual Judicial Education Conference

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The Judge Beyond Immunity: Countywide and Statewide Perspective

FACULTY:

Mr. David A. Harris

COURSE DESCRIPTION

Decisions made when judges act in an administrative capacity instead of a judicial capacity continue to plague the judiciary. This session explores case law, explains the differences between "chosen" participation and "mandatory" participation, and provides practical hints and tips to determine whether an act is judicial for purposes of absolute judicial immunity.

[0.75 Ethics]

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ACTIONS BY JUDGES IMMUNITY – LIABILITY – INDEMNITY

By: David A. Harris

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for the State of Texas

DISCLAIMER

The purpose of this disclaimer is to clarify that although I am employed as an Assistant Attorney General, the opinions and arguments stated in this paper do not represent an opinion or official position taken by the Attorney General of the State of Texas. I am neither part of the Administration nor am I a member of the Opinions Committee. General Abbott has authorized me to give presentations and write this paper sharing with the judiciary my personal experience handling cases involving judicial liability as well as my research attempting to predict trends in that area.

ACTIONS BY JUDGES IMMUNITY – LIABILITY – INDEMNITY

INTRODUCTION.

The term judge conjures up an image of an individual wearing a black robe sitting on a raised bench presiding over a trial. If this was the only function that a judge performed there would be little need for this paper. In addition to presiding over trials, your election to the bench will necessarily thrust you into various other roles. It is important for you to understand that not every action taken by a judge is a judicial action. The fact that the duty is mandated by the Legislature does not control whether or not the action is "judicial".

Recently, attorneys have been probing the limits of judicial immunity by bringing suits seeking to hold judges responsible for perceived wrongs. It would behoove you to have a functioning understanding of what constitutes a judicial act since only judicial acts are protected by judicial immunity. Other actions that you take may be protected by other immunities. You should understand the nature of those immunities as well as their limitations. Finally, you should understand that in the event you are found to have engaged in improper conduct which is not protected by any immunities, your indemnification is limited.

Judges, like any other defendant, can be sued in either state or federal court. The doctrine of judicial immunity is well established in state and federal law. The majority of suits against judges have been filed in federal court. For this reason, the main focus of this paper is judicial liability in federal rather than state court. As with every other area of the law, this subject matter is evolving. You should maintain an awareness of legislation and cases which impact judicial immunity during the time that you are on the bench.

TYPES OF IMMUNITIES.

It has long been recognized that public officials are often called upon to make difficult decisions. The doctrine of immunity has developed to facilitate the functioning of good government by providing government officials charged with making difficult discretionary decisions with protection from suit. The primary scope of this paper is judicial immunity. Judicial immunity is but one absolute immunity.

Absolute immunities are immunities from the judicial process as well as damages. The most commonly recognized absolute immunities are: (a) Eleventh Amendment immunity – the immunity from suit that states enjoy in federal court; (b) sovereign immunity – the immunity from suit that states enjoy in both federal and state court; (c) legislative immunity – the immunity enjoyed by federal and state legislators when enacting law; and (d) judicial immunity – the immunity enjoyed by judges when acting in a judicial capacity.

Absolute immunity is immunity from suit and damages. The defendant is entitled to have his immunity determined at the earliest possible time since this immunity is an immunity from the process itself (including discovery). If it is determined that the defendant has absolute immunity, the suit should be dismissed. Generally speaking, the defendant will have the right to take an interlocutory appeal in the event the absolute immunity issue is found against the defendant. Absolute immunities are limited to states, state agencies, state employees acting in their official capacity, persons performing legislative functions, and persons performing judicial functions.

Government officials are not entitled to assert absolute immunity if they are sued in an individual capacity. Rather, most state officials must rely upon official immunity when sued in state court or qualified immunity when sued in federal court. As noted in the preceding paragraphs, an official sued in their official capacity is entitled to raise the absolute immunities of sovereign immunity and Eleventh Amendment immunity. The Eleventh Amendment is an absolute bar to a suit for constitutional violation pursuant to 42 U.S.C. §1983 brought against a state actor. For this reason, civil rights suits will almost always be brought against the state actor in their individual capacity. Similarly, a suit brought against an actor in their official capacity could be barred by sovereign immunity. Recall that to establish a waiver of sovereign immunity it is incumbent upon the plaintiff to establish that their injury was caused by a government employee's use of motor driven equipment or tangible property. If the alleged negligence did not involve property or motor-driven equipment, the only avenue open to an aggrieved plaintiff is to bring suit against the employee in their individual capacity. It is not uncommon for a defendant to assert that they were acting in their official capacity at the time the complained of action arose. Both state and federal law have developed precedent that establishes the fact that the plaintiff is entitled to bring the suit against the defendant in their individual capacity. This theory of law has evolved to allow aggrieved plaintiffs to avoid the harsh result of sovereign and Eleventh Amendment immunity. Qualified and official immunities are immunities from damages, not suit.

If a defendant can establish their entitlement to qualified or official immunity as a matter of law, they may be successful in getting a suit dismissed prior to any discovery. However, it is not uncommon for courts to order limited discovery on the subject of immunity. It is important to remember that qualified and official immunity are immunities from damages rather than the judicial process.

JUDICIAL IMMUNITY.

It is hornbook law, settled in our jurisprudence for over a century, that a judge enjoys absolute immunity from liability for damages for judicial acts performed within his jurisdiction. The doctrine of absolute judicial immunity protects judges from liability for all actions taken in their judicial capacities, so long as they do not act in a clear absence of <u>all</u> jurisdiction. It is well settled that the

¹ Hale v. Harnev, 786 F.2d 688, 690 (5th Cir. 1986).

² See *Mireles v. Waco*, 502 U.S. 9, 1 1-12, 1 12 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356-358, 98 S.Ct. 1099, 1104-1105, 55 L.Ed.2d 331 (1978).

doctrine of absolute judicial immunity protects a judicial officer not only from liability, but also from suit.³

In *Mireles v. Waco*, ⁴ the United States Supreme Court reiterated the long standing rule that absolute judicial immunity is overcome in only two rather narrow sets of circumstances: first, a judge is not immune from liability for non-judicial actions, i.e., actions not taken in the judge's judicial capacity; and second, a judge is not immune for actions, though judicial in nature, taken in a complete absence of all jurisdiction. ⁵ Examination of the cases cited by the Supreme Court in its opinion in *Mireles* to illustrate each such exception to the general rule is illuminating. As an example of the first exception (non-judicial actions), the Supreme Court cited to its opinion in *Forrester v. White*, ⁶ in which it held that a judge was not immune for liability for allegedly having engaged in illegal discrimination when firing a court employee. As an example of the second exception (actions taken in a complete absence of all jurisdiction), the Supreme Court cited to its prior opinion in *Bradley v. Fischer*, ¹⁷ in which it discussed a hypothetical situation in which a judge in a Probate Court with limited statutory jurisdiction attempted to try parties for public criminal offenses.

Judges are absolutely immune against an action for damages for acts performed in their judicial capacity, even when such acts are alleged to have been done maliciously or corruptly. Judicial immunity is not overcome by allegations of bad faith or malice. A judge is absolutely immune for all judicial acts "not performed in a clear absence of all jurisdiction however erroneous the act and however evil the motive. Absolute immunity is justified and defined by the governmental functions it protects and serves, not by the motives with which a particular officer performs those

³ See *Mireles v. Waco*, 502 U.S. at II, 112 S.Ct. at 288.

⁴ 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

⁵ See *Mireles v. Waco*, 502 U.S. at 11-12, 112 S.Ct. at 288.

⁶ 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

⁷ 13 Wall.335, 20 L.Ed. 646 (1972).

⁸ See *Mireles v. Waco*, 502 U.S. I I, 112 S.Ct. at 288; *Stump v. Sparkman*, 435 U.S. at 356-358, 98 S.Ct. at 1104-1105.

⁹ See *Mitchell v. McBryde*, 944 F.2d at 230 *Young v. Biggers*, 938 F.2d. at 569 (n.5); *Dayse v. Schuldt*, 894 F.2d at 172.

¹⁰ See *Mitchell v. McBryde*, 944 F.2d at 230 *Brandley v. Keeshan*, 64 F.3d at 200-201; *Brummett v. Camble*, 946 F.2d 1178-1181

functions."¹¹ The alleged magnitude of the error or the mendacity of the acts is irrelevant."¹² The fact that it is alleged that the judge acted pursuant to a conspiracy and committed grave procedural errors is not sufficient to avoid absolute judicial immunity.¹³ Grave procedural errors do not deprive a judge of all jurisdiction."¹⁴

In determining whether a judge's actions were "judicial in nature" the Federal Court is to consider whether (1) the precise act complained of is a normal judicial function; (2) the acts occurred in the courtroom or appropriate adjacent spaces such as the judge's chambers; (3) the controversy centered around a case pending before the court; and (4) the acts arose directly out of a visit to the judge in his official capacity. A judge's acts are judicial in nature if they are normally performed by a judge and the parties affected "dealt with the judge in his judicial capacity. These four factors are broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular ease. Where a court has some subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes. These factors should he construed broadly in favor of immunity, and should be construed generously to the holder of the immunity and in light of the policies underlying judicial immunity.

¹¹ Young v. Biggers, 938 F.2d. at 569.

¹² *Holloway v. Walker*, 765 F,2d 517, 522-523 (5th Cir. 1985), cert. denied, 474 U.S. 1037 (1985).

¹³ See *Mitchell v. McBryde*, 944 F.2d at 230; *Stump v. Sparkman*, 435 U.S. at 359, 98 S.Ct. at 1106.

¹⁴ See *Malina v. Gonzales*, 994 F.2d at 1125 and *Holloway v. Walker*, 765 F.2d at 522 (holding that mere allegations that a judge performed judicial acts pursuant to a bribe or conspiracy will not suffice to avoid absolute immunity).

¹⁵ See *Malina v. Gonzales*, 994 F.2d at 1124 and *McAlester v. Brown*, 469 F.2d 1280, 1282 (5" Cir. 1972).

¹⁶ Boyd v. Biggers, 31 F.3d at 285 quoting Mireles v. Waco, 502 U.S. at 12, 112 S.Ct. at 288, which in turn quoted Stump v. Sparkman, 435 U.S. at 362, 98 S.Ct. at 1107.

¹⁷ Molina v. Gonzales, 994 F.2d at 1124 and Adams v. Mellhany, 764 F.2d 294, 297 (5" Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

¹⁸ See Malina v. Gonzales, 994 F.2d at 1125 and Adams v. Mcllhanv, 764 F.2d 298.

¹⁹ Adams v. Mcllhany, 764 F.2d 294, 297 (51" Cir. 1985).

There are two tests found in the above discussion of judicial immunity. When gauging your entitlement to judicial immunity you must first determine whether or not you are engaged in a judicial function (see Four Part Test) and if so, whether or not you are acting in an absence of jurisdiction.

When gauging their own conduct, most judges have a tendency to be overly generous in determining whether or not they are entitled to judicial immunity. For this reason, it would be wise for every judge to be familiar with *Forrester v. White*.

FORRESTER v. WHITE.²⁰

Forrester v. White is a United States Supreme Court case that was decided in 1988. The defendant judge had hired, promoted, then demoted, and ultimately fired a female probation officer. The defendant judge was sued for sexual discrimination. Unfortunately, judicial immunity was not raised as a defense to this cause of action until after a jury had returned an adverse verdict at the conclusion of trial. Judicial immunity was raised for the first time on appeal.

The United States Supreme Court ultimately determined that the defendant judge was not entitled to judicial immunity. The Court noted that judges engage in judicial acts as well as acts that just happen to be done by judges. They noted that judges act in administrative, legislative, and executive functions. All of these functions could be legislatively assigned. They went on to discuss the various capacities that judges act in other than the judicial capacity. In discussing what constitutes an administrative decision, they noted that judicial immunity was not available to a county judge who had been charged in a criminal indictment for racial discrimination in the selection of trial jurors for the county courts. They noted the character of the act, not the agent, determines if the immunity applies. They specifically noted that the duty of selecting jurors could have been committed to a private person. In discussing legislative actions, they noted that even though Virginia law delegated adoption of the has code to the Virginia Court, the adoption of such a code was an act of "rule making" rather than "adjudication". They went on to say that in the event the Courts acted to enforce the bar code, such actions would not be judicial. They would be prosecutorial.

The Court then analyzed the facts before them. It opined that while the actions of supervising the Court "... may be important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." They noted that there was no reasonable distinction between the actions of this type taken by judges and any other governmental office. Finally, they determined that qualified immunity would be sufficient to provide the judge with sufficient safeguards to make a judge feel comfortable in discharging an incompetent employee.

²⁰ 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

A strict reading of *Forrester* suggests that only actions taken in the narrow confines of the courtroom are protected by judicial immunity. This is the position pressed by plaintiff's attorneys seeking to subject judges to liability. They will always try to paint the "complained-of conduct" as an administrative act since it is undisputed that such actions are no longer protected by any type of judicial immunity. As a judge you will be required to participate in functions other than presiding over your court. The status or nature of most of these functions have yet to be determined by any court. In the time that I have represented judges, I have learned that these additional duties are commonly referred to as "administrative duties". I have encouraged judges to stop referring to these additional tasks in this manner since it strengthens the plaintiff's case that they are administrative, and therefore not protected by judicial immunity. A better way to characterize these actions is to refer to them as extra judicial actions.

Similarly, judges will commonly refer to themselves as a board or other type of identifiable body when discharging their legislatively-mandated duties in areas of adult probation supervision, etc. Again, the establishment of a board suggests something other than a judicial act.

The better practice would be to study the statute that creates the duty. If the statute recognizes that a board has been created, there is no harm to referring to yourself by that title. If the statute is silent, I recommend that you refer to yourselves as a collection of judges rather than a board which has administrative connotations.

JUDICIAL IMMUNITY LIMITATIONS.

Since 2000, there has been an increase in the number of suits filed against judges by attorneys in Texas. Fortunately, most of these cases have been disposed of at the trial court level, and no appeal has been taken. This section is included so that you are aware of the types of challenges that are being made to judicial immunity.

Alexander v. Tarrant County. A probationer being housed at a shock incarceration facility died from a rare staph infection. The parents of the deceased brought a civil rights suit against the Tarrant County Criminal judges asserting that they had breached their administrative duties to the deceased probationer by allowing a private sector contractor to operate the facility. The Texas Code of Criminal Procedure mandates that sole responsibility for the supervision of probationers rests with the judiciary. Moreover, Chapter 76 of the Texas Government Code mandates the establishment of Adult Probation Departments. The federal judge determined that the defendant judges were not entitled to judicial immunity. His rationale was that the statute entitled rather than mandated judicial participation in the Adult Probation Departments. This test was never reviewed by the Fifth Circuit. The case was subsequently dismissed due to Plaintiff's failure to state a claim against the judges sufficient to overcome an assertion of qualified immunity. Qualified immunity will be discussed below. Plaintiff agreed to forego the appeal of this dismissal as a part of a settlement of an ancillary case.

Davis v. Tarrant County. Plaintiff is a criminal defense attorney practicing law in Tarrant County, Texas. He applied to be placed on the felony appointment list mandated by the Fair Defense Act. The district judges voted to exclude Plaintiff from the list, and suit was brought against the district judges asserting that the passage of the Fair Defense Act changed the character of appointment of counsel from a judicial act to an administrative act. The federal judge dismissed this case based upon judicial immunity. On April 8, 2009, the Fifth Circuit affirmed the trial court's dismissal.²¹ This case contains a good discussion of the "nature of the act" analysis. Ultimately, the Fifth Circuit determined that even though the creation of a list of attorneys has been determined to be an administrative act,²² the creation of a list under the Fair Defense Act is judicial.

On Page 226, the Court noted:

... the appointment process must be viewed holistically. In this case, the selection of applicants for inclusion on the list, and the actual appointment of attorneys in specific cases occur as part of an appointment process that cannot be divided in a principled way in judicial and administrative act. In light of the fact that the defendant judges have very limited discretion in deciding which attorney to appoint in a specific case - they may only deviate from the rotation system for good cause – decisions about which attorneys should be placed on the wheel functionally determine which attorney will actually be appointed in a particular case.

Arguably, this determination puts the Fifth Circuit in conflict with the Second Circuit.

Dunn v. Kennedy. This is another Fair Defense Act case brought by an attorney who was removed from the indigent counsel list. Suit was brought against the judge that recommended that he be removed as well as a court staff member. The federal judge dismissed this case based upon judicial immunity. An appeal was taken to the Fifth Circuit. The Fifth Circuit upheld the finding of judicial immunity, but determined that the case should not be published. Pursuant to Fifth Circuit rules, this case has no precedential value.

Durrance v. Gabriel. In this Fair Defense Act case, an attorney was removed from the felony appointment list by the district judges. Plaintiff asserts that the judges are acting in an administrative capacity when developing the county-wide plans, and that they are acting in a ministerial capacity when they place or remove attorneys on the list. Judge Shell dismissed this case on the basis of judicial immunity relying upon Davis v. Tarrant County.

²¹ 565 F.3d 214 (5th Cir. 2009)(writ denied), 130 S.Ct. 624 (2009).

²² Mitchell v. Fishbein, 377 F.3d 157 (2nd Cir. 2004).

Richard v. Keller. The surviving spouse of an executed inmate sued the presiding judge of the Court of Criminal Appeals alleging that she had interfered with the offender's attempt to file a stay of execution. The Texas Rules of Appellate Procedure specifically provide that documents can be filed in an appellate court with the clerk or any judge willing to accept the filing. Accordingly, the federal judge determined that Plaintiff's suit was barred by judicial immunity.

Stagner v. Blake. The Plaintiff is an attorney that was taken into custody by the court bailiff after he refused an order from the Court to tender a document to the bench. After a short pause, he was returned to the courtroom and asked whether or not he had been held in contempt. The Court indicated that he had not. Plaintiff alleged that without having held him in contempt, the Court lacked jurisdiction to have him taken into custody. He alleged that the Court was guilty of false arrest and improper detainment. This state court case was dismissed based upon judicial immunity.

OTHER JURISDICTIONS.

McKnight v. Middleton.²³ Plaintiff was involved in a child custody case. He alleges that the judge racially discriminated against him. He also asserted that the trial judge exceeded her authority in approving a wire tap and recording his conversations. The Court held that while these decisions were not necessarily "legally sound" the discretion to order the wire tap was within the Court's authority, and protected by immunity.

Huminski v. Corsones,²⁴ The plaintiff was a harsh and frequent critic of the Vermont judges. Orders were issued excluding him from the courthouse. He was held in contempt and jailed. Judicial immunity was upheld because Vermont law vested responsibility for courthouse security in the judiciary. This opinion illustrates the confusion that can arise in determining "judicial capacity." This opinion appears to be at odds with Forrester v. White. Recall, the Supreme Court noted that just because the task is delegated to the judiciary, it is not necessarily "judicial or adjudicative." Courthouse security could have been delegated to the Sheriff's Department or several other Executive Branch officials. I would encourage you to keep that in mind if your county asks you to become involved in decisions involving courthouse security.

