



TEXAS LEGAL
SERVICES CENTER

PROVIDING ACCESS TO JUSTICE FOR
SENIORS, VETERANS, AND OTHER UNDESERVED TEXANS

December 5, 2014

Charles L. "Chip" Babcock
Chair, Supreme Court Rules
Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Hon. Nathan L. Hecht
Chief Justice
Supreme Court of Texas
201 West 14th Street
P.O. Box 12248
Austin, TX 78711

Re: Views Relating to Legal Services for the Poor

Dear Sirs:

Thank you for the opportunity to address the Supreme Court Rules Advisory Committee regarding legal services for the poor. Under the tireless leadership of Chief Justice Hecht, and former Chief Justice Jefferson, and going back to the successful efforts of former Chief Justice Phillips and former Chief Justice Pope, the Supreme Court of Texas has an unparalleled reputation as a champion of access to justice for the poor. As liaison to the Texas Access to Justice Commission, Justice Guzman exemplifies the Court's continued role as a national leader in access to justice.

Texas Legal Services Center is a provider of legal assistance, without charge, to Texans of modest means. We provide legal assistance to Veterans, victims of sexual assault, seniors and persons with disabilities, persons denied pensions they have earned, and persons in need of health care.

Texas has various "tools in the toolbox" to assist in access to justice. For that reason, coordinating and expanding the use of existing tools can further the cause of access to justice.

Recently, several counties in Texas have established various types of self-help centers, among them Fort Bend, Harris, Hidalgo, Lubbock, McLennan, Nacogdoches, Smith, and Travis. But a State more junior than Texas has an "attorney-serviced self-help center to assist self-represented with a variety of legal issues" in each county. See "A Quick Reference Guide to the California Courts' Self-Help Centers and Family Law Facilitators," <http://courts.ca.gov/selfhelp.htm/> Given the evident value of self-help centers where they exist in Texas, their expansion will be a positive step. (The statewide existence of self-help centers can co-exist with high levels of compensation for attorneys, see http://www.abajournal.com/magazine/article/what_americas_lawyers_earn.)

A more long-standing tool in the toolbox is mediation. Texas' public dispute resolution centers can be adept at separating parties' positions from their interests. Once the interests of parties can be identified and focused on, disputes may be capable of resolution. Well-trained dispute resolution staff and volunteers can be alert for and can address power imbalances that would otherwise make a fair outcome unlikely. Since parties cannot be required to reach a mediated settlement, mediation preserves access to the courts, although mediation also often does indeed result in an agreed resolution. A relatively recent development in mediation is the use of distance means to mediate, sometimes referred to as "e-mediation." Although e-mediation is said to offer convenience, it also results in loss of "cues" that face-face mediation affords. See *"Dispute Resolution Using Online Mediation,"* by Keith Lutz, in *Mediation*, October 25, 2014. One of the benefits for people of modest means, in the context of a mediation conducted by a trained and alert mediator, is the above-mentioned leveling of power imbalances. If e-mediation is to garner increased acceptance, it will be necessary to preserve that ability to address power imbalances. Although PayPal has on-line mediation, this has not received universal acclaim. See *"Online Dispute Resolution Creating Unhappy Customers,"* <http://www.mediation.com/articles/online-dispute-resolution-at-the-paypal-site.aspx>. The main point though is not that absolutely all users of online mediation should be guaranteed a happy outcome. Rather the main point is that Texas' public dispute resolution centers can provide excellent service, including to poor persons, and that standard of excellence should be preserved as they develop e-mediation as one of their approaches. Maintaining the ability to separate parties' interests from their positions, and maintaining the ability to level power imbalances will be important, if e-mediation is to be useful for poor persons.

Even more long-standing than public dispute resolution centers has been the State Bar of Texas with its encouragement of volunteer lawyering. The State Bar of Texas encourages volunteer lawyering, and the Pro Bono College of the State Bar is a means to that end. Many local bar associations support volunteer lawyer programs, often in coordination with the private attorney involvement programs of Texas' Legal Services Corporation field programs. The Pro Bono College of the State Bar and the local volunteer lawyer programs give recognition to the significant efforts of large numbers of Texas lawyers to help meet the unmet need of the poor for civil legal services.