Jennings v. Patton.²⁵ Plaintiff sued the judge alleging that the judge had falsely accused him of bribery. Plaintiff alleged that he had hired an attorney to sue the judge for wrongful imprisonment. The attorney contacted the judge, and offered to settle the claim prior to filing suit. The judge accused both the plaintiff and his attorney of extortion, and caused plaintiff to be indicted. Defendant judge alleged that he was acting in a judicial capacity. In ruling against the defendant judge, the Court determined that at the summary judgment stage it must accept the plaintiff's facts as true. Under those facts, the Defendant judge was accused of making false statements to the grand

²³ 2010 WL 1221431 (E.D.N.Y.).

²⁴ 396 F.3d 53 (2nd Cir. 2005).

²⁵ 2010 WL 706497 (S.D.Miss.).

jury and withholding exculpatory evidence. The visit of plaintiff's attorney to the judge was not in official capacity. Rather, plaintiff's counsel was exploring the possibility of settling a claim prior to bringing suit. Under these circumstances, the alleged actions of the defendant judge were not judicial or protected by judicial immunity.

QUALIFIED IMMUNITY.26

You will recall that when the United States Supreme Court decided *Forrester v. White*, they determined that depriving judges of judicial immunity in the employment context should not adversely impact the operation of the court. They specifically stated that the defenses available in the doctrine of qualified immunity should be sufficient to allow for the efficient operation of the court in personnel matters.

The doctrine of qualified immunity shields governmental officials from civil liability "to the extent that their conduct is objectively reasonable in light of clearly established law." The burden of negating the defense of qualified immunity lies with the plaintiff. When a motion for summary judgment is before the Court on qualified immunity, the district court must make two determinations: (1) whether the conduct at issue, as a matter of law, is unreasonable in light of clearly established law; and (2) whether there exists a genuine issue of material fact that the defendant actually engaged in such conduct.²⁹

Qualified immunity protects a defendant from suits arising from the performance of their discretionary duties so long as they act in good faith in the exercise of duties that are within the scope of their authority.

This immunity attaches to an official's actions when his or her job requires the exercise of personal judgment and discretion. The purpose of such immunity is to insulate government employees from personal liability and from the harassment of litigation.³⁰ Moreover, it is also a prerequisite to

²⁶ Official immunity is the state court counterpart to qualified immunity. These two immunities are very similar, but do have some minor differences which are beyond the scope of this paper. A good discussion of official immunity can be found in *City of Lancaster v*. *Chambers*, 883 S.W.2d 650 (Tex. 1994).

²⁷ *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004)(*en banc*)(quoting *Harlow v. Fitzgerald*, 457 US. 800, 818 (1982).

²⁸ Foster v. City of Lake Jackson, 28 F.3d 425, 428 (5th Cir. 1994).

²⁹ Kinney, 367 F.3d at 346; see also Conroe Creosothing Co. v. Montgomery County, 249 F.3d 337, 350 (5th Cir. 2001).

³⁰ Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d. 396 (1982). See also Saucier v. Katz, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

liability that the law that the defendant allegedly violated was "clearly recognized" at the time of the violation.³¹ The Supreme Court has encouraged trial courts to make the qualified immunity determination as early as possible. If the defendant can establish his entitlement to qualified immunity as a matter of law, it functionally can be as effective as judicial immunity.

Texas is in the Fifth Circuit. The Fifth Circuit has mandated that once a defendant raises qualified immunity in their answer, the plaintiff must overcome the assertion of qualified immunity with specific (non-conclusory) allegations sufficient to overcome the assertion of qualified immunity. ³²In the Alexander case, the defendant judges took the position that the plaintiffs had failed to allege that each of them had engaged in individual acts which both violated clearly established law and that were unreasonable. Judge Means agreed that the allegations against the defendant judges were conclusory in nature, and were not factually specific. He dismissed Plaintiffs' cause of action for failure to slate a claim.

The Fifth Circuit does not allow any discovery until the plaintiff has met this pleading threshold. Other circuits are not as rigid in their interpretation of qualified immunity. Many courts allow limited discovery on the subject of qualified immunity. In most instances, a denial of qualified immunity is immediately appealable. However, the plaintiff can successfully defeat an interlocutory appeal if they can establish that the analysis of qualified immunity rests in any part on a factual determination.

As a general rule, a defendant can only be held liable for a violation of 42 U.S.C. § 1983 if they were actually personally involved in the action that allegedly brought about a harm. The Fifth Circuit has held that lawsuits against supervisory personnel based on their positions of authority are claims of liability under the doctrine of respondent superior which generally does not apply in § 1983 cases.³³ A supervisor may be held liable if there is personal involvement in a constitutional deprivation, a causal connection between the supervisor's wrongful conduct and a constitutional deprivation, or if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind a constitutional deprivation.³⁴

It should be noted at this juncture that qualified immunity does not attach to anything other than discretionary actions. If an action is ministerial (mandated by law or a rule), qualified immunity does not attach. An important distinction should be drawn between duties which are legislatively mandated, and those which allow the discretion in how the duty is to be performed to be left up to the actor.

³¹ Will v. Hallock, 129 S.Ct. 952, 163 L.Ed.2d 836 (2006).

³² Wicks v. Mississippi State Employment Servs., 41 F.3d 991 (5t Cir. 1995).

³³ Williams v. Luna, 909 F.2d 121 (5th Cir. 1990).

³⁴ Thompkins v. Belt, 828 F.2d 298 (5th Cir. 1987).

The clearest example of this type of distinction can be found in a suit against a law enforcement official for abuse of force. The rule or law may mandate that the official has an obligation to maintain order and discipline while leaving the means and methods of maintaining order to the discretion of the official.

REPRESENTATION.

Hopefully, you will make it through your entire judicial career without ever needing to be familiar with this section. However, recent trends indicate that it is less likely now than at any time in the past. When a judge is sued, he/she should immediately determine the appropriate contact person/agency. Generally speaking, state judges are entitled to representation from the Attorney General's office. As a general rule, county judges may be defended by the county attorney, district attorney, or a private insurance company.³⁵

Obviously, being a defendant in a lawsuit can be a stressful situation. For this reason, I would recommend that you make the appropriate inquiries to determine the proper procedure for transmitting suit papers prior to being sued in a particular case. I recommend that state judges fax a letter requesting representation to the attention of the First Assistant in the Office of the Attorney General. The fax should include the citation and suit papers. The original of these documents should then be put in the mail so that the attorney that is ultimately assigned the case will have everything that was served. The judge should retain a copy of all documents for their own file, and to be used in the event the faxed and mailed documents are lost or mis-delivered. County judges should check with the appropriate county officials to determine who would represent them in the event that a lawsuit is filed. The county judge should become familiar with the process that is to be followed when the judge is sued. If the county provides an insurance policy, ³⁶ it would be wise for the judge to stay familiar with the company providing coverage.

INDEMNIFICATION.

Most judges are surprised to learn that there are limits on the indemnification available to them. The state indemnification statute is found in §104.001 *et seq.* of the Tex. CIV. PRAC. & REM. CODE. State indemnification for state judges is limited to \$100,000 per person and \$300,000 per occurrence. Unfortunately, county judges do not have a statute analogous to §104.001 *et seq.* of the Tex. CIV. PRAC. & REM. CODE which clearly sets out their indemnification. This information is best obtained from the local officials in your county since there is apt to be variations from county to county. I would recommend county judges check with the appropriate county authorities to determine any limitations on their indemnification.

³⁵ In 2005, Ch.76 of the TEX. GOV'T CODE was amended to give county judges the option of being represented by the Attorney General's office when the suit against them arises from actions they were taking pursuant to Ch.76 of the TEX. GOV'T CODE.

³⁶ Policies can also include district judges.

In the *Alexander v. Tarrant County* case discussed above, the plaintiffs had obtained a verdict against the private sector defendant in the amount of \$40,000 (inclusive of punitive damages). Nineteen judges were defendants in the companion civil rights case. The \$40 million verdict was an indication of the potential exposure facing the nineteen judges in the civil rights case. Understandably, few of the nineteen judges felt a great deal of comfort when they learned that the available indemnification was limited to \$300,000. Judges should identify, and become familiar with, any statutes which provide for indemnification as well as any exceptions or limitations placed on the indemnification provided.

INSURANCE.

As referenced above, many counties purchase insurance policies for their judges. You should remember that an insurance policy is nothing more than a contract. If you are the beneficiary of such a contract, take care that it does not provide you with a false sense of security. The better practice would be to obtain a complete copy of the policy. Time should be spent determining what acts and/or omissions are actually covered by the policy. Equal time should be spent in the "exceptions" section to determine any limitations on the coverage discussed in the policy. Some policies cover liability arising from "judicial actions". Obviously, this type of policy is worthless since a judge has absolute immunity when performing these types of functions. If you are going to obtain an insurance policy, care should be taken to insure that the policy will coverage administrative and/or extra judicial capacity claims.

INJUNCTIVE/DECLARATORY RELIEF.

Be aware of the fact that judges are subject to injunctive and declaratory relief just like any other official. Such a suit on the equity side of the docket also avoids the bar of sovereign and Eleventh Amendment immunity. While there is no risk that a judge will be required to pay monetary damages, a prevailing plaintiff is entitled to recover court costs and attorney's fees.

RECUSAL AND COMPELLED TESTIMONY.

Normally, the Office of the Attorney General does not become involved in recusals. A recusal is not a suit against a judge, and generally, a judge should not be a participant in the recusal process once the matter has been referred to the presiding judge.

In the recent months, parties and attorneys have attempted to depose and/or subpoena judges to testify in the recusal process. Subpoenas have been served on the judge sought to be recused, judges that have decided previous recusal cases involving the judge to be recused, and the presiding judge of the judicial region who assigns judges to hear recusal matters. Judges have also been subpoenaed to testify in a criminal case where the defendant's attorney was attempting to disqualify the district attorney's office from handling the appeal.³⁷ In another instance, a state district judge was

³⁷ The trial judge had previously recused himself from handling any post-judgment motions.

subpoenaed to testify in federal court because he had signed a search warrant. The attorney for the criminal defendant advanced theory that the judge's campaign literature promising to "get tough on crime" evidenced a bias which predisposed the judge to favor law enforcement, and grant warrants even if probable cause was lacking.

This is actually one circumstance where it is better to be in federal court. The federal system has adopted the "Mental Processes Rule." The decision of judges are afforded strong protection by the Mental Processes Rule. Federal courts have acknowledged that if judges were constantly subjected to the threat of being subpoenaed to explain their reasoning behind their decisions and acts it would adversely impact the integrity of the courts. Courts have refused to issue to subpoena for testimony of judges in all but the "most extreme and extraordinary circumstances." Unfortunately, Texas courts have not actually embraced the Mental Processes Rule. This rule was discussed by the First District Houston Court of Appeals in *Tate v. State*, 834 S.W.2d 566, 570 (Tex.App.--Houston [1st Dist.] 1992). In discussing the Mental Processes Rule, the Court stated:

Texas law has not established circumstances or conditions under which a judicial officer might properly be compelled to articulate his reasons for a decision in a particular case, and we do not propose to state such a rule here. However, we conclude that if such a rule were to established, the better rule would be to require, at the very least, a threshold showing of improper conduct on the part of the judge that would justify compelling him to testify. (*Emphasis added.*)

However, more recent opinions suggest that the Mental Processes Rule has been informally adopted. It was cited as the reason for quashing a judge's subpoena in *Thomas v. Walker*, 860 S.W.2d 579, 582 (Tex.App. Waco 1993). In *Sims v. Fitzpatrick*, 288 S.W.3d 93, 102 (Tex.Civ.App.--Houston [1st Dist.] 2009), the Court suggests in a footnote that the rule recommended in *Tate v. State* actually applies.

. . . Had appellants preserved their general complaint that the assigned judges erred in quashing the subpoenas issued to the trial judge, appellants still were required to show extraordinary circumstances to justify compelling the trial judge to testify regarding her mental processes in arriving at her decisions. *Tate v. State*, 834 S.W.2d 566, 569-70 (Tex.App. Houston [1st Dist.] 1992, pet. ref'd); *Thomas v. Walker*, 860 S.W.2d 579, 582 (Tex.App. Waco 1993, no writ). Here appellants presented no evidence at the recusal hearings. In their "bill of exceptions," appellants referred to statements made

³⁸ United States v. Morgan, 61 S.Ct. 999, 104 (1940).

³⁹ *Gary v. State of Louisiana Dept. of Health and Human Resources*, 861 F.2d 1366, 1368 (5th Cir. 1988)(quoting *U.S. v. Dowdy*, 440 F.Supp. 894, 896 (W.D.Va. 1977)).

by the trial judge during various hearings. Thus, appellants failed to make a threshold showing of improper conduct on the part of the trial judge that would have justified compelling her to testify. *Tate*, 834 S.W.2d at 569-70.

The *Tate v. State* rule was also cited as authority in the unpublished opinion of *White v. State*, 202 WL 440795 (Tex.App. Amarillo).

The Mental Processes Rule is not the only restriction on judicial testimony. In *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991), the Texas Supreme Court engaged in an extensive discussion of the propriety of judicial testimony. In this original mandamus proceeding, the Court held that a retired district judge who continues to serve as a judicial officer by assignment could not testify as an expert witness. Obviously, this case was a little different than those discussed above. In this case, the judge was a willing participant in the judicial process. On at least two occasions, I have utilized this case to keep former judges from testifying.

Cannon Two of the Code of Judicial Conduct specifically restricts judges from testifying as a character witness. On Page 238, the Court also noted:

There is yet another reason for restricting judges from testifying as witnesses. The appearance of a judge as a witness threatens, rather than promotes, "public confidence in the integrity and impartiality of the judiciary." A judge who testifies that one party to a case does or does not have good character seems, at least, to be taking sides in the litigation. This is inconsistent with the role of a judge. The risk of confusion of the roles of witness and judge when the same person acts as both can create an appearance of impropriety.

However, this same opinion makes it very clear that there are circumstances where it is appropriate for a judge to testify. The standards set out in Cannon Ten provide guidance when judicial testimony is appropriate. "Although these standards are invoked whenever a judge testifies, we do not hold that they prohibit judges from ever testifying in Court." Certainly, a judge must, like anyone else, testify to relevant facts when it is within his knowledge when summoned to do so. Obviously, these concerns are diminished or dispensed with if a jury is not involved. Moreover, judicial testimony is allowed when a judicial witness is unavailable.

Texas Rule of Civil Evidence 605 provides another limitation on judicial testimony. See *Bradley v. State*, 990 S.W.2d 245, 248 (Tex. 1999) and the unpublished opinion of *Arafiles v. State*, 202 WL 27311 (Tex.App.—Corpus Christi).

⁴⁰ Joachim at 239.

Caperton v. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009).

I have included this opinion in the paper because it could represent a new area of potential liability. In a majority decision, the United States Supreme Court determined that a West Virginia Supreme Court Judge's failure to recuse himself constituted a violation of a party's right to due process.

The facts set in the opinion are fairly egregious. Plaintiffs had obtained a judgment against Massey Coal in the amount of \$50 million. The West Virginia Supreme Court reversed this judgment. One of the Supreme Court judges who had been part of the majority had denied a recusal motion. The basis for the recusal motion was the fact that the CEO of Massey Coal had contributed \$3 million to his election campaign. Justice Kennedy wrote the majority opinion. His reasoning is both persuasive and curious. The West Virginia judge determined that there was not actual bias and that he had acted impartially. On Page 2263, the Court states: "We do not question his subjective findings of impartiality and impropriety. Nor do we determine there was actual bias." On Page 2265, the Opinion states:

... due process "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136, 75 S.Ct. 623. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence coupled with temporal relationship between the election and the pending case —" "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." "*Lavoie*, 475 U.S., at 825, 106 S.Ct. 1580 (quoting *Monroeville*, 409 U.S., at 60, 93 S.Ct. 80, in turn quoting *Tumey*, 273 U.S., at 532, 47 S.Ct. 437). On these extreme facts the probability of actual bias rises to an unconstitutional level.

We have all heard the maxim, "hard facts make bad law." Assuming the facts set forth in the majority opinion are complete and accurate, it is difficult to argue that the West Virginia judge should not have recused himself. Unfortunately, this opinion was not written by a trial court or a lower appellate court. The problems with the <u>effect</u> this opinion is set forth in the dissent written by Chief Justice Roberts. On Page 2267, he begins by noting:

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or appearance of bias were never a bias for disqualification, either at common law or under our constitutional precedence. Those issues were instead addressed by legislation or court rules.

The majority opinion recognizes a "probability of bias" basis for recusal which can amount to a due process violation. On Page 2268, Justice Roberts notes:

In any given case there are a number of facts that could give rise to a "probability" or "appearance" of bias: friendship with a party or lawyer, prior employment experience, membership in club or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a "probability of bias." Many state *statutes* require recusals based upon a probability or appearance of bias, but "that alone would not be a sufficient basis for imposing a *constitutional* requirement under the Due Process Clause." *Lavoie*, *supra* at 820, 106 S.Ct. 1580 (*emphasis added*).

On Pages 2269-2272, Justice Roberts lists 40 theoretical circumstances which could now require recusal based upon the constitutional due process violation of "probability of bias."

The opinion does not contain any discussion of any liability on the part of the judge that failed to recuse himself. Arguably, recusal is still a "judicial" action which should mean the judge would be insulated from paying a party monetary damages for the alleged constitutional violation. However, as discussed above, there is a possibility of finding that a litigant is entitled to equitable relief. In such circumstances, the judge could be responsible for paying the prevailing parties costs and attorney's fees. So long as the *Caperton* rules stays confined to these facts it should not create much of a problem for the judiciary. However, the judges should keep an eye on this area of the law to be aware if the due process violation is expanded into other areas.

CONCLUSION.

We have seen that all actions taken by judges are not judicial in nature. The character of the action determines whether or not an act taken by a judge will be protected by judicial immunity. Judges and other governmental officials can act in either an official or individual capacity. If a judge is engaged in a non-judicial function, he may be protected by legislative or prosecutorial immunity. If the action is administrative in nature, the judge is only protected by the defense of official immunity.

If a judge is found to be liable for an improper action for which no immunity attaches, he is personally responsible for any damages assessed against him in excess of any potential available indemnification limits afforded by state statute.

WHAT YOU CAN DO.

I would encourage every judge to become proactive in understanding the potential scope of their liability as well as the indemnification potentially available to protect them in the event of an adverse verdict. In addition to becoming acutely familiar with the test to be utilized in determining when actions are judicial, the judge should familiarize themselves with the interpretation of qualified immunity.

I would encourage judges to determine the appropriateness of their involvement in potentially dangerous situations by applying the same test that they would apply in determining whether or not they would allow expert testimony in their court. Specifically, if the judge, by education, training. or experience does not possess any greater expertise than a layperson in a particular subject area, they should he loathe to impose their judgment or opinion in any situation.

If employment decisions are being made in a department or agency over which the judge has supervisory control, the judge should be reluctant to interfere with such decisions unless the judge possesses professional knowledge or expertise which equips them to do so. Put another way, the judge's personal preferences and personality should not create, or be the basis of conflicts.

I would recommend that you create a notebook containing the statutes which impose any duties and/or obligations on you. Be familiar with the wording of the statute, and at the time you are performing the duties mandated by the statute be sensitive to the fact that you may be engaged in an administrative acts.

Keep in mind that if you are acting in an administrative capacity your only immunity may be qualified immunity. Qualified immunity only attaches to discretionary tasks. Put another way, if the statute mandates that you take a particular action, and you do not do so, you are <u>not</u> performing a discretionary task, and qualified immunity will <u>not</u> be available.

Finally, I would encourage you to start thinking and acting like judges. Obviously, each of you had to select a political party to reach the bench that you now hold. Political infighting in the judiciary will only inure to the benefit of those seeking to expand judicial exposure. As noted above, the litmus test in qualified immunity is a "reasonableness" standard. Put another way, consistency among the judiciary will inure to the benefit of all judges. Similarly, open communication on the proper way to handle challenges facing judges should lead to more consistency thereby strengthening the potential defense of qualified immunity.

You should also be aware of the fact that a matter has been handled in a particular way in the past is not a guarantee that there will not be future liability. Talk to more experienced judges, and benefit from their experience. You should also take the time to examine their recommendations in the new light of potential judicial immunity, and determine whether or not improvements can be made to existing systems.



B

U.S. Supreme Court

Forrester v. White, 484 U.S. 219 (1988)

Forrester v. White

No. 86-761

Argued November 2, 1987

Decided January 12, 1988

484 U.S. 219

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE SEVENTH CIRCUIT

Syllabus

Respondent, an Illinois state court judge, had authority under state law to appoint and discharge probation officers. After hiring petitioner as a probation officer and later promoting her, respondent demoted and then discharged her. Petitioner filed a damages action in Federal District Court under 42 U.S.C. § 1983, alleging that she was demoted and discharged on account of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the jury found in her favor, the court granted summary judgment to respondent on the ground that he was entitled to absolute immunity from a civil damages suit. The Court of Appeals affirmed.

Held: A state court judge does not have absolute immunity from a damages suit under § 1983 for his decisions to demote and dismiss a court employee. Pp. 484 U. S. 223-230.

(a) Because the threat of personal liability for damages can inhibit government officials in the proper performance of their duties, various forms of official immunity from suit have been created. Aware, however, that the threat of such liability may also have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner, this Court has been cautious in recognizing absolute immunity claims other than those decided by constitutional or statutory enactment. Accordingly, the Court has applied a "functional" approach under which the nature of the functions entrusted to particular officials is examined in order to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those

functions. Even with respect to constitutional immunities granted for certain functions of Congress and the President, the Court has been careful not to extend the scope of protection further than its purposes require. Pp. <u>484 U. S. 223</u>-225.

(b) Judges have long enjoyed absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. It is the nature of the function performed -- adjudication -- rather than the identity of the actor

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who performed it -- a judge -- that determines whether absolute immunity attaches to the act. Pp. 484 U. S. 225-229.

(c) Respondent's decisions to demote and discharge petitioner were administrative, rather than judicial or adjudicative, in nature. Such decisions are indistinguishable from those of an executive branch official responsible for making similar personnel decisions, which, no matter how crucial to the efficient operation of public institutions, are not entitled to absolute immunity from liability in damages under § 1983. The Court of Appeals reasoned that the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions. However true this may be, it does not serve to distinguish judges from other public officials who hire and fire subordinates. In neither case is the danger that officials will be deflected from the effective performance of their duties great enough to justify absolute immunity. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions, a question not decided here. Pp. 484 U. S. 229-230.

792 F.2d 647, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, WHITE, MARSHALL, STEVENS, and SCALIA, JJ., joined, and in all but Part II of which BLACKMUN, J., joined.

JUSTICE O'CONNOR delivered the opinion of the Court. *

This case requires us to decide whether a state court judge has absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate

court employee. The employee, who had been a probation officer, alleged that she was demoted and discharged on account of

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her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. We conclude that the judge's decisions were not judicial acts for which he should be held absolutely immune.

Ι

Respondent Howard Lee White served as Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court in Jersey County. Under Illinois law, Judge White had the authority to hire adult probation officers, who were removable in his discretion. Ill.Rev.Stat., ch. 38, • 204-1 (1979). In addition, as designee of the Chief Judge of the Seventh Judicial Circuit, Judge White had the authority to appoint juvenile probation officers to serve at his pleasure. Ill.Rev.Stat., ch. 37, • 706-5 (1979).

In April, 1977, Judge White hired petitioner Cynthia A. Forrester as an adult and juvenile probation officer. Forrester prepared presentence reports for Judge White in adult offender cases, and recommendations for disposition and placement in juvenile cases. She also supervised persons on probation and recommended revocation when necessary. In July, 1979, Judge White appointed Forrester as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, a position that carried increased supervisory responsibilities. Judge White demoted Forrester to a nonsupervisory position in the summer of 1980. He discharged her on October 1, 1980.

Forrester filed this lawsuit in the United States District Court for the Southern District of Illinois in July, 1982. She alleged violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, and § 1 of the Civil Rights Act of 1871, Rev.Stat. § 1979, as amended, 42 U.S.C. § 1983. A jury found that Judge White had discriminated against Forrester on account of her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. The jury awarded her \$81,818.80 in

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compensatory damages under § 1983. Forrester's other claims were dismissed in the course of the lawsuit.

After Judge White's motion for judgment notwithstanding the verdict was denied, he moved for a new trial. The District Court granted this motion, holding that the jury verdict was against the weight of the evidence. Judge White then moved for summary judgment on the ground that he was entitled to "judicial immunity" from a civil damages suit. This motion, too, was granted. Forrester appealed.

A divided panel of the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment. The majority reasoned that judges are immune for activities implicating the substance of their decisions in the cases before them, although they are not shielded "from the trials of life generally." 792 F.2d 647, 652 (1986). Some members of a judge's staff aid in the performance of adjudicative functions, and the threat of suits by such persons could make a judge reluctant to replace them even after losing confidence in their work. This could distort the judge's decisionmaking, and thereby indirectly affect the rights of litigants. Here, Forrester performed functions that were "inextricably tied to discretionary decisions that have consistently been considered judicial acts." *Id.* at 657. Unless Judge White felt free to replace Forrester, the majority thought, the quality of his own decisions might decline. The Court of Appeals therefore held that Judge White was absolutely immune from Forrester's civil damages suit. In view of this holding, the court found it unnecessary to decide whether the District Court had erred in granting Judge White's motion for a new trial.

In dissent, Judge Posner argued that judicial immunity should protect only adjudicative functions, and that employment decisions are administrative functions for which judges should not be given absolute immunity.

In *Goodwin v. Circuit Court of St. Louis County, Mo.,* 729 F.2d 541, 549, *cert. denied*,469 U.S. 828 (1984), the United

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States Court of Appeals for the Eighth Circuit held that a judge was not immune from civil damages for his decision to demote a hearing officer. We granted certiorari, 479 U.S. 1083 (1987), to resolve the conflict.

II

Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and

appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that, above all, are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials

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should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity. See, e.g., Scheuer v. Rhodes, 416 U. S. 232 (1974); Butz v. Economou, 438 U. S. 478(1978); Harlow v. Fitzgerald, 457 U. S. 800 (1982).

This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S.Const., Art. I, § 6, cl.

1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require. See, e.g., Gravel v. United States, 408 U. S. 606, 408 U. S. 622-627 (1972); see also Hutchinson v. Proxmire, 443 U. S. 111, 443 U. S. 123-133 (1979); Doe v. McMillan, 412 U. S. 306 (1973); United States v. Brewster, 408 U. S. 501 (1972); United States v. Johnson, 383 U. S. 169 (1966); Kilbourn v. Thompson, 103 U. S. 168 (1881). Furthermore, on facts analogous to those in the case before us, the Court indicated that a United States Congressman would not be entitled to absolute immunity, in a sex-discrimination suit filed by a personal aide whom he had fired, unless such immunity was afforded by the Speech or Debate Clause. Davis v. Passman, 442 U. S. 228, 442 U. S. 246 (1979); see also id. at 442 U. S. 246, n. 25 (reserving question of qualified immunity).

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Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts. *Nixon v. Fitzgerald*, 457 U. S. 731 (1982). This immunity, however, is based on the President's "unique position in the constitutional scheme," *id.* at 457 U. S. 749, and it does not extend indiscriminately to the President's personal aides, *see Harlow, supra*, or to Cabinet level officers, *Mitchell v. Forsyth*, 472 U. S. 511 (1985). Nor are the highest executive officials in the States protected by absolute immunity under federal law. *See Scheuer v. Rhodes, supra*.

III

As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well defined. Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks, and thereby helping to establish appellate procedures as the standard system for correcting judicial error. *See* Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L.J. 879. More recently, this Court found that judicial immunity was

"the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."

<u>Bradley v. Fisher</u>, 13 Wall. 335, <u>80 U. S. 347</u> (1872). Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the <u>Bradley Court</u> concluded, judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants. <u>Id.</u> at <u>80 U. S. 348</u>.

In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. *See, e.g., Pierson v. Ray,* 386 U. S. 547 (1967). On the contrary, these protections have been held to extend to Executive Branch officials who perform quasi-judicial functions, *see Butz v. Economou, supra,* at 438 U. S. 513-514,

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or who perform prosecutorial functions that are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U. S. 409, 424 U. S. 430(1976). The common law's rationale for these decisions -- freeing the judicial process of harassment or intimidation -- has been thought to require absolute immunity even for advocates and witnesses. *See Briscoe v. LaHue*, 460 U. S. 325 (1983); *Butz v. Economou*, 438 U.S. at 438 U.S. 512.

One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function than they are to similar dangers in other contexts. *Cf. id.* at 438 U. S. 528, n. (REHNQUIST, J., concurring in part and dissenting in part). Although Congress has not undertaken to cut back the judicial immunities recognized by this Court, we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own. At the same time, we cannot pretend that we are writing on a clean slate, or that we should ignore compelling reasons that may well justify broader protections for judges than for some other officials.

The purposes served by judicial immunity from liability in damages have been variously described. In *Bradley v. Fisher, supra*, at 80 U. S. 348, and again in *Pierson v. Ray, supra*, at 386 U. S. 554, the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. As Judge Posner pointed out in his dissenting opinion below, this is the principal characteristic that adjudication has in common with legislation and with criminal prosecution, which are the two other areas in which absolute immunity has most generously been provided. 792 F.2d at 660. If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious,

would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. *Id.* at 660-661. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side effects inevitably associated with exposing judges to personal liability.

When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.

This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. *See Stump v. Sparkman*, 435 U. S. 349, 435 U. S. 363, n. 12 (1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive. *Bradley v. Fisher*, 13 Wall. at 80 U. S. 354.

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As the *Bradley* Court noted:

"Against the consequences of [judges'] erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort."

Ibid.

Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In *Ex parte Virginia*, $\underline{100}$ $\underline{\text{U. S. }339}$ (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts. The Court reasoned:

"Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . That the jurors are selected for a court makes no difference. So are court criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?"

Id. at $\underline{100 \text{ U. S. } 348}$. Although this case involved a criminal charge against a judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance.

Likewise, judicial immunity has not been extended to judges acting to promulgate a code of conduct for attorneys. *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U. S. 719 (1980). In explaining why legislative, rather than judicial, immunity furnished the appropriate standard, we said:

"Although it is clear that, under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication, but one of rulemaking."

Id. at <u>446 U. S. 731</u>. Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would

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be amenable to suit for injunctive and declaratory relief. *Id.* at <u>446 U. S. 734</u>-737. *Cf. Pulliam v. Allen,* <u>466 U. S. 522</u> (1984). Once again, it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.

IV

In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts -- like many others involved in supervising court employees and overseeing the efficient operation of a court -- may have been quite important in providing the necessary conditions of a

sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

The majority below thought that the threat of vexatious lawsuits by disgruntled exemployees could interfere with the quality of a judge's decisions:

"The evil to be avoided is the following: a judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decisionmaking will decline."

792 F.2d at 658. There is considerable force in this analysis, but it in no way serves to distinguish judges from other public officials who

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hire and fire subordinates. Indeed, to the extent that a judge is less free than most Executive Branch officials to delegate decisionmaking authority to subordinates, there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials. This does not imply that qualified immunity, like that available to Executive Branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions. *See, e.g., Scheuer v. Rhodes, 416 U. S. 232* (1974); *Davis v. Scherer, 468 U. S. 183* (1984). *Cf. Harlow v. Fitzgerald, 457 U.S.* at 457 U.S. at 457 U.S. 818. Absolute immunity, however, is "strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great." 792 F.2d at 660 (Posner, J., dissenting). The danger here is not great enough. Nor do we think it significant that, under Illinois law, only a judge can hire or fire probation officers. To conclude that, because a judge acts within the scope of his authority, such employment decisions are brought within the court's "jurisdiction," or converted into "judicial acts," would lift form above substance. Under Virginia law, only that State's judges could

promulgate and enforce a Bar Code, but we nonetheless concluded that neither function was judicial in nature. See Supreme Court of Virginia v. Consumers Union, supra.

We conclude that Judge White was not entitled to absolute immunity for his decisions to demote and discharge Forrester. In so holding, we do not decide whether Judge White is entitled to a new trial, or whether he may be able to claim a qualified immunity for the acts complained of in Forrester's suit. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* JUSTICE BLACKMUN joins in all but Part II of this opinion.

C

Michael S. Greco Past President, American Bar Association "Civil Right to Counsel" Resolution Pennsylvania Bar Association House of Delegates November 30, 2007

I regret that I cannot be with you in person today as you, the members of the Pennsylvania Bar Association House of Delegates, deliberate and I hope approve the implementing of a defined civil right to counsel for indigent persons in Pennsylvania.

I briefly want to share some thoughts with you as you begin your deliberations.

First, I commend you for considering this historic resolution today. I commend the leadership of the Pennsylvania Bar for being at the forefront of what is now a burgeoning movement across our country – particularly the leadership of your President Andy Susko, and that of Dveera Segal, Co-Chair of the PBA's Legal Services to the Public Committee, and Sam Milkes, Executive Director of the Pennsylvania Legal Aid Network.

And I commend the Commonwealth of Pennsylvania for having already led the way in implementing, by legislation or court decision, a right to civil counsel in matters involving child dependency, paternity and guardianship.

The Resolution before you is straightforward:

RESOLVED, that the Pennsylvania Bar Association urges the Commonwealth of Pennsylvania to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.

At its heart, the Resolution urges a commitment by all in Pennsylvania to the principle that no one should be denied his or her legal rights because of the inability to afford counsel or legal representation.

It is the responsibility of all in society -- but particularly of lawyers -- to give life to the eloquent promise of equal justice, and equal access to justice, for all in our country.

We know that today, that promise is unfulfilled – it's an empty promise for millions of people – despite all the laudable pro bono efforts of lawyers in private practice, despite the dedicated efforts of legal services lawyers and programs across the country, and despite Congressional funding of the Legal Services Corporation since its creation more than three decades ago.

You have heard the documented statistics -

- That 80% of the legal needs of poor persons in Pennsylvania and throughout the US go unaddressed year after year --
- That 50% of the poor people across Pennsylvania who make it to a legal aid office are turned away because of limited resources --
- That more than *forty million* Americans qualify for legal aid because they are at or near the poverty level --
- That the meager funding provided by Congress to the Legal Services
 Corporation provides help for only about one million of those forty million
 Americans.

Do you think that those forty million Americans might be justified in feeling that the justice system protects only people with money, and not them? That society does not care about them? Isn't it time that, finally, we try a new solution to this shameful situation?

For that reason, as ABA President I appointed the ABA Task Force on Access to Civil Justice to address the problem. I asked a distinguished group of judges, lawyers and others to consider an idea whose time has come in America: a right to counsel on the *civil* side funded by the state -- for poor and vulnerable fellow Americans, parallel to the right that now exists on the *criminal* side.

The US Supreme Court held in *Gideon v. Wainwright* that the Sixth Amendment guarantees a right to counsel paid by the state to an indigent who faces imprisonment.

But "imprisonment" in America can be by other than steel bars. In the US, every day, in every community, a poor person is imprisoned by devastating health problems, by homelessness, and by poverty-related problems that a lawyer could help solve.

I asked the ABA Task Force to consider whether the ABA, at long last, should endorse a civil right to counsel in adversary legal matters that threaten needs that are basic to human existence.

In a democracy all citizens – whether rich or poor – should have the assistance of counsel when custody of children is threatened; or loss of shelter is imminent; or to obtain legislatively-mandated health benefits. In those areas, every person in America should have counsel at his or her side to help secure their legal rights – whether criminal or civil.

No one in America – the most bountiful country in the world – should be without counsel when those basic needs are threatened. No one.

A civil right to counsel for poor persons may be viewed as "cutting edge" in the US – but such a right has been recognized in many civilized nations around the world for a century or longer – in constitutions, statutes, and court decisions.

In Lassister v. Department of Social Services the US Supreme Court in a 5-4 decision in 1981 held that the US Constitution does not require a *civil* right to counsel. Respectfully I say that the five justices in the majority got it wrong. I believe that in time Lassiter should be – and will be –- overturned.

Until then, the states are free to address the issue in a number of state-constitution and due process-based ways, ways that are very thoughtfully discussed in the final report and recommendations of the ABA Task Force on Access to Civil Justice. If you have not yet read that report, I suggest that you do so – at www.abanet.org.

The Task Force Force's report and recommendation that the ABA endorse a civil right to counsel were adopted by a *unanimous* vote of the ABA House of Delegates at our Annual Meeting in August 2006. What more powerful, historic, statement could be made by the 550 delegates to the ABA House from throughout the US to address this shameful situation?

Since then there has been growing activity in states coast to coast regarding implementation of a civil right to counsel. I have spoken about the issue to very receptive and supportive bar associations and citizen groups in numerous states — including California, Washington State, Alabama, New York, Maryland, Ohio, Montana, and my own state of Massachusetts, among others. I am pleased that the Massachusetts Bar Association House of Delegates recently adopted the resolution that is now before you by a unanimous vote.

When I was a boy my parents – perhaps like your parents – reminded us that where there is a will, there is a way. There is no doubt that the will exists among Pennsylvania lawyers to provide equal justice, and equal access to justice, for fellow human beings.

The Resolution before you simply states a basic principle, one that is worthy of your support. As I said to my colleagues in the Massachusetts Bar Association House

of Delegates before they voted on the Resolution, matters such as the scope and cost of implementing the civil right to counsel will receive the careful consideration of all, once we have endorsed the principle. But that can only happen if we have endorsed the principle.