These tools – the recently established self-help centers, the more long-standing public dispute resolution centers, and the decades-long tradition of volunteerism by Texas lawyers – are accompanied by an even more ancient tool. That is the authority of Texas courts to appoint counsel to represent poor persons in civil matters. The U.S. Supreme Court has seen this authority of Texas judges as emblematic of "[m]any human and enlightened States," referring to "Tex.Rev.Stat., Art. 1125 (1879) (enacted 1846)." *Mallard v. United States District Court for the Southern District of Iowa et al.*, 490 U.S.

296 at 303, 109 S. Ct. 1814 at 1819 (1989). This authority rooted in the earliest days of our State is now codified at Texas Government Code §24.016 (for District Courts) and Texas Government Code §26.049 (for County Courts).

It is thus settled law that Texas courts have the authority to appoint counsel “to attend to the cause of a party who makes affidavit that he is too poor to employ counsel to attend to the cause.” Texas Government Code §24.016, cf. Texas Government Code §26.049 (“The county judge may appoint counsel to represent a party who makes affidavit that he is too poor to employ counsel”). In view of the “humane and enlightened purpose” of such authority, *Mallard*, what could be more fully developed would be criteria for the exercise of the authority. At present, there is one criterion, albeit an overarching one: That the cause constitute “exceptional circumstances.” *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003), citing *Travelers Indemnity Co. v. Mayfield*, 923 S.W.2d 590 (1996).

The Court stated in *Gibson v. Tolbert* that “Only by evaluating the unique circumstances of a given civil case could a court ever determine that it has no reasonable alternative but to appoint counsel.” *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003). Additional guidance could, though, aid in lessening time-consuming review of whether discretion was abused. There have also been developments since *Gibson v. Tolbert* that support consideration of providing guidance for the exercise of discretion.

For instance, House Bill 75 of the 80th Texas Legislature, in 2007, enacted in Texas what is called “state court judicial review of final administrative decisions” regarding eligibility for services under Texas Human Resources Code Chapter 32 (Medical Assistance) and Chapter 33 (Nutritional Assistance). These judicial reviews involve the State and its attorney opposing an individual seeking to meet very basic needs. They can involve highly complex state and federal rules.

An even more recent development occurred on Tuesday of this week when the Supreme Court of Montana decided *In the Matter of the Adoption of A.W.S. and K.R.S., Minor Children; J.N.S., Petitioner and Respondent v. A.W., Respondent and Appellant*, 2014 MT 322, December 2, 2014. The Montana Supreme Court ruled that equal protection is violated when state law provides for appointed counsel for an indigent parent if the state is pursuing termination of parental rights, but not when it is a private party pursuing the termination of parental rights. Because in either case “a parent stands to lose the same fundamental constitutional right by a judicial determination...” and given the “strict scrutiny” applicable under an equal protection analysis, and given the absence of a compelling governmental interest to justify the distinction, the Montana Supreme Court found that the state’s equal protection clause was violated. In effect, state action was supplied by the involvement of the judiciary in decision-making, even though the state was not the party seeking to terminate parental rights.

While it is clear that *Gibson v. Tolbert* anticipated there would be “unique circumstances” in civil cases, there could be benefit from guidelines to signal to indigent litigants when it is worthwhile to move for appointed counsel in civil cases. The guidelines could include, just by way of examples, whether the matter is one that a member of the private bar would handle on a contingent fee basis; whether the matter can be stayed while mediation is attempted; whether legal aid or volunteer lawyering is available; whether the matter concerns basic human needs; whether the state is the opposing party; whether the opposing party is represented; whether the matter involves a fundamental constitutional right; whether the matter itself is otherwise complex; whether the presentation and investigation of the matter justify appointed counsel; whether there is likely to be conflicting testimony; whether the indigent litigant’s unfamiliarity with the law justifies appointed counsel; and whether appointment of counsel will benefit the court and the parties by shortening the trial and assisting in just determination of the cause.