I ask you today to lead the way for all your fellow citizens in implementing a civil right to counsel in Pennsylvania. I know that, together, we can get it done not only in Pennsylvania, but throughout the United States.

Thank you for your kind attention, and thank you for the vote you are about to take.

Assembly Bill No. 590

	Chief Clerk of the Assembly
assed the So	enate September 9, 2009
	Secretary of the Senate
This bill	was received by the Governor this day

CHAPTER _____

An act to add Article 9.6 (commencing with Section 6159.5) to Chapter 4 of Division 3 of the Business and Professions Code, and to amend, repeal, and add Sections 68085.1 and 70626 of, and to add Chapter 2.1 (commencing with Section 68650) to Title 8 of, the Government Code, relating to the practice of law.

LEGISLATIVE COUNSEL'S DIGEST

AB 590, Feuer. Legal aid.

(1) The State Bar Act provides for the licensure and regulation of attorneys by the State Bar of California, a public corporation. Existing law provides that it is the duty of an attorney to, among other things, never reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed. Existing law provides that a lawyer may fulfill his or her ethical commitment to provide pro bono services, in part, by providing financial support to organizations providing free legal services to persons of limited means.

This bill would state the intent of the Legislature to encourage the legal profession to make further efforts to meet its professional responsibilities and other obligations by providing pro bono legal services and financial support of nonprofit legal organizations that provide free legal services to underserved communities.

This bill would prohibit a person or organization that is not a specified type of legal aid organization, as defined, from using the term "legal aid," or any confusingly similar name in any firm name, trade name, fictitious business name, or other designation, or on any advertisement, letterhead, business card, or sign. The bill would subject a person or organization that violates this prohibition to specified civil liability.

This bill would, commencing July 1, 2011, and subject to funding specifically provided for this purpose, require the Judicial Council to develop one or more model pilot projects in selected courts for 3-year periods pursuant to a competitive grant process and a request for proposals. The bill would provide that legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs in those courts selected

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by the Judicial Council, as specified. The bill would provide that each project shall be a partnership between the court, a qualified legal services project that shall serve as the lead agency for case assessment and direction, and other legal services providers in the community who are able to provide the services for the project. The bill would require the lead legal services agency, to the extent practical, to identify and make use of pro bono services in order to maximize available services efficiently and economically. The bill would provide that the court partner is responsible for providing procedures, personnel, training, and case management and administration practices that reflect best practices, as specified. The bill would require a local advisory committee to be formed to facilitate the administration of the local project and to ensure that the project is fulfilling its objectives. The bill would require the Judicial Council to conduct a study to demonstrate the effectiveness and continued need for the pilot program, and to report its findings and recommendations to the Governor and the Legislature on or before January 31, 2016.

(2) Existing law sets the fees at \$25 or \$30 for various court services, including, but not limited to, issuing a writ for the enforcement of an order or judgment, issuing an abstract of judgment, recording or registering any license or certificate, issuing an order of sale, and filing and entering an award under the Workers' Compensation Law.

This bill would provide, from July 1, 2011, to June 30, 2017, inclusive, that \$10 of each fee collected pursuant to these provisions shall be used by the Judicial Council for the expenses of the Judicial Council in implementing and administering the civil representation pilot program described in (1) above. Commencing July 1, 2017, the bill would reduce each of those fees by \$10.

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) There is an increasingly dire need for legal services for poor Californians. Due to insufficient funding from all sources, existing programs providing free services in civil matters to indigent and disadvantaged persons, especially underserved groups such as

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elderly, disabled, children, and non-English-speaking persons, are not adequate to meet existing needs.

- (b) The critical need for legal representation in civil cases has been documented repeatedly, and the statistics are staggering. California courts are facing an ever increasing number of parties who go to court without legal counsel. Over 4.3 million Californians are believed to be currently unrepresented in civil court proceedings, largely because they cannot afford representation. Current funding allows legal services programs to assist less than one-third of California's poor and lower income residents. As a result, many Californians are unable to meaningfully access the courts and obtain justice in a timely and effective manner. The effect is that critical legal decisions are made without the court having the necessary information, or without the parties having an adequate understanding of the orders to which they are subject.
- (c) The modern movement to offer legal services for the poor was spearheaded by Sargent Shriver in 1966, aided by the American Bar Association, then headed by future Supreme Court Justice Lewis Powell, driven by the large disparity that existed between the number of lawyers available for poor Americans compared with the availability of legal services for others. While much progress has been made since then, significant disparity continues. According to federal poverty data, there was one legal aid attorney in 2006 for every 8,373 poor people in California. By contrast, the number of attorneys providing legal services to the general population is approximately one for every 240 people nearly 35 times higher.
- (d) The fair resolution of conflicts through the legal system offers financial and economic benefits by reducing the need for many state services and allowing people to help themselves. There are significant social and governmental fiscal costs of depriving unrepresented parties of vital legal rights affecting basic human needs, particularly with respect to indigent parties, including the elderly and people with disabilities, and these costs may be avoided or reduced by providing the assistance of counsel where parties have a reasonable possibility of achieving a favorable outcome.
- (e) Expanding representation will not only improve access to the courts and the quality of justice obtained by these individuals, but will allow court calendars that currently include many

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self-represented litigants to be handled more effectively and efficiently. Increasing the availability of legal representation for litigants who must currently represent themselves or face loss of their legal rights is a key priority of the Judicial Council and Chief Justice Ronald M. George. As the Chief Justice has noted, the large and growing number of self-represented litigants is one of the most challenging issues in the coming decade, imposing significant costs on the judicial system and the public by impairing the ability of the courts to efficiently process heavy caseloads, and eroding the public's confidence in our judicial system. While court self-help services are important, those services are insufficient alone to meet all needs. Experience has shown that those services are much less effective when, among other factors, unrepresented parties lack income, education, and other skills needed to navigate a complex and unfamiliar court process, and particularly when unrepresented parties are required to appear in court or face opposing counsel. Recognizing that not all indigent parties may be allowed representation, even when they have meritorious cases, and that self-help services cannot meet the needs of all unrepresented parties, courts presented with disputes regarding basic human needs that involve low-income litigants facing parties who are represented by counsel have a special responsibility to employ best practices designed to ensure that unrepresented parties obtain meaningful access to justice and to guard against the involuntary waiver or other loss of rights or the disposition of those cases without appropriate information and regard for potential claims and defenses, consistent with principles of judicial neutrality. The experience and data collected through a pilot program will assist the courts and the legal community in developing new strategies to provide legal representation to overcome this challenge.

(f) The doctrine of equal justice under the law is based on two principles. One is that the substantive protections and obligations of the law shall be applied equally to everyone, no matter how high or low their station in life. The second principle involves access to the legal system. Even if we have fair laws and an unbiased judiciary to apply them, true equality before the law will be thwarted if people cannot invoke the laws for their protection. For persons without access, our system provides no justice at all, a situation that may be far worse than one in which the laws expressly favor some and disfavor others.

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- (g) Many judicial leaders acknowledge that the disparity in outcomes is so great that indigent parties who lack representation regularly lose cases that they would win if they had counsel. A growing body of empirical research confirms the widespread perception that parties who attempt to represent themselves are likely to lose, regardless of the merits of their case, particularly when the opposing party has a lawyer, while parties represented by counsel are far more likely to prevail. Judicial leaders and scholars also believe that the presence of counsel encourages settlements. Just as importantly, court opinion surveys show that more than two-thirds of Californians believe low-income people usually receive worse outcomes in court than others. Unfairness in court procedures and outcomes, whether real or perceived, threatens to undermine public trust and confidence in the courts. The sense that court decisions are made through a process that is fair and just, both in substance and procedure, strongly affects public approval and confidence in California courts. As many legal and judicial leaders have noted, the combined effect of widespread financial inability to afford representation coupled with the severe disadvantages of appearing in court without an attorney foster a destructive perception that money drives the judicial system. Respect for the law and the legal system is not encouraged if the public perceives, rightly or wrongly, that justice is mainly for the
- (h) Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions.
- (i) The adversarial system of justice relied upon in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles, and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally trained professional. The absence of representation not only disadvantages parties, it has a negative effect on the functioning of the judicial system. When parties lack legal counsel, courts must cope with the need to provide guidance and assistance to ensure that the matter is properly administered and the parties receive a fair trial or hearing. Those efforts,

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however, deplete scarce court resources and negatively affect the court's ability to function as intended, including causing erroneous and incomplete pleadings, inaccurate information, unproductive court appearances, improper defaults, unnecessary continuances, delays in proceedings for all court users, and other problems that can ultimately subvert the administration of justice.

- (j) Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.
- (k) Many of those living in this state cannot afford to pay for the services of lawyers when needed for them to enjoy fair and equal access to justice. In some cases, justice is not achievable if one side is unrepresented because the parties cannot afford the cost of representation. The guarantees of due process and equal protection as well as the common law that serves as the rule of decision in California courts underscore the need to provide legal representation in critical civil matters when parties cannot afford the cost of retaining a lawyer. In order for those who are unable to afford representation to exercise this essential right of participants in a democracy, to protect their rights to liberty and property, and to the pursuit of basic human needs, the state has a responsibility to provide legal counsel without cost. In many cases decided in the state's adversarial system of civil justice the parties cannot gain fair and equal access to justice unless they are advised and represented by lawyers. In other cases, there are some forums in which it may be possible for most parties to have fair and equal access if they have the benefit of representation by qualified nonlawyer advocates, and other forums where parties can represent themselves if they receive self-help assistance.
- (1) The state has an interest in providing publicly funded legal representation and nonlawyer advocates or self-help advice and assistance, when the latter is sufficient, and doing so in a cost-effective manner by ensuring the level and type of service provided is the lowest cost type of service consistent with providing fair and equal access to justice. Several factors can affect the determination of when representation by an attorney is needed for fair and equal access to justice and when other forms of assistance will suffice. These factors include the complexity of the substantive

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law, the complexity of the forum's procedures and process, the individual's education, sophistication, and English language ability, and the presence of counsel on the opposing side of the dispute.

- (m) If those advised, assisted, or represented by publicly funded lawyers are to have fair and equal access to justice, those lawyers must be as independent, ethical, and loyal to their clients as those serving clients who can afford to pay for counsel.
- (n) The services provided for in Section 5 of this act are not intended to, and shall not, supplant legal services resources from any other source. This act does not entitle any person to receive services from a particular legal services provider, nor shall this act override the local or national priorities of existing legal services programs. The services provided for in Section 5 of this act are likewise not intended to undermine any existing pilot programs or other efforts to simplify court procedures or provide assistance to unrepresented litigants. Furthermore, nothing in this act shall be construed to prohibit the provision of full legal representation or other appropriate services funded by another source.
- SEC. 2. In light of the large and ongoing justice gap between the legal needs of low-income Californians and the legal resources available to meet those needs, it is the intent of the Legislature to encourage the legal profession to make further efforts to meet its professional responsibilities and other obligations by providing pro bono legal services and financial support of nonprofit legal organizations that provide free legal services to underserved communities.
- SEC. 3. Article 9.6 (commencing with Section 6159.5) is added to Chapter 4 of Division 3 of the Business and Professions Code, to read:

Article 9.6. Legal Aid Organizations

- 6159.5. The Legislature hereby finds and declares all of the following:
- (a) Legal aid programs provide a valuable service to the public by providing free legal services to the poor.
- (b) Private, for-profit organizations that have no lawyers have been using the name "legal aid" in order to obtain business from people who believe they are obtaining services from a nonprofit legal aid organization.

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- (c) Public opinion research has shown that the term "legal aid" is commonly understood by the public to mean free legal assistance for the poor.
- (d) Members of the public seeking free legal assistance are often referred by telephone and other directory assistance information providers to for-profit organizations that charge a fee for their services, and there are a large number of listings in many telephone directories for "legal aid" that are not nonprofit but are actually for-profit organizations.
- (e) The Los Angeles Superior Court has held that there is a common law trademark on the name "legal aid," which means legal services for the poor provided by a nonprofit organization.
- (f) The public will be benefited if for-profit organizations are prohibited from using the term "legal aid," in order to avoid confusion.
- 6159.51. For purposes of this article, "legal aid organization" means a nonprofit organization that provides civil legal services for the poor without charge.
- 6159.52. It is unlawful for any person or organization to use the term "legal aid," "legal aide," or any confusingly similar name in any firm name, trade name, fictitious business name, or any other designation, or on any advertisement, letterhead, business card, or sign, unless the person or organization is a legal aid organization subject to fair use principles for nominative, descriptive, or noncommercial use.
- 6159.53. (a) Any consumer injured by a violation of Section 6159.52 may file a complaint and seek injunctive relief, restitution, and damages in the superior court of any county in which the defendant maintains an office, advertises, or is listed in a telephone directory.
- (b) A person who violates Section 6159.52 shall be subject to an injunction against further violation of Section 6159.52 by any legal aid organization that maintains an office in any county in which the defendant maintains an office, advertises, or is listed in a telephone directory. In an action under this subdivision, it is not necessary to allege or prove actual damage to the plaintiff, and irreparable harm and interim harm to the plaintiff shall be presumed.
- (c) Reasonable attorney's fees shall be awarded to the prevailing plaintiff in any action under this section.

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SEC. 4. Section 68085.1 of the Government Code is amended to read:

68085.1. (a) This section applies to all fees and fines that are collected on or after January 1, 2006, under all of the following:

- (1) Sections 177.5, 209, 403.060, 491.150, 631.3, 683.150, 704.750, 708.160, 724.100, 1134, 1161.2, 1218, and 1993.2 of, subdivision (g) of Section 411.20 and subdivisions (c) and (g) of Section 411.21 of, and Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of, the Code of Civil Procedure.
 - (2) Section 3112 of the Family Code.
 - (3) Section 31622 of the Food and Agricultural Code.
- (4) Subdivision (d) of Section 6103.5, Sections 68086 and 68086.1, subdivision (d) of Section 68511.3, Sections 68926.1 and 69953.5, and Chapter 5.8 (commencing with Section 70600).
 - (5) Section 103470 of the Health and Safety Code.
- (6) Subdivisions (b) and (c) of Section 166 and Section 1214.1 of the Penal Code.
- (7) Sections 1835, 1851.5, 2343, 7660, and 13201 of the Probate Code
 - (8) Sections 14607.6 and 16373 of the Vehicle Code.
- (9) Section 71386 of this code, Sections 304, 7851.5, and 9002 of the Family Code, and Section 1513.1 of the Probate Code, if the reimbursement is for expenses incurred by the court.
- (10) Section 3153 of the Family Code, if the amount is paid to the court for the cost of counsel appointed by the court to represent a child.
- (b) On and after January 1, 2006, each superior court shall deposit all fees and fines listed in subdivision (a), as soon as practicable after collection and on a regular basis, into a bank account established for this purpose by the Administrative Office of the Courts. Upon direction of the Administrative Office of the Courts, the county shall deposit civil assessments under Section 1214.1 of the Penal Code and any other money it collects under the sections listed in subdivision (a) as soon as practicable after collection and on a regular basis into the bank account established for this purpose and specified by the Administrative Office of the Courts. The deposits shall be made as required by rules adopted by, and financial policies and procedures authorized by, the Judicial Council under subdivision (a) of Section 77206. Within 15 days after the end of the month in which the fees and fines are collected,

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each court, and each county that collects any fines or fees under subdivision (a), shall provide the Administrative Office of the Courts with a report of the fees by categories as specified by the Administrative Office of the Courts. The Administrative Office of the Courts and any court may agree upon a time period greater than 15 days, but in no case more than 30 days after the end of the month in which the fees and fines are collected. The fees and fines listed in subdivision (a) shall be distributed as provided in this section.

- (c) (1) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the Administrative Office of the Courts shall make the following distributions:
- (A) To the small claims advisory services, as described in subdivision (f) of Section 116.230 of the Code of Civil Procedure.
- (B) To dispute resolution programs, as described in subdivision (b) of Section 68085.3 and subdivision (b) of Section 68085.4.
- (C) To the county law library funds, as described in Sections 116.230 and 116.760 of the Code of Civil Procedure, subdivision (b) of Section 68085.3, subdivision (b) of Section 68085.4, and Section 70621 of this code, and Section 14607.6 of the Vehicle Code.
- (D) To the courthouse construction funds in the Counties of Riverside, San Bernardino, and San Francisco, as described in Sections 70622, 70624, and 70625.
- (E) Commencing July 1, 2011, to the Trial Court Trust Fund, as described in subdivision (d) of Section 70626, to be used by the Judicial Council to implement and administer the civil representation pilot program under Section 68651.
- (2) If any distribution under this subdivision is delinquent, the Administrative Office of the Courts shall add a penalty to the distribution as specified in subdivision (i).
- (d) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the amounts remaining after the distributions in subdivision (c) shall be transmitted to the State Treasury for deposit in the Trial Court Trust Fund and other funds as required by law. This remittance shall be accompanied by a remittance advice identifying the collection month and the appropriate account in the Trial Court Trust Fund or other fund to which it is to be deposited. Upon the

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receipt of any delinquent payment required under this subdivision, the Controller shall calculate a penalty as provided under subdivision (i).

- (e) From the money transmitted to the State Treasury under subdivision (d), the Controller shall make deposits as follows:
- (1) Into the State Court Facilities Construction Fund, the Judges' Retirement Fund, and the Equal Access Fund, as described in subdivision (c) of Section 68085.3 and subdivision (c) of Section 68085.4.
- (2) Into the Health Statistics Special Fund, as described in subdivision (b) of Section 70670 of this code and Section 103730 of the Health and Safety Code.
- (3) Into the Family Law Trust Fund, as described in Section 70674.
- (4) Into the Immediate and Critical Needs Account of the State Court Facilities Construction Fund, established in Section 70371.5, as described in Sections 68085.3, 68085.4, and 70657.5, and subdivision (e) of Section 70617.
- (5) The remainder of the money shall be deposited into the Trial Court Trust Fund.
- (f) The amounts collected by each superior court under Section 116.232, subdivision (g) of Section 411.20, and subdivision (g) of Section 411.21 of the Code of Civil Procedure, Sections 304, 3112, 3153, 7851.5, and 9002 of the Family Code, subdivision (d) of Section 6103.5, subdivision (d) of Section 68511.3 and Sections 68926.1, 69953.5, 70627, 70631, 70640, 70661, 70678, and 71386 of this code, and Sections 1513.1, 1835, 1851.5, and 2343 of the Probate Code shall be added to the monthly apportionment for that court under subdivision (a) of Section 68085.
- (g) If any of the fees provided in subdivision (a) are partially waived by court order or otherwise reduced, and the fee is to be divided between the Trial Court Trust Fund and any other fund or account, the amount of the reduction shall be deducted from the amount to be distributed to each fund in the same proportion as the amount of each distribution bears to the total amount of the fee. If the fee is paid by installment payments, the amount distributed to each fund or account from each installment shall bear the same proportion to the installment payment as the full distribution to that fund or account does to the full fee. If a court collects a fee that was incurred before January 1, 2006, under a

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provision that was the predecessor to one of the paragraphs contained in subdivision (a), the fee may be deposited as if it were collected under the paragraph of subdivision (a) that corresponds to the predecessor of that paragraph and distributed in prorated amounts to each fund or account to which the fee in subdivision (a) must be distributed.

- (h) Except as provided in Sections 470.5 and 6322.1 of the Business and Professions Code, and Sections 70622, 70624, and 70625 of this code, no agency may take action to change the amounts allocated to any of the funds described in subdivision (c), (d), or (e).
- (i) The amount of the penalty on any delinquent payment under subdivision (c) or (d) shall be calculated by multiplying the amount of the delinquent payment at a daily rate equivalent to 1½ percent per month for the number of days the payment is delinquent. The penalty shall be paid from the Trial Court Trust Fund. Penalties on delinquent payments under subdivision (d) shall be calculated only on the amounts to be distributed to the Trial Court Trust Fund and the State Court Facilities Construction Fund, and each penalty shall be distributed proportionately to the funds to which the delinquent payment was to be distributed.
- (j) If a delinquent payment under subdivision (c) or (d) results from a delinquency by a superior court under subdivision (b), the court shall reimburse the Trial Court Trust Fund for the amount of the penalty. Notwithstanding Section 77009, any penalty on a delinquent payment that a court is required to reimburse pursuant to this section shall be paid from the court operations fund for that court. The penalty shall be paid by the court to the Trial Court Trust Fund no later than 45 days after the end of the month in which the penalty was calculated. If the penalty is not paid within the specified time, the Administrative Office of the Courts may reduce the amount of a subsequent monthly allocation to the court by the amount of the penalty on the delinquent payment.
- (k) If a delinquent payment under subdivision (c) or (d) results from a delinquency by a county in transmitting fees and fines listed in subdivision (a) to the bank account established for this purpose, as described in subdivision (b), the county shall reimburse the Trial Court Trust Fund for the amount of the penalty. The penalty shall be paid by the county to the Trial Court Trust Fund no later than

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45 days after the end of the month in which the penalty was calculated.

- (1) This section shall become inoperative on July 1, 2017, and, as of January 1, 2018, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2018, deletes or extends the dates on which it becomes inoperative and is repealed.
- SEC. 5. Section 68085.1 is added to the Government Code, to read:
- 68085.1. (a) This section applies to all fees and fines that are collected on or after January 1, 2006, under all of the following:
- (1) Sections 177.5, 209, 403.060, 491.150, 631.3, 683.150, 704.750, 708.160, 724.100, 1134, 1161.2, 1218, and 1993.2 of, subdivision (g) of Section 411.20 and subdivisions (c) and (g) of Section 411.21 of, and Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of, the Code of Civil Procedure.
 - (2) Section 3112 of the Family Code.
 - (3) Section 31622 of the Food and Agricultural Code.
- (4) Subdivision (d) of Section 6103.5, Sections 68086 and 68086.1, subdivision (d) of Section 68511.3, Sections 68926.1 and 69953.5, and Chapter 5.8 (commencing with Section 70600).
 - (5) Section 103470 of the Health and Safety Code.
- (6) Subdivisions (b) and (c) of Section 166 and Section 1214.1 of the Penal Code.
- (7) Sections 1835, 1851.5, 2343, 7660, and 13201 of the Probate Code.
 - (8) Sections 14607.6 and 16373 of the Vehicle Code.
- (9) Section 71386 of this code, Sections 304, 7851.5, and 9002 of the Family Code, and Section 1513.1 of the Probate Code, if the reimbursement is for expenses incurred by the court.
- (10) Section 3153 of the Family Code, if the amount is paid to the court for the cost of counsel appointed by the court to represent a child.
- (b) On and after January 1, 2006, each superior court shall deposit all fees and fines listed in subdivision (a), as soon as practicable after collection and on a regular basis, into a bank account established for this purpose by the Administrative Office of the Courts. Upon direction of the Administrative Office of the Courts, the county shall deposit civil assessments under Section 1214.1 of the Penal Code and any other money it collects under the sections listed in subdivision (a) as soon as practicable after

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collection and on a regular basis into the bank account established for this purpose and specified by the Administrative Office of the Courts. The deposits shall be made as required by rules adopted by, and financial policies and procedures authorized by, the Judicial Council under subdivision (a) of Section 77206. Within 15 days after the end of the month in which the fees and fines are collected, each court, and each county that collects any fines or fees under subdivision (a), shall provide the Administrative Office of the Courts with a report of the fees by categories as specified by the Administrative Office of the Courts. The Administrative Office of the Courts and any court may agree upon a time period greater than 15 days, but in no case more than 30 days after the end of the month in which the fees and fines are collected. The fees and fines listed in subdivision (a) shall be distributed as provided in this section.

- (c) (1) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the Administrative Office of the Courts shall make the following distributions:
- (A) To the small claims advisory services, as described in subdivision (f) of Section 116.230 of the Code of Civil Procedure.
- (B) To dispute resolution programs, as described in subdivision (b) of Section 68085.3 and subdivision (b) of Section 68085.4.
- (C) To the county law library funds, as described in Sections 116.230 and 116.760 of the Code of Civil Procedure, subdivision (b) of Section 68085.3, subdivision (b) of Section 68085.4, and Section 70621 of this code, and Section 14607.6 of the Vehicle Code.
- (D) To the courthouse construction funds in the Counties of Riverside, San Bernardino, and San Francisco, as described in Sections 70622, 70624, and 70625.
- (2) If any distribution under this subdivision is delinquent, the Administrative Office of the Courts shall add a penalty to the distribution as specified in subdivision (i).
- (d) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the amounts remaining after the distributions in subdivision (c) shall be transmitted to the State Treasury for deposit in the Trial Court Trust Fund and other funds as required by law. This remittance shall be accompanied by a remittance advice identifying the

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collection month and the appropriate account in the Trial Court Trust Fund or other fund to which it is to be deposited. Upon the receipt of any delinquent payment required under this subdivision, the Controller shall calculate a penalty as provided under subdivision (i).

- (e) From the money transmitted to the State Treasury under subdivision (d), the Controller shall make deposits as follows:
- (1) Into the State Court Facilities Construction Fund, the Judges' Retirement Fund, and the Equal Access Fund, as described in subdivision (c) of Section 68085.3 and subdivision (c) of Section 68085.4.
- (2) Into the Health Statistics Special Fund, as described in subdivision (b) of Section 70670 of this code and Section 103730 of the Health and Safety Code.
- (3) Into the Family Law Trust Fund, as described in Section 70674.
- (4) Into the Immediate and Critical Needs Account of the State Court Facilities Construction Fund, established in Section 70371.5, as described in Sections 68085.3, 68085.4, and 70657.5, and subdivision (e) of Section 70617.
- (5) The remainder of the money shall be deposited into the Trial Court Trust Fund.
- (f) The amounts collected by each superior court under Section 116.232, subdivision (g) of Section 411.20, and subdivision (g) of Section 411.21 of the Code of Civil Procedure, Sections 304, 3112, 3153, 7851.5, and 9002 of the Family Code, subdivision (d) of Section 6103.5, subdivision (d) of Section 68511.3 and Sections 68926.1, 69953.5, 70627, 70631, 70640, 70661, 70678, and 71386 of this code, and Sections 1513.1, 1835, 1851.5, and 2343 of the Probate Code shall be added to the monthly apportionment for that court under subdivision (a) of Section 68085.
- (g) If any of the fees provided in subdivision (a) are partially waived by court order or otherwise reduced, and the fee is to be divided between the Trial Court Trust Fund and any other fund or account, the amount of the reduction shall be deducted from the amount to be distributed to each fund in the same proportion as the amount of each distribution bears to the total amount of the fee. If the fee is paid by installment payments, the amount distributed to each fund or account from each installment shall bear the same proportion to the installment payment as the full

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distribution to that fund or account does to the full fee. If a court collects a fee that was incurred before January 1, 2006, under a provision that was the predecessor to one of the paragraphs contained in subdivision (a), the fee may be deposited as if it were collected under the paragraph of subdivision (a) that corresponds to the predecessor of that paragraph and distributed in prorated amounts to each fund or account to which the fee in subdivision (a) must be distributed.

- (h) Except as provided in Sections 470.5 and 6322.1 of the Business and Professions Code, and Sections 70622, 70624, and 70625 of this code, no agency may take action to change the amounts allocated to any of the funds described in subdivision (c), (d), or (e).
- (i) The amount of the penalty on any delinquent payment under subdivision (c) or (d) shall be calculated by multiplying the amount of the delinquent payment at a daily rate equivalent to 1½ percent per month for the number of days the payment is delinquent. The penalty shall be paid from the Trial Court Trust Fund. Penalties on delinquent payments under subdivision (d) shall be calculated only on the amounts to be distributed to the Trial Court Trust Fund and the State Court Facilities Construction Fund, and each penalty shall be distributed proportionately to the funds to which the delinquent payment was to be distributed.
- (j) If a delinquent payment under subdivision (c) or (d) results from a delinquency by a superior court under subdivision (b), the court shall reimburse the Trial Court Trust Fund for the amount of the penalty. Notwithstanding Section 77009, any penalty on a delinquent payment that a court is required to reimburse pursuant to this section shall be paid from the court operations fund for that court. The penalty shall be paid by the court to the Trial Court Trust Fund no later than 45 days after the end of the month in which the penalty was calculated. If the penalty is not paid within the specified time, the Administrative Office of the Courts may reduce the amount of a subsequent monthly allocation to the court by the amount of the penalty on the delinquent payment.
- (k) If a delinquent payment under subdivision (c) or (d) results from a delinquency by a county in transmitting fees and fines listed in subdivision (a) to the bank account established for this purpose, as described in subdivision (b), the county shall reimburse the Trial Court Trust Fund for the amount of the penalty. The penalty shall

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be paid by the county to the Trial Court Trust Fund no later than 45 days after the end of the month in which the penalty was calculated.

(1) This section shall become operative on July 1, 2017.

SEC. 6. Chapter 2.1 (commencing with Section 68650) is added to Title 8 of the Government Code, to read:

CHAPTER 2.1. CIVIL LEGAL REPRESENTATION

68650. This chapter shall be known, and may be cited, as the Sargent Shriver Civil Counsel Act.

- 68651. (a) Legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council as provided in this section.
- (b) (1) Subject to funding specifically provided for this purpose pursuant to subdivision (d) of Section 70626, the Judicial Council shall develop one or more model pilot projects in selected courts pursuant to a competitive grant process and a request for proposals. Projects authorized under this section shall provide representation of counsel for low-income persons who require legal services in civil matters involving housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child, as well as providing court procedures, personnel, training, and case management and administration methods that reflect best practices to ensure unrepresented parties in those cases have meaningful access to justice, and to gather information on the outcomes associated with providing these services, to guard against the involuntary waiver of those rights or their disposition by default. These pilot projects should be designed to address the substantial inequities in timely and effective access to justice that often give rise to an undue risk of erroneous decision because of the nature and complexity of the law and the proceeding or disparities between the parties in proficiency. sophistication, language education, representation, access to self-help, and alternative dispute resolution services. In order to ensure that the scarce funds available for the program are used to serve the most critical cases and the parties least able to access the courts without

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representation, eligibility for representation shall be limited to clients whose household income falls at or below 200 percent of the federal poverty level. Projects shall impose asset limitations consistent with their existing practices in order to ensure optimal use of funds.

- (2) (A) In light of the significant percentage of parties who are unrepresented in family law matters, proposals to provide counsel in child custody cases should be considered among the highest priorities for funding, particularly when one side is represented and the other is not.
- (B) Up to 20 percent of available funds shall be directed to projects regarding civil matters involving actions by a parent to obtain sole legal or physical custody of a child. This subparagraph shall not apply to distributions made pursuant to paragraph (3).
- (3) For the 2012–13 fiscal year, and each subsequent fiscal year, any amounts collected pursuant to subdivision (d) of Section 70626 in excess of the total amount transferred to the Trial Court Trust Fund in the 2011–12 fiscal year pursuant to subparagraph (E) of paragraph (1) of subdivision (c) of Section 68085.1 and subdivision (d) of Section 70626 shall be distributed by the Judicial Council without regard to subparagraph (B) of paragraph (2). Those amounts may be distributed by the Judicial Council as set forth in this subdivision beginning July 1, 2012. If the funds are to be distributed to new projects, the Judicial Council shall distribute those amounts pursuant to the process set forth in this subdivision.
- (4) Each project shall be a partnership between the court, a qualified legal services project, as defined by subdivision (a) of Section 6213 of the Business and Professions Code, that shall serve as the lead agency for case assessment and direction, and other legal services providers in the community who are able to provide the services for the project. The lead legal services agency shall be the central point of contact for receipt of referrals to the project and to make determinations of eligibility based on uniform criteria. The lead legal services agency shall be responsible for providing representation to the clients or referring the matter to one of the organization or individual providers with whom the lead legal services agency contracts to provide the service. Funds received by a qualified legal services project shall not qualify as expenditures for the purposes of the distribution of funds pursuant to Section 6216 of the Business and Professions Code. To the

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extent practical, the lead legal services agency shall identify and make use of pro bono services in order to maximize available services efficiently and economically. Recognizing that not all indigent parties can be afforded representation, even when they have meritorious cases, the court partner shall, as a corollary to the services provided by the lead legal services agency, be responsible for providing procedures, personnel, training, and case management and administration practices that reflect best practices to ensure unrepresented parties meaningful access to justice and to guard against the involuntary waiver of rights, as well as to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality.

- (5) The participating projects shall be selected by a committee appointed by the Judicial Council with representation from key stakeholder groups, including judicial officers, legal services providers, and others, as appropriate. The committee shall assess the applicants' capacity for success, innovation, and efficiency, including, but not limited to, the likelihood that the project would deliver quality representation in an effective manner that would meet critical needs in the community and address the needs of the court with regard to access to justice and calendar management, and the unique local unmet needs for representation in the community. Projects approved pursuant to this section shall initially be authorized for a three-year period, commencing July 1, 2011, subject to renewal for a period to be determined by the Judicial Council, in consultation with the participating project in light of the project's capacity and success. After the initial three-year period, the Judicial Council shall distribute any future funds available as the result of the termination or nonrenewal of a project pursuant to the process set forth in this subdivision. Projects shall be selected on the basis of whether in the cases proposed for service the persons to be assisted are likely to be opposed by a party who is represented by counsel. The Judicial Council shall also consider the following factors in selecting the projects:
- (A) The likelihood that representation in the proposed case type tends to affect whether a party prevails or otherwise obtains a significantly more favorable outcome in a matter in which they would otherwise frequently have judgment entered against them or suffer the deprivation of the basic human need at issue.
 - (B) The likelihood of reducing the risk of erroneous decision.

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- (C) The nature and severity of potential consequences for the unrepresented party regarding the basic human need at stake if representation is not provided.
- (D) Whether the provision of legal services may eliminate or reduce the potential need for and cost of public social services regarding the basic human need at stake for the client and others in the client's household.
- (E) The unmet need for legal services in the geographic area to be served
- (F) The availability and effectiveness of other types of court services, such as self-help.
 - (6) Each applicant shall do all of the following:
- (A) Identify the nature of the partnership between the court, the lead legal services agency, and the other agencies or other providers that would work within the project.
- (B) Describe the referral protocols to be used, the criteria that would be employed in case assessment, why those cases were selected, the manner to address conflicts without violating any attorney-client privilege when adverse parties are seeking representation through the project, and the means for serving potential clients who need assistance with English.
- (C) Describe how the project would be administered, including how the data collection requirements would be met without causing an undue burden on the courts, clients, or the providers, the particular objectives of the project, strategies to evaluate their success in meeting those objectives, and the means by which the project would serve the particular needs of the community, such as by providing representation to limited-English-speaking clients.
- (7) To ensure the most effective use of the funding available, the lead legal services agency shall serve as a hub for all referrals, and the point at which decisions are made about which referrals will be served and by whom. Referrals shall emanate from the court, as well as from the other agencies providing services through the program, and shall be directed to the lead legal services agency for review. That agency, or another agency or attorney in the event of conflict, shall collect the information necessary to assess whether the case should be served. In performing that case assessment, the agency shall determine the relative need for representation of the litigant, including all of the following:
 - (A) Case complexity.

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- (B) Whether the other party is represented.
- (C) The adversarial nature of the proceeding.
- (D) The availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case.
 - (E) Language issues.
 - (F) Disability access issues.
 - (G) Literacy issues.
 - (H) The merits of the case.
- (I) The nature and severity of potential consequences for the potential client if representation is not provided.
- (J) Whether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.
- (8) If both parties to a dispute are financially eligible for representation, each proposal shall ensure that representation for both sides is evaluated. In these and other cases in which conflict issues arise, the lead legal services agency shall have referral protocols with other agencies and providers, such as a private attorney panel, to address those conflicts.
- (9) Each pilot project shall be responsible for keeping records on the referrals accepted and those not accepted for representation, and the reasons for each, in a manner that does not violate any privileged communications between the agency and the prospective client. Each pilot project shall be provided with standardized data collection tools, and required to track case information for each referral to allow the evaluation to measure the number of cases served, the level of service required, and the outcomes for the clients in each case. In addition to this information on the effect of the representation on the clients, data shall be collected regarding the outcomes for the trial courts.
- (10) A local advisory committee shall be formed for each pilot project, to include representatives of the bench and court administration, the lead legal services agency, and the other agencies or providers that are part of the local project team. The role of the advisory committee is to facilitate the administration of the local pilot project, and to ensure that the project is fulfilling its objectives. In addition, the committee shall resolve any issues that arise during the course of the pilot project, including issues concerning case eligibility, and recommend changes in project

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administration in response to implementation challenges. The committee shall meet at least monthly for the first six months of the project, and no less than quarterly for the duration of the pilot period. Each authorized pilot project shall catalog changes to the program made during the three-year period based on its experiences with best practices in serving the eligible population.

- (c) The Judicial Council shall conduct a study to demonstrate the effectiveness and continued need for the pilot program established pursuant to this section and shall report its findings and recommendations to the Governor and the Legislature on or before January 31, 2016. The study shall report on the percentage of funding by case type and shall include data on the impact of counsel on equal access to justice and the effect on court administration and efficiency, and enhanced coordination between courts and other government service providers and community resources. This report shall describe the benefits of providing representation to those who were previously not represented, both for the clients and the courts, as well as strategies and recommendations for maximizing the benefit of that representation in the future. The report shall describe and include data, if available, on the impact of the pilot program on families and children. The report also shall include an assessment of the continuing unmet needs and, if available, data regarding those unmet needs.
- (d) This section shall not be construed to negate, alter, or limit any right to counsel in a criminal or civil action or proceeding otherwise provided by state or federal law.
 - (e) The section shall become operative on July 1, 2011.
- SEC. 7. Section 70626 of the Government Code is amended to read:
- 70626. (a) The fee for each of the following services is twenty-five dollars (\$25). Subject to subdivision (d), amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.
- (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of sale, a writ of possession, a writ of prohibition, or any other writ for the enforcement of any order or judgment.
 - (2) Issuing an abstract of judgment.
- (3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the Code of Civil Procedure.