Given the increasing availability of courthouse self-help centers, and the prospect of mediation as a tool, and the encouragement of volunteer lawyering by the State Bar and local bar associations, the adoption of guidelines for Texas Government Code §§24.016 and 26.049 need not undermine the “rarity” of the exercise of discretion to appoint counsel, *Gibson v. Tolbert*, 102 S.W.3d 710 at 713 (2003). Rather such guidelines could signal to indigent unrepresented litigants whether it is even worth it to move for appointed counsel.

Templates already exist by which an indigent unrepresented litigant can move for appointed counsel. Attachment A (Motion), Attachment B (Affidavit), Attachment C (Order).

In view of ongoing developments in the law, there would be benefit to having guidelines regarding Texas Government Code §§24.016 and 26.049.

In sum, it is a tribute to the founders of this great State that one of their earliest enactments – providing for appointed counsel for indigent litigants – exemplified a “humane and enlightened State.” *Mallard v. United States District Court for the Southern District of Iowa et al.*, 490 U.S. 296 at 303, 109 S. Ct. 1814 at 1819 (1989). It is a tribute to the Supreme Court of Texas and the State Bar of Texas and the Texas Legislature that access to justice has continued to improve. That is also a reflection of the day-in, day-out volunteer lawyering of many Texas attorneys, and the work of Texas’ legal aid programs. It is suggested that consideration be given to the establishment of guidelines for Texas Government Code §§24.016 and 26.049, so that they can be even better coordinated with the other tools in the toolbox of access to justice.

Thank you for your consideration.

Respectfully submitted,

Bruce P. Bower

Bruce P. Bower

Attachment A

Motion for Appointment of Counsel and Notice of Hearing on Motion

NAME OF PETITIONER)	IN THE DISTRICT COURT FOR
)	THE _____ DISTRICT
VS.)	_____ COUNTY, TEXAS
)	
NAME OF DEFENDANT)	
)	CASE NO. _____

MOTION FOR APPOINTMENT OF COUNSEL AND NOTICE OF HEARING ON MOTION

Comes now NAME OF PARTY, PETITIONER/DEFENDANT herein, and pursuant to the Government Code of Texas, Section 24.016, Vernon's Texas Statutes Annotated, moves that the Court appoint counsel to attend to movant's cause herein. Grounds for this motion are:

(1) Section 24.016 of the Government Code of Texas allows a District Judge to appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause.

(2) The affidavit required by Section 24.016 of the Government Code of Texas accompanies this motion and is incorporated herein by reference.

(3) Movant is too poor to employ counsel to attend to movant's cause herein. As set forth in the accompanying Affidavit, this case presents exceptional circumstances warranting appointment of counsel.

WHEREFORE, pursuant to Section 24.016 of the Government Code of Texas, movant moves that the Court grant this motion for appointment of counsel.

Date: _____

Respectfully submitted,

Signed: _____
FULL NAME

STREET ADDRESS
CITY, TX ZIP
PHONE.: (A.C.) ###-####

NOTICE OF HEARING ON MOTION FOR APPOINTMENT OF COUNSEL

To: _____

Take notice that the foregoing Motion will be heard in the _____
District Court, in Room _____ of the _____
County Courthouse at _____ in
the City of _____, Texas on
the _____ day of _____, 20____, at _____ .m.

Date: _____ Respectfully submitted,

Signed: _____

FULL NAME
STREET ADDRESS
CITY, TX ZIP
PHONE.: (A.C.) ###-####

CERTIFICATE OF SERVICE

A copy of the foregoing with the Affidavit in Support and the proposed Order, were mailed to the opposing party, or the opposing party's attorney (if the opposing party is represented) by first class certified mail, U.S. postage pre-paid, on the _____ day of _____, 20____.

Signed: _____

Attachment B

Affidavit in Support of Motion for Appointment of Counsel

NAME OF PETITIONER) IN THE DISTRICT COURT FOR
) THE _____ DISTRICT
VS.) _____ COUNTY, TEXAS
)
NAME OF DEFENDANT)
) CAUSE NO. _____

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

Comes now NAME OF PARTY, PETITIONER/DEFENDANT herein, and pursuant to the Government Code of Texas, Section 24.016, Vernon's Texas Statutes Annotated, makes this Affidavit in support of the Motion for Appointment of Counsel herein.