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- (4) Certifying a copy of any paper, record, or proceeding on file in the office of the clerk of any court.
- (5) Taking an affidavit, except in criminal cases or adoption proceedings.
- (6) Acknowledgment of any deed or other instrument, including the certificate.
- (7) Recording or registering any license or certificate, or issuing any certificate in connection with a license, required by law, for which a charge is not otherwise prescribed.
- (8) Issuing any certificate for which the fee is not otherwise fixed.
- (b) The fee for each of the following services is thirty dollars (\$30). Subject to subdivision (d), amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.
 - (1) Issuing an order of sale.
- (2) Receiving and filing an abstract of judgment rendered by a judge of another court and subsequent services based on it, unless the abstract of judgment is filed under Section 704.750 or 708.160 of the Code of Civil Procedure.
- (3) Filing a confession of judgment under Section 1134 of the Code of Civil Procedure.
- (4) Filing an application for renewal of judgment under Section 683.150 of the Code of Civil Procedure.
- (5) Issuing a commission to take a deposition in another state or place under Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under Section 2029.300 to take a deposition in this state for purposes of a proceeding pending in another jurisdiction.
- (6) Filing and entering an award under the Workers' Compensation Law (Division 4 (commencing with Section 3200) of the Labor Code).
- (7) Filing an affidavit of publication of notice of dissolution of partnership.
- (8) Filing an appeal of a determination whether a dog is potentially dangerous or vicious under Section 31622 of the Food and Agricultural Code.
- (9) Filing an affidavit under Section 13200 of the Probate Code, together with the issuance of one certified copy of the affidavit under Section 13202 of the Probate Code.

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- (10) Filing and indexing all papers for which a charge is not elsewhere provided, other than papers filed in actions or special proceedings, official bonds, or certificates of appointment.
- (c) The fee for filing a first petition under Section 2029.600 or 2029.620 of the Code of Civil Procedure, if the petitioner is not a party to the out-of-state case, is eighty dollars (\$80). Amounts collected shall be distributed to the Trial Court Trust Fund pursuant to Section 68085.1.
- (d) From July 1, 2011, to June 30, 2017, inclusive, ten dollars (\$10) of each fee collected pursuant to subdivisions (a) and (b) shall be used by the Judicial Council for the expenses of the Judicial Council in implementing and administering the civil representation pilot program under Section 68651.
- (e) This section shall become inoperative on July 1, 2017, and, as of January 1, 2018, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2018, deletes or extends the dates on which it becomes inoperative and is repealed.
- SEC. 8. Section 70626 is added to the Government Code, to read:
- 70626. (a) The fee for each of the following services is fifteen dollars (\$15). Amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.
- (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of sale, a writ of possession, a writ of prohibition, or any other writ for the enforcement of any order or judgment.
 - (2) Issuing an abstract of judgment.
- (3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the Code of Civil Procedure.
- (4) Certifying a copy of any paper, record, or proceeding on file in the office of the clerk of any court.
- (5) Taking an affidavit, except in criminal cases or adoption proceedings.
- (6) Acknowledgment of any deed or other instrument, including the certificate.
- (7) Recording or registering any license or certificate, or issuing any certificate in connection with a license, required by law, for which a charge is not otherwise prescribed.
- (8) Issuing any certificate for which the fee is not otherwise fixed.

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- (b) The fee for each of the following services is twenty dollars (\$20). Amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.
 - (1) Issuing an order of sale.
- (2) Receiving and filing an abstract of judgment rendered by a judge of another court and subsequent services based on it, unless the abstract of judgment is filed under Section 704.750 or 708.160 of the Code of Civil Procedure.
- (3) Filing a confession of judgment under Section 1134 of the Code of Civil Procedure.
- (4) Filing an application for renewal of judgment under Section 683.150 of the Code of Civil Procedure.
- (5) Issuing a commission to take a deposition in another state or place under Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under Section 2029.300 to take a deposition in this state for purposes of a proceeding pending in another jurisdiction.
- (6) Filing and entering an award under the Workers' Compensation Law (Division 4 (commencing with Section 3200) of the Labor Code).
- (7) Filing an affidavit of publication of notice of dissolution of partnership.
- (8) Filing an appeal of a determination whether a dog is potentially dangerous or vicious under Section 31622 of the Food and Agricultural Code.
- (9) Filing an affidavit under Section 13200 of the Probate Code, together with the issuance of one certified copy of the affidavit under Section 13202 of the Probate Code.
- (10) Filing and indexing all papers for which a charge is not elsewhere provided, other than papers filed in actions or special proceedings, official bonds, or certificates of appointment.
- (c) The fee for filing a first petition under Section 2029.600 or 2029.620 of the Code of Civil Procedure, if the petitioner is not a party to the out-of-state case, is eighty dollars (\$80). Amounts collected shall be distributed to the Trial Court Trust Fund pursuant to Section 68085.1.
 - (d) This section shall become operative on July 1, 2017.

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Systematic
Approach to
Self-Represented
Litigation

Chapter One

Services for Self-Represented Litigants

s self-represented litigants have become more numerous, jurisdictions around the country have begun to address the issue with new programs and services. These programs range from informal, ad hoc responses to systemwide programs. According to a survey by the American Judicature Society (AJS), 20 states have implemented statewide initiatives for self-represented litigants. In addition, the AJS survey received information on 152 local programs in 45 states. The services provided fall into five general areas:

- Self-Help Centers. These centers provide services such as distributing educational
 materials, brochures, and informational packets; helping users complete forms;
 providing access to computer terminals; and referring users to other services.
- Family Law Facilitators. Usually connected with the court system, family law
 facilitators provide assistance to litigants on a range of family court issues and
 expedite the processing of cases through family court.
- Pro Bono and Lawyer Referral Programs. Jurisdictions are collaborating with legal services programs, law school clinics, and bar associations to offer pro bono representation to litigants considering representing themselves in court. These programs range from simple referrals, to organized legal services programs, to well-structured bar and law school programs that operate offices at the local court or through clinics located outside the courthouse.
- Pro Se Clinics. Primarily relying on volunteer attorneys, clinics educate litigants so
 they can proceed with their case.

 Technology-Based Assistance. This type of service uses telephone hotlines, kiosks, or Web sites that provide information to litigants on how to proceed through the court system. Some technologies allow the litigants to fill out forms and initiate actions from one location.

Some Wisconsin jurisdictions have recognized the need to provide services to the self-represented litigant. These programs vary from the distribution of "pro se packets" to clinics that help individuals complete family law forms. While these programs are not widespread, interest in them continues to increase.

The following are examples of programs and services currently offered or planned in Wisconsin counties:

Milwaukee County. The Wisconsin Family Justice Clinic uses volunteer attorneys, paralegals, legal secretaries, law students, and advocates to provide one-on-one assistance to self-represented litigants. Litigants receive assistance with forms, procedures, and referrals to community resources. Spanish-speaking facilitators are also available. The volunteers do not provide legal advice. The Clinic is located in the Milwaukee County Courthouse and is open from 1:00 - 2:00 p.m., Monday through Friday.

Richland County. Non-attorney volunteers who assist self-represented litigants with simple uncontested divorces staff the Richland County Resource Center. The volunteers provide forms and instructions and basic information concerning court procedures. The Resource Center is located in the Richland County Courthouse and is open the first Wednesday of the month.

Waukesha County. In partnership with the nonprofit Wisconsin Correctional Services, Waukesha County has initiated a court self-help program. The program is in the early stages of development, but has recently received an outside grant to hire a coordinator for the project.

Dane County. The Dane County Bar Association has established a Family Law Assistance Center. The Center uses volunteer attorneys and non-attorneys to provide one-on-one assistance with forms, procedures, and referrals to community resources. The Center is located in the Dane County Courthouse and is open each Wednesday.

Chippewa County. The Chippewa County Free Legal Clinic is staffed by four volunteer attorneys and a coordinator. The coordinator provides self-represented litigants with the necessary forms and assigns them to an attorney based on the area

of law they want to discuss. Each user receives a 15-minute private consultation with the attorney. The Clinic is held the fourth Wednesday of the month at the Chippewa Falls Public Library from 6:30 to 8:00 p.m.

Systematic Approach to Self-Represented Litigants

The Pro Se Working Group has reviewed information and research from other states and the programs currently operating in Wisconsin. Based on this evaluation, the Working Group developed a systematic approach for tailoring responses to the challenge of self-represented litigants. The development of a systematic approach allows for a wide range of recommendations, rather than focusing on one part of the problem. The benefits of this approach are:

- 1) it considers the entire court process when identifying responses,
- 2) it provides a framework for jurisdictions to determine appropriate responses for their unique situations, and
- 3) it can be used to determine both state and local responses.

Action Areas

The model developed by the Working Group includes six opportunities within the typical litigation process for implementation of programs or services to address the issue of self-represented litigation. These six opportunities, or action areas, allow jurisdictions, both state and local, to consider a range of options for dealing with self-represented litigants. A jurisdiction may tailor programs based on specific needs or available resources.

Figure 1 illustrates the model developed by the Working Group. The six action areas are designated in the diamond-shaped boxes, and include:

Inform	Inform the self-represented litigant of the risks and responsibilities of	
# 1111 CH 111	midin the sen-represented neighbor of the risks and responsionates or	

proceeding without an attorney.

Refer Ensure that individuals who are interested in obtaining assistance are

referred to appropriate information, including legal and other

community services.

Simplify Simplify materials self-represented litigants need to process their

cases.

Assist Facilitate accurate and complete filings and productive court

proceedings by providing assistance to self-represented litigants.

Manage Ensure that the courts use effective case management techniques in

self-represented cases.

Evaluate Evaluate strengths and weaknesses of processing cases involving

self-represented litigants.

This report is based on this model, with each subsequent chapter describing a particular action area. The description contains four parts, including:

1) the objective of the action area,

2) issues associated with the action area,

3) potential actions that may be appropriate for state or local initiatives, and

4) recommendations to the chief justice for statewide implementation.

The list of potential actions is included to allow local jurisdictions to identify approaches that best suit their county or region. The Working Group recommendations are designed to help the chief justice and director of state courts identify a statewide plan for responding to this issue.

Victim advocates, especially in domestic violence cases, also struggle with the level of information that is appropriate to provide a self-represented litigant. Victim advocates are allowed by Wis. Stat. § 895.73(2)³ to sit adjacent to the complainant and confer orally and in writing with the complainant in a reasonable manner during every hearing, court proceeding, or disposition. However, based on a 1994 informal opinion by the state attorney general, advocates are allowed to provide legal information but are prohibited from giving legal advice. That can be a difficult distinction to make, however.

Potential Actions

- Develop a brochure outlining the risks and responsibilities of proceeding without representation.
- Conduct "orientation" sessions to court proceedings by volunteers or by video.
- Develop guidelines for court staff and advocates on the type of information that is appropriate to provide.
- Provide specialized training for court staff and victim advocates on the topic of what constitutes legal advice.
- Establish information centers within the courthouse to answer general questions.
- Hold regular information seminars for the public on specific aspects of the law.
- Increase awareness of legal hotline services available through the State Bar of Wisconsin.

³ Wis, Stat. § 895.73(2) Right to be present. A complainant has the right to select a service representative to attend, with the complainant, hearings, depositions and court proceedings, whether criminal or civil, and all interviews and meetings related to those hearings, depositions and court proceedings, if abusive conduct is alleged to have occurred against the complainant or if a crime is alleged to have been committed against the complainant and if the abusive conduct or the crime is a factor under s. 767.24 or is a factor in the complainant's ability to represent his or her interest at the hearing, deposition or court proceeding. The complainant shall notify the court orally, or in writing, of that selection. A service representative selected by a complainant has the right to be present at every hearing, deposition and court proceeding and all interviews and meetings related to those hearings, depositions and court proceedings that the complainant is required or authorized to attend. The service representative selected by the complainant has the right to sit adjacent to the complainant and confer orally and in writing with the complainant in a reasonable manner during every hearing, deposition or court proceeding and related interviews and meetings, except when the complainant is testifying or is represented by private counsel. The service representative may not sit at counsel table during a jury trial. The service representative may address the court if permitted to do so by the court.

⁴ State Attorney General Informal Opinion, dated June 20, 1994.

Working Group Recommendations

Publication and Distribution of Information on the Risks and Responsibilities of Proceeding without an Attorney.

Self-represented litigants are often unfamiliar with the most basic court procedures. In addition, they may not be aware of the consequences of inadequately presenting their case. If an individual starts the litigation process with a misunderstanding of the procedures and consequences, it is more likely that the individual, and court staff and judges, will experience a higher level of frustration. It is preferable that individuals considering representing themselves make an informed decision. Since individuals consider representing themselves for different reasons, information provided at the beginning of the process may result in some people deciding that they should not proceed without the assistance of an attorney.

The Working Group recommends that a publication be developed by the court system that provides persons considering representing themselves in court with information about their responsibilities in proceeding without an attorney and the potential consequences of their actions. The information should be comprehensible to all and not overly lengthy. This information may also be presented in a video that could be shown to individuals considering representing themselves.

Guidelines on Providing Assistance to Self-Represented Litigants.

While training will help clarify what type of information is appropriate to provide to self-represented litigants, court staff may still be concerned about "stepping over the line." One way to alleviate this concern is to develop statewide guidelines that clearly define what information is, and is not, considered legal advice. By establishing statewide guidelines, court staff will feel more confident providing information. The guidelines will also institute a more uniform level of assistance to self-represented litigants around the state.

The Working Group recommends that a petition be submitted to the Wisconsin Supreme Court that establishes guidelines for providing assistance to self-represented litigants. Specifically, the rule should include:

- 1) what information should not be provided by court staff,
- 2) what information is authorized for dissemination, and
- 3) an order to distribute and post the authorized information at county courthouses.

This recommendation is modeled after other states, specifically, New Mexico and Iowa. Iowa has drafted guidelines concerning assistance to self-represented litigants. The New Mexico Supreme Court has adopted an order that lists what information can and cannot be provided and the reasons. This information is provided to court staff as a guide and is posted in the courthouse to advise the public.⁵

Legal Advice Training.

In general, court staff and lay advocates have not been trained to respond effectively to the requests for advice and information now sought by self-represented litigants on a daily basis. The language of the legal profession makes it difficult for self-represented litigants to pose the right questions and for individuals providing assistance to know whether an answer constitutes legal advice. The Working Group recommends that a curriculum and training program be developed for court staff. This educational program should be applicable not only to court staff and judges, but also to advocates who may interact with self-represented litigants.

⁵ See appendix for Iowa Court's *Guidelines for Clerks Who Assist Pro Se Litigants* (p. 45) and the New Mexico Supreme Court Order Regarding Self-Represented Litigants (p. 49).

Chapter Three Refer

he objective of the **REFER ACTION AREA** is to ensure that individuals who are interested in obtaining assistance have information about their options, including the legal and other community services available to them. Persons considering representing themselves in court may be classified into three categories: 1) individuals who think they cannot afford an attorney; 2) individuals who truly cannot afford an attorney; and 3) those who do not want an attorney regardless of cost.

Since court cases can involve serious issues and critical decisions that affect the daily lives of litigants and their families, efforts should be made to assist litigants in obtaining representation if they want it. This action area identifies programs and services that could increase the likelihood that litigants in the first two groups obtain legal services. This includes ensuring that adequate legal services are available to individuals who would like to retain representation.

Issues

Legal Services Funding.

The four Wisconsin Legal Services Corporation affiliates have experienced a decline in federal funding. For example, the federal budget for legal services has dropped 25 percent since 1995. The reduction in funding reduces the availability of legal services to low-income individuals in Wisconsin. As a result, individuals who would like representation are forced to proceed unrepresented. This issue is fully discussed in the

1996 report by the Commission on the Delivery of Legal Services established by the State Bar of Wisconsin.⁶

Unbundled Legal Services.

The court system and parties benefit when legal representation is available to all litigants. However, many individuals are unable to afford the cost of full legal representation. One approach to this problem is to reduce the overall cost of legal assistance by "unbundling" legal services, also known as "discrete task representation." Unbundling allows a lawyer to perform only a specific portion of the entire legal matter.

While unbundling legal services provides an opportunity for individuals to decrease the cost of representation, the concept of unbundling also presents questions of ethics and liability. These issues are described in the Commission on the Delivery of Legal Services report, which states:

A lawyer's role is not limited to the performance of discrete tasks which can be allocated between the lawyer and client. Rather, lawyers serve in an advisory or counseling capacity, providing clients with an understanding of their legal rights and responsibilities and explaining the practical implications of those rights and responsibilities. *See generally*, Preamble to SCR Ch. 20, Rules of Professional Conduct for Attorneys. If a lawyer merely accepts the client's identification of his or her legal needs without conducting an independent evaluation, there is a substantial risk that important considerations will be overlooked, thereby jeopardizing the client's interests and exposing the lawyer to a malpractice claim. Moreover, while the Rules of Professional Conduct permit lawyers to 'limit the objectives of the representation if the client consents after consultation,' Supreme Court Rule (SCR) 20:1.2(c), lawyers retain the ethical obligation to provide competent representation. Given these ethical constraints, the boundaries of permissible 'job sharing' with clients is unclear.

If unbundling legal services is to be used in Wisconsin, corresponding rules will need to be promulgated by the Supreme Court with recommendations from the State Bar of Wisconsin.

Pro Bono Representation.

Pro bono representation is another way to assist those interested in obtaining an attorney but are limited by income. While many lawyers provide pro bono representation, the demand outstrips the supply. As a result, the aggressive recruitment of pro bono attorneys

⁶ The report of the Commission on the Delivery of Legal Services is available on the State Bar of Wisconsin Web site at www.wisbar.org/bar/cmleged.htm, or by calling (608) 257-3838.

is important to increasing the options available to individuals considering proceeding without an attorney.

Potential Actions

- Develop a standardized attorney roster that would be available at courthouses.
- Establish partnerships with pro bono and legal service organizations.
- Develop a local referral phone center.
- Implement courtroom procedures to facilitate pro bono representation.
- Ensure information about pro bono attorneys and legal service organizations is available at the courthouse.
- Involve judges in recruiting pro bono attorneys.
- Create a pro bono plan in each county or judicial district.
- Pursue options to provide funding for legal services for low-income persons.

Working Group Recommendations

Increase Pro Bono Representation.

With the increasing need for low- or no-cost legal services and the decreasing resources to provide that service, there is an urgent need to develop sources of pro bono representation. While the State Bar of Wisconsin continues to recruit attorneys through its pro bono program, the Working Group recommends pursuing the following additional approaches:

- 1) Encourage the establishment of a pro bono component in the curriculum of University of Wisconsin and Marquette University law schools.
- 2) Review the idea of establishing a pro bono plan for each judicial administrative district. The plan would evaluate the needs of pro bono service and determine the adequacy of the available pro bono services.

- 3) Encourage judges to provide scheduling accommodations to facilitate volunteer service by pro bono attorneys. One example is to hear pro bono cases first on the daily calendar to minimize inconvenience to volunteer attorneys.
- 4) Explore the feasibility of offering reduced rates for continuing legal education programs to attorneys who provide pro bono representation.
- 5) Remove legal impediments for government lawyers to provide pro bono representation.

Pursue Financial Resources for Legal Services.

Since many individuals who proceed without representation do so because of their limited incomes, legal service organizations could play a critical role in addressing the needs of self-represented litigants. The current funding levels of these organizations are not, however, adequate to meet the demand. Legal service organizations are forced to make difficult choices when using their resources, leaving many individuals without representation.

The Working Group recommends that options be pursued that would increase the resources available to legal service organizations, including funding increases at the national level and identifying innovative programs within the state that have found ways to stretch the limited funding to provide more services.

Clarify Supreme Court Rule Concerning Unbundled Legal Services.

Unbundling of legal representation is one way to make representation available to more litigants. However, the Rules for Professional Conduct for Attorneys (SCR Chapter 20^7) are not clear concerning this type of representation. The Working Group recommends that the Supreme Court Rules be changed to allow the unbundling of legal services.

Wisconsin SCRs are available on the Court System Web site: www.courts.state.wi.us/supreme/sc_rules.asp.

Chapter Four Simplify

he objective of the **SIMPLIFY ACTION AREA** is to make the materials, forms, and instructions commonly used by self-represented litigants easier to understand and to complete. A litigant's inability to complete required forms can frustrate both the litigant and the court. No matter how well the system informs or refers litigants, some individuals will decide to proceed without an attorney. Steps must be taken to make forms user-friendly.

Currently, a variety of pro se forms are available around the state, but these forms are ordinarily useful only within the counties in which they are developed. State-developed forms would reduce the variety of forms circulating, increase compliance of the forms with law changes, reduce the burden on local organizations to keep forms current, and provide the foundation for assistance programs on a regional or statewide basis.

Issues

Understandable Forms and Instructions.

Self-represented litigants may have difficulty understanding and completing court forms because the language and format of many court forms can be overwhelming. As a result, the self-represented litigant asks for guidance from court staff, becomes frustrated when help is not available, and may ultimately file the wrong form with the court.

The simplification of court forms, especially in the family law area, could help the self-represented litigant navigate the court process. As noted in the final report of the Commission on the Delivery of Legal Services, "there is a critical need for uniform, reliable, user-friendly forms and instructional materials to assist pro se litigants."

Simplified forms can assist the self-represented litigant, but will not, however, fulfill their potential unless understandable instructions are also developed. These instructions should allow self-represented litigants to gain a better understanding of what information is required within each part of the form.

Non-English-speaking litigants also have a difficult time completing forms. While it may not be practical to develop forms in languages other than English, instructions in several languages would allow non-English-speaking litigants to understand and complete the forms.

Mechanism for Updating Forms and Instructions.

The simplification of forms and instructions should be completed on a statewide basis to ensure that forms are consistent and current. This approach would require that a statewide organization or committee be responsible for developing these forms and instructions. However, equally important is a mechanism to update these forms for changes in the law. Currently, the Records Management Committee of the Director of State Courts Office is responsible for updating statewide forms as necessary. While this committee would be a logical choice for updating the simplified forms, the committee is probably not equipped to handle this extra work and the question of the mandatory use of the forms becomes an issue (Supreme Court Rule 70.153⁸ in conjunction with Wis. Stat. § 758.18⁹ provides for the mandatory use of all standard forms developed by the Records Management Committee.).

⁸ SCR 70.153 Judicial conference, forms.

⁽¹⁾ The standard court forms that the judicial conference is required to adopt under section 758.18 of the statutes shall be developed by the records management committee, an advisory committee to the director of state courts office.

⁽²⁾ Under article VIII of the bylaws of the judicial conference, the judicial members of the records management committee act on behalf of the judicial conference in the adoption of standard court forms.

⁽³⁾ Each standard court form shall include a notice that the form may be supplemented with additional material. (4)(a) Upon adoption of a standard court form, the records management committee shall distribute or make a copy of the form available to the clerks of circuit court, the circuit court judges, the state bar of Wisconsin and other persons who are required to use the form.

⁽b) Within 90 days after the date of distribution of a standard court form under par. (a), an interested person may file with the records management committee a written objection to the mandatory use of the form, to the content of the form or to both the use and the content.

⁽c) The records management committee shall respond to the objector under par. (b) in writing within 90 days after receipt of the objection.

⁽d) Within 30 days after the date on which he or she receives the written response of the records management committee to an objection filed under par. (b), the person filing the objection may file with the clerk of the supreme court a petition for review of the decision of the records management committee. The supreme court may request a response from the records management committee and establish a schedule for submission of the matter to the supreme court for determination.

⁹ Wis. Stat. § 758.18 Judicial conference: standard court forms. The judicial conference shall adopt standard court forms for use by parties and court officials in all civil and criminal actions and proceedings in the circuit court.

Since mandating certain forms for self-represented litigants is not the intent of developing simplified forms, assigning the updating function to the Records Management Committee may not be practical.

Access to and Distribution of Forms and Instructions.

Once simplified forms are developed, mechanisms for access to and distribution of these forms and instructions need to be established. To ensure that litigants in all counties have access to these forms and instructions, electronic and paper copies must be available.

Electronically, the forms should be available on appropriate Web sites, such as county sites, the state court Web site, and the State Bar Web site. By making the forms available on a broad range of Web sites, more self-represented litigants will use them.

But since many self-represented litigants may not have access to the Internet, paper copies of the forms are also needed within each county. Logistically, these forms could be provided to counties on a computer disk to print as needed. This approach would also allow some modification of the forms that may be needed in each county.

Potential Actions

- Create simplified/readable forms.
- Create simple, concise instructions for completing forms.
- Identify a responsible organization to create and update forms.
- Make standard forms and instructions available electronically.
- Develop local procedural instructions in each jurisdiction.

Working Group Recommendations

Creation of Simplified Family Law Forms.

A significant area of difficulty for self-represented litigants is understanding and completing forms. This is especially evident in the area of family law cases. While the Records Management Committee is responsible for developing standard forms, few standard forms have been developed in the area of family law. The Working Group recommends that simplified family law forms be developed for use in Wisconsin. The simplified forms should be made widely available in both electronic and paper formats.

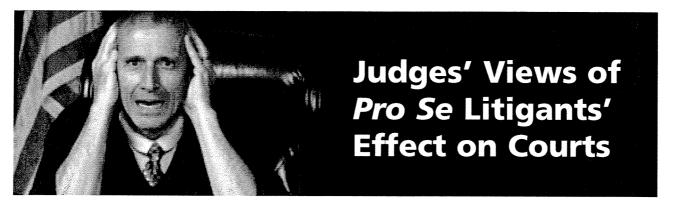
Establish a Coordinator Position in the Director of State Courts Office.

This report identifies a number of recommendations to address some of the current challenges of self-represented litigants. However, many of these responses would benefit from establishing a full-time position at the state level that would coordinate future actions. For example, if simplified court forms are developed, regular maintenance will be required. A coordinator could be responsible for updating forms as needed. In addition, a coordinator could provide technical assistance to counties interested in establishing self-help programs and also provide training to judges, court staff, and volunteers on handling self-represented litigants.

Provide Educational Material on the Internet.

The Internet provides the opportunity to provide explanatory and educational materials to self-represented litigants. While forms have been mentioned for inclusion on the court system Web site, additional materials could also be provided. These materials might include directions to courthouses, descriptions of courts, or procedural information.

The Working Group recommends that the Wisconsin court system Web site include a section for self-represented litigants. This section could include various forms of information that can be easily updated as needed. In addition, links to legal services, local court sites, or local service providers could provide enough information for self-represented litigants to get the help they need.



[Editor's Note: Eleven state court judges in Wisconsin filed an amicus brief in *Kelly v. Warpinski*, a case in which the petitioners asked the Wisconsin Supreme Court to take original jurisdiction and rule on their argument that the state constitution conferred a right to appointed counsel in civil cases. In their brief, the amici explained how *pro se* litigants burdened the courts; the amici argued that original jurisdiction in the supreme court was warranted under state law. Below we reproduce the portions of the brief on the burden on the courts. Dan Conley, O. Thomas Armstrong, and Jeffrey O. Davis, with Nathan R. Mathews (Quarles & Brady LLP, 411 E. Wisconsin Ave., Milwaukee, WI 53202; 414.978.86090), represented the amici on the brief. The full brief (Clearinghouse No. 55,816) is available in the Poverty Law Library of the Sargent Shriver National Center on Poverty Law. See www.poverty law.org/poverty-law-library/case/55800/55816.]

Introduction

Eleven current and retired judges¹ from the Milwaukee and Dane County Circuit Courts move this Court for leave to appear *amicus curiae* for the limited purpose of supporting Petitioners' requests that the Supreme Court take jurisdiction of an original action. The Movants do not take a position on the appropriate remedy, if any, for the complex issues raised by the Petitioners. Likewise, Movants do not suggest that any such remedy should cover all civil matters.² Rather, Movants have experienced first hand the burden caused by self-represented litigants on the Wisconsin court system, other litigants, and the *pro se* litigants' own causes and ask that this Court find that the Petitioners raise issue *publici juris* which warrant exercise of original jurisdiction.

Argument

Pro se Civil Litigants Represent a Significant and Growing Burden on a Judicial System Which Is Not Well-Equipped to Deal with Them.

A lawyer who represents herself is said to have a fool for a client. That problem is compounded—and the effects and burdens extend well beyond the disadvantaged lawyer/client—when the "fool" also lacks any legal training or experience. Yet, this predicament occurs every day in Wisconsin courts involving important and complicated matters vitally affecting the lives of the state's citizens. This memorandum analyzes the burden that the lack of representation for impoverished civil litigants has on the Wisconsin courts and its personnel, as well as other litigants in the system.

A. Pro Se Litigants Are a Significant and Growing Part of State Trial Courts' Caseloads.

Every year, tens of thousands of civil pro se litigants file or defend actions in the state of Wisconsin. Statistics released by the Wisconsin Pro Se Working Group, a committee of the Office of the Chief Justice, reveal that 70% of Milwaukee County family law cases in recent years involved non-represented litigants, some 10,204 persons in this category alone.

¹The Movants are Judges Carl Ashley, Thomas P. Donegan, Christopher R. Foley, Mark A. Frankel, Michael D. Guolee, Michael Malmstadt, Patricia D. McMahon, Marshall B. Murray, Richard J. Sankovitz, Mary E. Triggiano, and Joseph R. Wall.

²Small claims matters, for example, quite naturally involve high numbers of self-represented litigants. Having a right to counsel in these cases may not result in as significant of a reduction in the burden to the court system that doing so, for example, in family law matters may.

Wisconsin Pro Se Working Group, Meeting the Challenges of Self-Represented Litigants in Wisconsin, Report to Chief Justice Shirley S. Abrahamson, at 8 (December 2000). To provide context, more than 100,000 civil actions³ were opened statewide last year, approximately half of which were family law cases. Office of Court Operations, Yearend Caseload Summary-Statewide Report (generated May 6, 2004), http://www.courts.state.wi.us/about/ pubs/circuit/docs/caseloadstateo3.pdf. Moreover, the number of pro se litigants in civil matters has been increasing during the last decade, both in Wisconsin and nationally. 4 Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra, at 5, 7 (2000); Rebecca A. Albrecht et al., Judicial Techniques for Cases Involving Self-Represented Litigants, 42 Judges J. 1, at 16 (2003).

B. Unsophisticated and Inexperienced *Pro Se* Litigants Complicate the Process and Burden the Entire System.

Due to a fundamental lack of understanding of the process, in combination with a deficiency of access to resources and guidance in the face of their complicated legal issues, self-represented litigants produce time-consuming frictions at every level of the state court organization. The bulk of pro se litigants are demonstrably indigent, very few of whom have any legal experience or training that prepares them for the complexities of the adversarial system. In the context of custody hearings, this Court already has explicitly recognized the burden of poorly educated, frightened, and inexperienced litigants on the entire judicial process. Joni B. v. State, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996).

A multitude of specific burdens on the court system are caused by self-represented litigants. See Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra, at 9. Principally, pro se litigants need assistance and seek it directly from the court staff, encumbering already strained resources by forcing personnel to instruct on the most common practices and procedure. Id. This also raises conflict issues for court personnel, who are charged with remaining impartial in the litigation process, and places staff in an ethically precarious position related to unauthorized practice of law. Id. at 9, 17-18; State Bar of Wisconsin. Commission on the Delivery of Legal Services-Final Report and Recommendations, at 30-31 (June 1996). Judges likewise endanger violation of the judicial code by providing help to litigants. Albrecht et al., supra, at 16. They must also personally expend an inordinate amount of time deciphering pleadings5 and hearings, when properly scheduled, are slow and onerous. Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,

C. Pro Se Litigants Complicate Not Only Their Own Cases But Can Increase the Burden and Transaction Costs of Other Parties, Represented or Not.

One self-represented party causes problems for all litigants in the action. It goes without saying that even the most determined self-represented individual finds herself significantly disadvantaged in the litigation by a typical inability to understand and clearly and properly assert her cause (or lack thereof). *Id.* at 18; *Commission on the Delivery of Legal Services*, supra, at 30, 35. However, represented litigants also experience problems

³Small claims cases are *not* included in this figure

⁴Far from abating, this trend appears to be accelerating in the most recent years. Informal numbers from the Milwaukee County Office of District Court Administrator indicate that the percentage of family law cases involving at least one self-represented litigant has increased from 72% in 2002 to 74.4% last year. Preliminary year-to-date numbers for 2004 indicate that 76.6% of Milwaukee County family law cases have involved at least one *pro* se litigant. Likewise, excluding small claims cases, informal statistics in District 1 suggest a trend of increasing self-representation in non-family civil cases from 37.9% in 2002, to 38,3% in 2003, to 44.9% (preliminary) year-to-date. Telephone Conversation with Bruce M. Harvey, District 1 Court Administrator (Nov. 17, 2004).

⁵Wisconsin courts commonly note that a pleading from a self-represented party, "like many *pro se* petitions, is difficult to understand." See, e.g., Amek Bin-Rilla v. Israel, 113 Wis. 2d 514, 516, 519, 335 N.W.2d 384 (1983).

arranging for depositions and other discovery, giving notice and being properly notified, and responding to poorly articulated but often colorable claims and defenses. These problems significantly increase the expense for the represented party. Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra, at 9.

D. A Telling Example.

Many of these difficulties are exemplified in the recent case of In re Paternity of Demetrius A.Y. v. Ronnie J., 271 Wis. 2d 242, 677 N.W.2d 684 (Ct. App. 2004). In this paternity action lasting over a dozen years in the Wisconsin court system, conclusive genetic testing, admissions from the mother, and other evidence made it clear that the appellant could not have been the father of the children. Id. at 249. That is, "all parties recognize[d] that a meritorious defense exist[ed] to the two false claims of paternity." Id. at 256. The appellant had launched repeated unsuccessful pro se attempts to open the default judgments of paternity against him, to no avail. b Id. at 247-48. After over a decade of litigation, appellant finally was able to retain counsel and comparatively quickly got the judgments expunged.

It is not surprising that it took a dozen years for the judgment to be reversed despite admittedly conclusive evidence supporting appellant's position. The case is full of inadequate notices, failures to respond, scores of appearances by only one party, "fundamental deficiencies in the record," and grossly inadequate attempts by the appellant to represent himself. *Id.* The court summarized the problem concisely: "[I]t is an understatement to say that Ronnie was a less than sophisticated *pro se* litigant." *Id.* at 255. Rather, it was "obvious that

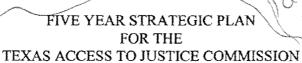
through most of his travail, Ronnie was the victim of his own uninformed knowledge of the intricacies of the judicial system." *Id.* at 256. The Wisconsin court system, including its judges, staff, attorneys, and other litigants were also obviously victimized by the years of unnecessary litigation? in the matter. Such cases are far too common.

E. The Courts' Inherent Power to Appoint Counsel Has, for a Number of Reasons, Not Been an Effective Means of Addressing the Problem.

Wisconsin courts have an inherent power to appoint counsel for the representation of an indigent litigant. State ex rel. Fitas v. Milwaukii County, 65 Wis. 2d 130, 134, 221 N.W.2d 902 (1974). However, while a circuit judge may act on an individual case basis, this remedy does not adequately meet the needs of the litigants and the court system because: (1) judges are mindful of limitations in funding for appointed civil counsel; (2) except in unusual situations, such appointments come only after an application for counsel by the pro se litigant, many of whom are not capable of properly making the request; (3) referral to, or appointment of, one of the independently operating legal clinics is not an alternative due to low funding and staffing levels and because pro se litigants likely have already been turned down by those organizations for the same reasons; and (4) referral to private attorneys is sporadically used due to the inconsistencies in the probono commitments of the greater legal community. See Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra, at 11-13 (2000); Commission on the Delivery of Legal Services, supra, at 43-44. The current approach is rife with inefficiencies and has resulted in a heavy burden on the lower courts and its litigants. Id.

⁶Tellingly, the trial court had denied the appellant's most recent *pro se* attempt in part because he had failed to file his motion in a timely fashion. *Id.* at 249.

Astoundingly, after a dozen years in the court system, the Appellate Court noted that "[n]o judicial consideration of the merits has ever occurred." Id. at 256



(Adopted May 27, 2009)

I. Introduction

Under the dedicated leadership of Chair James Sales, major progress was made on the goals set forth in the Five Year Strategic Plan adopted on October 4, 2004. (Attached as Appendix A.) Unfortunately, the current economic recession, a growing poverty population, the continued failure of Federal assistance to meet the increasing need, plummeting IOLTA revenue due to the recent decline in interest rates, and the devastating effects of natural disasters such as Hurricane Ike, have left our state in desperate need of greater resources to provide equal access to justice.

The Commission proposes that the following strategic objectives and initiatives be taken to address the State's critical needs for legal services to the poor:

II. Continue Efforts to Ensure Stable Funding for Legal Services Providers

- A. Change State Bar Dues Form from "opt-in" to "opt-out" for Access to Justice Campaign contributions to ensure full consideration of needs by State Bar members.
- B. Persuade Texas law firms, lawyers and corporations to sponsor annual fellowships to fund the costs of a lawyer working for a recognized legal services provider (similar to a Skadden Arps Fellowship Program).
- C. Assist with and promote law school endowments that are conditioned on the recipient spending an agreed amount of time with a recognized legal services provider.
- D. Explore legislation or rule changes that increase funding for legal services to the poor.
- E. Continue hosting annual Gala to increase funds and awareness for access to justice efforts.