I am eighteen (18) years of age or older, and I have personal knowledge of the following: I am too poor to employ counsel to attend to my cause herein.

A. My monthly income is from the sources checked, and in the amounts indicated per month (if none, check "none"):

☐ None

☐ Social Security. Amount: _____

☐ Supplemental Security Income.

Amount: _____

☐ Veteran's Benefits. Amount: _____

☐ Net earnings from employment.

Amount: _____

☐ Other income. Amount: _____

☐ Spouse's income per month.

Amount: _____

B. I am responsible for, and do support the following dependents (if none, check "none"):

☐ None

Name: _____	Relation: _____
Name: _____	Relation: _____
Name: _____	Relation: _____

C. My equity interests in property (fair market value, less any encumbrances such as loans) are as follows) (if none, check "none"):

☐ None

1. Cars and/or Trucks (if none, "none"):

a. Year/Make/Value of My Interest:

b. Year/Make/Value of My Interest:

D. My checking and/or savings accounts are as follows (if none, check "none"):

☐ None

1. Checking. Bank name(s) and location(s), account number(s), current balance(s):

2. Savings/IRAs/CDs. Bank name(s) and location(s), account number(s), current balance(s):

E. Cash on hand: \$ _____

F. Other property, excluding homestead. Description, location, estimated value (if none, check "none"):

☐ None

G. Monthly expenses:

1. Rent/mortgage: _____
2. Car payment: _____
3. Transportation: _____
4. Clothing/laundry: _____
5. Food: _____
6. Child care: _____
7. Medical/dental: _____
8. Utilities: _____
9. Other (describe and list cost):

TOTAL MONTHLY EXPENSES: _____

H. Debts and child support obligations (exclude houses and automobile):

Creditor: Monthly payment:

1. _____
2. _____
3. _____
4. _____
5. _____

I am not a lawyer, I am unschooled in the law, and I believe that adequate presentation of my cause requires the appointment of

counsel. This case involves exceptional circumstances and the public and private interests are such that the administration of justice will be best served by appointing an attorney to represent me. These circumstances include following (check and explain all that apply):

☐ I need an attorney appointed because of the type and complexity of this case (explain):

☐ I need an attorney appointed because of my limited ability to adequately present and investigate this case (explain):

☐ There will be evidence largely consisting of conflicting testimony

so as to require skill in presentation of evidence and cross-examination. I expect that there will be conflicting testimony on these issues:

☐ I am unfamiliar with the law in regard to these issues in this case:

☐ I believe that appointed counsel will benefit me in my presentation of my side of this case, and will benefit the court and will benefit the other party(ies) in this case by shortening the trial and assisting in the just determination of the case.

Based on the above, I request that the Court grant my motion for appointment of counsel. Further affiant sayeth naught.

Sworn to and subscribed before me, this _____ day of _____, 20____. _____ Notary Public

My commission expires:

Attachment C

Order for Appointment of Counsel

NAME OF PETITIONER) IN THE DISTRICT COURT FOR
VS.) THE _____ DISTRICT
NAME OF DEFENDANT) _____ COUNTY, TEXAS
CASE NO. _____

ORDER FOR APPOINTMENT OF COUNSEL

The Court, having considered the Motion of NAME of PARTY herein, pursuant to the Government Code of Texas, Section 24.016, and the file in this matter grants said Motion. The Court finds and concludes that exceptional circumstances exist warranting appointment of counsel, due to (check all that apply):

- ☐ The type and complexity of this case.
- ☐ The movant's limited ability to adequately present and investigate this case.
- ☐ The expectation that there will be evidence largely consisting of conflicting testimony so as to require skill in presentation of evidence and cross-examination.
- ☐ The movant's unfamiliarity with the law in regard to issues in this case.
- ☐ _____

The Court appoints the following counsel for movant:

Name of Attorney: _____

Address of Attorney: _____

Phone number of
Attorney: _____

The Court further schedules this matter for

(Name of next proceeding)

on the _____ day of _____, 20____, and directs that
movant forthwith consult with the above-appointed counsel to
prepare for said next scheduled proceeding herein.

SO ORDERED this _____ day of _____, 20____.

District Judge