III. Continue Education and Outreach Efforts to the Profession

- A. Continue and augment long-term program to educate the public and government officials about the realities of unequal access to justice and the need for enhanced resources.
- B. Continue recognition of lawyers who actively engage in pro bono in publications and bulletins.

- B. Explore a pro bono exemption for corporate lawyers licensed in other states to handle pro bono cases in Texas.
- C. Pursue effort to enlist General Counsel to join the corporate counsel committee and publicize the committee in the Texas Bar Journal whenever appropriate.
- D. Establish an annual giving campaign for corporations doing business in Texas.
- E. Leverage Corporate Counsel relationships to encourage increased pro bono participation among law firms and colleagues.

X. Develop a Legislative Strategy on Issues Affecting Legal Aid

- A. Devise a program for better educating legislators on the needs of low-income Texans.
- B. Continue to establish productive relationships with legislators and develop a network of lawyers available to contact their local representatives to support increased funding for legal services.
- C. Formulate or assist in the formulation of legislation, in consultation with the State Bar of Texas Board of Directors, designed to enhance delivery of legal services to the poor.
- D. Formulate methods to seek removal of impediments to, and to encourage participation of, government lawyers in the provision of pro bono services to low-income Texans.

XI. Enhance Partnerships with Law Firms to Increase Firm Participation in Access To Justice Efforts

- A. Develop a model for creating a law firm leadership circle, which establishes best practices for law firms relating to pro bono and access to justice initiatives.
- B. Enhance "lend-a-lawyer" law firm programs in which firm staff dedicate their time to a legal aid agency for a period of time.

XII. Expand Efforts to Address Gaps in Legal Services

- A. Develop strategies for increasing access for Limited English Proficiency populations within legal services.
- B. Explore the formation of a government attorneys committee to work on pro bono policies as they apply to federal, state, city and county employees.
- C. Study and develop strategies for Civil Gideon.
- D. Study and develop recommendations regarding self-representation.

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BLAKE HAWTHORNE, Clerk
By______Deputy

Civil Gideon Roge 12

April 30, 2010

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For the Lieutenant Governor Hon, Rodney Glenn Ellis Houston

CHAIR EMERITUS

The Supreme Court of Texas Attn: Mr. Blake Hawthorne Supreme Court Building 201 West 14th Street, Room 104 Austin. Texas 78701

Dear Justices of the Supreme Court of Texas:

Re: Report of the Texas Access to Justice Commission to the Supreme Court of Texas for the period, December 1, 2009, through April 30, 2010

On behalf of the Texas Access to Justice Commission (hereinafter, the "Commission"), I am providing this report to the Supreme Court of Texas which summarizes the major activities of the Commission for the period December 1, 2009, through April 30, 2010. In addition to this written report, the Commission and its members are always available to meet with the members of the Supreme Court of Texas to discuss its programs and activities or answer questions.

Annual Event and Fundraising Committee

The Commission will host the Champions of Justice Gala May 4, 2010, at the AT&T Executive Education and Conference Center in Austin. The event will be chaired by David J. Beck, The Honorable Deborah Hankinson, Joseph D. Jamail, Jr., and Charles W. Matthews. This year, the Gala will raise funds to provide desperately needed civil legal services for the men and women of our armed forces. Justice Harriet O'Neill will emcee the event, and Joe Jamail will be the keynote speaker. The Gala will begin with a reception at 6:30 p.m. and dinner at 7:15 p.m. The Emily C. Jones Lifetime Achievement Award, which reflects the highest honor given for a career dedicated to supporting legal services for poor Texans, will be presented to Charles Matthews and to Justice Harriett O'Neill in

The Supreme Court of Texas Page 12 April 30, 2010

Business Continuity Plan *without* operational procedures in place would be meaningless and could result in a false sense of security. The Operational Guidelines document will focus on data integrity and protection, operational procedures, security procedures and routine maintenance. The Work Group is currently surveying legal services providers to assess what their most critical functions are. After this survey, the Committee will devise a disaster plan to assure technological continuity in those critical function areas.

Civil Gideon Task Force

The Civil Gideon Task Force, chaired by Judge Katie Kennedy, has been charged with studying and developing strategies for Civil Gideon. To this end, the Task Force is planning to survey the judiciary and the legal aid community regarding areas in which the appointment of counsel is most warranted. Information gleaned from these surveys will provide documentation to substantiate eventual recommendations on Civil Gideon from the Task Force. The Civil Gideon Survey to the Judiciary has been circulated to the Commission and a corresponding Civil Gideon Survey to legal aid providers will be drafted. The Task Force has also solicited feedback from the State Bar's Civil Legal Services to the Poor Committee. Following any necessary revisions, the Task Force will then begin the process of circulating the Judicial Survey.

Supreme Court Task Force to Expand Legal Services Delivery

The Task Force, chaired by Jeanne C. "Cezy" Collins, continues to consider programs to expand delivery of legal services statewide and to explore opportunities to promote pro bono involvement within the sections and organizations represented in the group.

The Task Force has recently created a listserv for its members to facilitate communication, which can be used to announce pro bono events, recruit volunteers, seek scholarship and grant applicants, and work on Task Force-wide pro bono projects. The Task Force is also considering a strategic planning retreat to consider the recently submitted Plans of Action and to develop strategies for how the sections can be most effective in the delivery of civil legal services on a statewide level.

Now way

The Supreme Court of Texas Page 13 April 30, 2010

The Task Force has also created the new Disaster Relief Subcommittee, which had its first meeting on March 16. The subcommittee will focus on continuing efforts related to disaster response and volunteer mobilization. Presently, the subcommittee is compiling all of the information that has already been produced related to this topic and will make it all available in one place on the State Bar's web page.

Texas Access to Justice Foundation Update

The Texas Access to Justice Foundation has worked tirelessly with its access to justice partners to strengthen its financial position during this time of historically low interest rates. Revenue from IOLTA for 2009 was approximately \$5.5 million, which is down from \$20 million in 2007 and \$12.2 million in 2008. The Texas Supreme Court's help in amending the comparability rule, revising benchmarks and the Foundation's work to increase non-IOLTA resources including fundraising, legislative advocacy for appropriations and increased filling fees and fines, and the launch of a cy pres campaign have all been instrumental in keeping funding for legal aid available. However, the Foundation projects that after funding from the one-time legislative appropriation ceases in 2011 and with the dismal prognosis of low interest rates, the Foundation will significantly reduce grant funding to legal aid providers for the 2010-11 year.

Like all agencies receiving state appropriations, the Foundation was asked by Governor Perry to submit an impact plan for a five percent reduction in general revenue funds for the biennium, which amounts to a total of \$2.3 million from the biennium appropriation approved by the 81st Texas Legislature. The Foundation is grateful for the tremendous support of Chief Justice Jefferson in asking the Governor to exempt funding for legal services grants from this budget reduction. (See Exhibit 9.)

Grants

The Foundation has informed current grantees of the projected decline in funding and has asked grantees to begin planning for a reduction in grants for 2010-11 and 2011-12. The Foundation Board approved a revision in the grant carryover policy to allow the grantees greater flexibility in planning for the impending reduction.

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December 1, 2009

CHAIR

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Mary Faithful Austin

Paul Furth, Jr.

Houston Beverly B. Godbay

Clint Harbour

Hon, Katie Kennedy

Houston Chades W. Matthews

Irvina

Hon. Harriet O'Neil Austin

Hon. Dean Rucker Midland

Randall O. "Randy" Sorrels Houston

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For the Speaker of the House

Hon, Aeron Peña

For the Lieutenant Governor Hon. Rodney Glenn Ellis

CHAIR EMERITUS

James 8. Sales Houston

The	Supr	eme (Court o	of Texa	S
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Supr	eme	Cour	t Bulldi	ng	
201	West	14 th :	Street,	Room	104
			78701 [°]		

BLAKE HAWTHORNE, Clerk .Deputy

IN SUPREME COURT

OF TEXAS

DEC 0 1 2009

Dear Justices of the Supreme Court of Texas:

Re: Report of the Texas Access to Justice Commission to the Supreme Court of Texas for the period May 1, 2009, through November 30, 2009

On behalf of the Texas Access to Justice Commission, I am pleased to summarize the major activities of the Commission for the period May 1, 2009, through November 30, 2009. The Commission and its members are, of course, available to meet with the Court to answer any questions.

Annual Event and Fundraising Committee

The Annual Event and Fundraising Committee has focused its efforts on increasing the profile of access to justice issues statewide while raising much needed funds for civil legal aid in Texas. In honor of the Texas Access to Justice Foundation's 25th Anniversary, the Commission hosted an Anniversary Gala at the AT&T Executive Education and Conference Center in Austin on May 27. Proceeds from the event, which will be used to fund legal aid services for poor Texans, totaled more than \$296,000.

Justice Harriet O'Neill served as Master of Ceremonies, and the attendance of the entire Court contributed greatly to the success of the Gala.

The Gala featured presentations honoring two individuals who have made lasting contributions to access to justice in Texas. Houston lawyer James B. Sales, the outgoing chair, and current Chair Emeritus of the Texas Access to Justice Commission, was presented the Harold F. Kleinman Award. Emily The Supreme Court of Texas Page 16 December 1, 2009

Strategic Plan

The Committee formed a Strategic Planning Work Group, comprised of a small subset of this Committee, to identify areas that the Committee should consider over the next three years. The Work Group will develop a plan including objectives it can focus on in the long term to assist and enhance the capabilities of services organizations. In addition, the Committee will continue to monitor the maintenance of the previously installed baseline technology to ensure that the providers are most efficiently utilizing technology in the delivery of legal services.

None change

Task Force on Expanding the Civil Right to Counsel in Texas

Former Commission Chair James B. Sales created the Task Force on Expanding the Civil Right to Counsel in Texas to evaluate Civil Rideon efforts nationally, to study the need for such efforts in Texas, and to propose a plan for Texas that best suits this state's needs. The Task Force is comprised of representatives of the Commission, the Texas Access to Justice Foundation, the State Bar of Texas Legal Services to the Poor in Civil Matters Standing Committee, and the State Bar of Texas' Poverty Law Section. Sales appointed Judge Katie Kennedy of the Commission and Andrew Strong of the Legal Services to the Poor in Civil Matters Standing Committee as co-chairs. Other members include Jeanne C. "Cezy" Collins of the Commission, Chuck Herring of the Legal Services to the Poor in Civil Matters Committee, Betty Balli Torres of the Texas Access to Justice Foundation, Jonathan Vickery of the Texas Access to Justice Foundation, Nelson Mock of the Poverty Law Section, and Jerome "Jerry" Wesevich of the Poverty Law Section.

The Task Force met for the first time on March 26 and discussed various strategies for evaluating the need in Texas and increasing awareness of Civil Gideon across the state. At that meeting, the Task Force decided to develop two surveys, one for the judiciary and one for legal aid practitioners. The purpose of the surveys is to determine what, if any, areas of law and types of cases most warrant representation. The Task Force is currently reviewing a proposed survey of the judiciary on Civil Gideon issues, which will be presented to the full Commission for approval.

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May 1, 2009

BLAKE HAWTHORNE, Clerk
BY _____Deputy

The Supreme Court of Texas Attn: Blake Hawthorne Supreme Court Building 201 West 14th, Room 104 Austin, Texas 78701



Re: Texas Access to Justice Commission's Report to the Supreme Court of Texas for the period December 1, 2008 through April 30, 2009

Dear Mr. Hawthorne:

On behalf of the Texas Access to Justice Commission (hereinafter, the "Commission"), I am providing this report to the Supreme Court of Texas which summarizes the major activities of the Commission for the period December 1, 2008 through April 30, 2009. In addition to this written report, the Commission and its members are always available to meet with the members of the Supreme Court of Texas to discuss its programs and activities or answer questions.

Resource Development Update

Plummeting Interest Rates Affect Texas Access to Justice Foundation

On December 16, 2008, the Federal Reserve lowered its benchmark interest rate to an all-time low of zero to .25 percent. This has caused a severe decline in funding for civil legal aid in Texas which depends primarily on interest on lawyers' trust accounts (IOLTA). Legal aid now confronts a never before experienced crisis in funding of epic proportion. Based on that precipitous decline, the Foundation has estimated, based on early projections, that IOLTA funds in 2009 could decline to approximately \$1.5 million — down from more than \$20 million in 2007. This collapse of IOLTA funding has imposed an enormous strain on the delivery of legal services to an ever increasing number of low income and poor Texans seeking legal help.

CHAIR James B Sales Houston

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For the Governor

B. Keith Ingram
Austin

For the Speaker of the House Hon. Aaron Peña Edinburg

For the Lieutenant Governor Hon, Rodney Glonn Ells Houston computer software and hardware. This prototype pilot program was offered to non-profit legal services programs that do not have designated information technology staff. All technology questions presented to the Help Desk were documented so that the Committee could collect the data to better understand the technical and technological needs that similarly situated legal services organizations confront on a day-to-day basis.

Business Continuity Checklist

The Business Continuity/ Disaster Recovery Work Group concluded that a Disaster Plan or Business Continuity Plan would not benefit most legal service providers given the diverse state of their technology infrastructures. With that in mind, the Work Group plans to develop Information Technology Operational Guidelines for Disaster Avoidance that would prime these organizations for routine, professional technology operations. The Committee would share these guidelines with the providers, but with the goal of increasing reliability and client information safety. It is titled Disaster Avoidance because routine disasters (faulty equipment, utility failures, staffing turnovers, malicious software), which are much more prevalent than and just as crippling as a hurricane, can be easily avoided. Many providers currently have no established procedures in place for these occurrences. Attempting to build a comprehensive Business Continuity Plan without operational procedures in place would be meaningless and could result in a false sense of security. The Operational Guidelines document will focus on data integrity and protection, operational procedures, security procedures and routine maintenance.

Strategic Plan

The Committee has formed a Strategic Planning Work Group, comprised of a small subset of this Committee, to identify areas that the ATJ Technology Committee should consider over the next three years. During the next six months, the Work Group will discuss possible areas on which the Committee can focus in the long-term to assist and enhance the capabilities of legal aid service organizations. In addition, the Committee will continue to monitor the maintenance of the previously installed baseline technology to ensure that all legal service providers are maintaining an acceptable level of essential technology.

Civil Gideon Task Force

Commission Chair Jim Sales created the Civil Gideon Task Force to evaluate Civil Gideon efforts nationally, to study the need for such efforts in Texas, and to propose a plan for Texas that best suits this state's needs. The Task Force is comprised of representatives of the Commission, the Texas Access to Justice Foundation, the State Bar of Texas Legal Services to the Poor in Civil Matters Standing Committee and the State Bar of Texas' Poverty Law Section. Sales appointed Judge Katie Kennedy of the Commission and Andrew Strong of the Legal Services to the Poor in Civil Matters Standing Committee as co-chairs. Other members include Jeanne C. "Cezy" Collins, of the Commission; Chuck Herring, of the Legal Services to the Poor in Civil Matters Committee; Jonathan Vickery, of the Texas Access to Justice Foundation; Lisa Melton, of the Texas Access to Justice Foundation; Nelson Mock, of the Poverty Law Section; and Jerome "Jerry" Wesevich, of the Poverty Law Section.

The Task Force met for the first time on March 26 and discussed various strategies for evaluating the need in Texas and increasing awareness of Civil Gideon across the state.

Supreme Court Task Force to Expand Legal Services Delivery

The Task Force, chaired by Karin Crump, continues to meet quarterly to consider programs to expand delivery of legal services statewide and to explore opportunities to promote pro bono involvement within the sections and organizations represented in the group. At its February meeting, the Task Force received updates on section activities. The Task Force also welcomed Betty Balli Torres, Executive Director of the Texas Access to Justice Foundation and Commission Chair Jim Sales to discuss the current revenue crisis confronting legal aid. Crump encouraged sections to reach out to their membership in a concerted effort to contribute their respective section's efforts to combat the funding crisis.

In 2007, the Task Force created the Pro Bono Section Awards to recognize annually outstanding pro bono efforts of one large-, one medium- and one small-sized section. In 2008 the Award was expanded to include State Bar associations and organizations that foster pro bono projects as well.

The Pro Bono Section Awards were presented at the April meeting of the State Bar of Texas Council of Chairs. The Task Force received outstanding nominations in every category. Pro bono projects included mobilizing section members to provide substantive law seminars, recruiting pro bono attorneys in rural communities, offering direct legal assistance in pro se appellate cases, allocating funding for law students, and instituting internships for students with legal services providers. The three winning projects, Texas Young Lawyers Association (large-sized), Taxation Section (medium sized) and Cameron County Bar Association (small-sized) were awarded \$1,000 each to invest into their ongoing pro bono projects.

The Texas Young Lawyers Association (TYLA) created a video, Healing the Wounds: Navigating the Legal System After Surviving Domestic Abuse, which directly benefits hundreds of low-income Texans. The video is available in Spanish and English and includes details on what victims of domestic violence can expect when utilizing the courts to obtain a protective order, a temporary restraining order, or a divorce. TYLA distributed over 1,500 copies of the video in less than three months. In addition, several live presentations were conducted throughout the state at shelters and other support agencies dedicated to survivors of domestic violence.

The Taxation Section created the Tax Court Pro Bono Program, which promotes the administration of justice in cases before the United States Tax Court by providing legal instruction to pro se petitioners in the small tax case sessions of the United States Tax Court. The Tax Court Pro Bono Program is the first of its kind in the nation whereby a state bar association makes its members available to impoverished taxpayers on a pro bono basis to help resolve their tax controversies with the Internal Revenue Service. The Program provides free access to seasoned tax practitioners who help evaluate a pro se taxpayer's tax controversy, negotiate toward settlement and/or provide advice on presenting evidence during a Tax Court trial. The money awarded to this section will help fund interpreters at the calendar calls for non-English speaking clients, train volunteers, and defray the costs of obtaining copies of necessary documents needed to defend a low income taxpayer.





State Bar of Texas Blog

Posted at 2:03 PM on March 30, 2009 by John Sirman

Strong named general counsel of A&M System



On Friday, March 27, the Texas A&M University Board of Regents selected Andrew Strong as general counsel of the Texas A&M System. As general counsel he'll be responsible for all legal matters affecting the system and provide legal counsel to A&M's board of regents, chancellor, and CEOs.

Strong is a partner in the Houston office of Pillsbury Winthrop Shaw Pittman LLP, which he joined in 2005 after serving as the managing partner of Campbell, George & Strong since 1994. At A&M Strong replaces former general counsel Jay Kimbrough, who now works in

the governor's office. According to an article in the Bryan College Station Eagle, details of Strong's starting date as general counsel are being worked out.

Strong is a former president of the Texas Young Lawvers Association and currently servces as chair of the State Bar of Texas Legal Services to the Poor in Civil Matters Committee, co-chair of the Texas Access to Justice Commission's Civil Gideon Task Force, and chair of the Children at Risk's Public Policy and Law Center.

Comments (0)Read through and enter the discussion with the form at the end

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