

**PROPOSAL FOR A PRO BONO
INITIATIVE**

SUBMITTED TO THE SUPREME COURT OF TEXAS

BY

THE STATE BAR OF TEXAS APPELLATE SECTION

PRO BONO COMMITTEE

OCTOBER 1, 2007

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THE PRO BONO PILOT PROGRAM

The following is a proposal from the Pro Bono Committee of the Texas Bar Association Appellate Section for a joint pilot program with the Supreme Court of Texas to deliver appellate services to indigent or nearly indigent clients at risk of losing important rights. Our goal is to match clients who are financially unable to procure legal representation with volunteer lawyers who agree to serve without expectation of compensation. We believe that supplying willing and able appellate lawyers to prepare and present the legal arguments in proceedings before the Court will assist the Court in the decision-making process while affording our members valuable experience and exposure to the Court. Below we present the Committee's proposal for the Pro Bono Pilot.

A. Overview

The Program is triggered when the Court requests full briefing of a pro se litigant's appeal and refers it to the Committee. Only after a pro se litigant's case receives three votes from the Court will it be eligible for referral. The Clerk's office will notify the parties and the Committee's Program Liaison of the referral.

The Committee's Program Liaison will then send a letter to the pro se litigant: (1) explaining the Program requirements; (2) providing an application; and (3) ascertaining his/her financial eligibility for the pro bono representation. If the litigant chooses not to apply or does not satisfy the financial eligibility requirements for the Program, the appeal proceeds pro se. Otherwise the Committee disseminates basic facts and information about the case, including parties and background, through selected Internet sites and a Listserv sent to a pool of volunteer attorneys that have previously signed up to participate in the Program. An attorney is selected from that pool, and the litigant is informed of the match by the Committee and afforded fourteen (14) days to object to the match. Barring objection, an engagement letter is executed, and the

volunteer attorney notifies the Court that he or she is counsel of record. The Court will then order a briefing schedule. The volunteer attorney can file a motion for extension of time to file the merits brief if needed to fully review the record and draft a brief on the merits. Oral argument is not guaranteed. A more detailed account of how we envision the Program to work follows.

B. Placement of Pro Bono Cases

1. Recruiting volunteer attorneys

The Committee has already undertaken a substantial and successful recruiting effort to enlist pro bono appellate lawyers willing to volunteer their time to take on cases selected for inclusion in the Pro Bono Program, as well as other specialty pro bono programs that the Committee is sponsoring. The Committee has amassed a list of volunteers to serve as pro bono counsel in matters deemed appropriate for inclusion in the Pro Bono Program. The questionnaires we have been using to recruit volunteers are fairly detailed so that we can be in a position to make appropriate matches between cases and volunteer attorneys according to their areas of interest, experience, and availability. We are pleased to report that we have more than 40 lawyers who have signed up based upon our first recruiting effort and expect to recruit many more as this and other pilot programs develop. We are continuing our marketing efforts throughout the bar.

Notably, we have been successful in obtaining volunteer commitments from a wide variety of appellate lawyers. It has been our experience that younger appellate lawyers are willing to devote the often substantial amounts of time involved in pursuing pro bono appeals in order to enhance their knowledge and skills, as well as to obtain the opportunities for greater exposure to, and oral argument before, the Court. The more seasoned appellate lawyers typically

have less time to contribute, but we believe their input and insight can be invaluable to the process both in terms of mentoring young lawyers and honing and enhancing the overall presentation of the issues. As a result, we have created a “Mentor” role designed to permit our most experienced appellate practitioners to participate in an advisory capacity, while preserving the young lawyer’s ability to take the lead on the appeal, including presentation of oral argument, if granted. It is from this pool of volunteers that the Committee will match the cases it selects for inclusion in the Program.

2. Qualifications/Financial Eligibility

The Court has indicated that it will determine whether a given case should be included in the Pro Bono Program at the time it considers the petition for review. Based on our understanding of the Court’s objectives, it is the Committee’s recommendation that the two criteria for inclusion in the Program are: (i) the petition presents one or more issues on which at least three Justices have requested merits briefing; and (ii) the pro se litigant meets the financial eligibility criteria for the Program. It is our belief that Pro Bono Program should be offered to parties who meet the criteria for indigence under the Texas Rules of Civil and Appellate Procedure or otherwise would satisfy the requirement for representation by an IOLTA-funded program, such as Legal Services Corporation or Volunteer Legal Services. Insuring that a pro se litigant satisfies one or both of these financial eligibility requirements is important to the Committee because its malpractice coverage requires that we insure that at least half of our Program clients are within 175% of federal poverty guidelines.¹

¹ We are working with the Executive Director of the Task Force for the Delivery of Legal Services to the Indigent to increase the percentage to 200% of federal poverty guidelines to be consistent with Legal Services Corporation and other IOLTA providers.

The Committee emphasizes that it is willing and able to place cases for parties whose income might exceed these requirements, but who cannot afford appellate counsel—especially because the cases selected by the Court for briefing on the merits will likely be ones having potential for meriting the Court’s review and setting precedent. However, we also believe the Program may function more smoothly if financial eligibility is established in advance by objective criteria. We propose that the financial eligibility requirement for participation in the Program be defined as follows:

Participation in the Supreme Court’s Pro Bono Pilot Program is available to litigants who satisfy the Program’s financial eligibility requirements. For purposes of the Program, “financial eligibility” means that the party has filed an affidavit of indigence in accordance with Texas Rule of Appellate Procedure 20, is proceeding without paying costs of court, and either no contest was made to the affidavit, or the contest was sustained in favor of the indigent party.

Pro se parties can also satisfy the financial eligibility requirement for the Program if, due to their financial circumstances, they are receiving, or are eligible to receive, free legal services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (“IOLTA”) program. In this circumstance, the attorney must file an IOLTA certificate confirming that the

The following table depicts the relevant income levels for various categories of families based upon 175% of the 2006 Poverty Guidelines from the U.S. Department of Health and Human Services:

Persons in Family or Household	175% of Federal Poverty Guidelines
1	\$17,150.00
2	\$23,100.00
3	\$29,050.00
4	\$35,000.00
5	\$40,950.00
6	\$46,900.00
7	\$52,850.00
8	\$58,800.00
For each additional person, add	

ORIGINAL SOURCE: The 2006 Federal Poverty Guidelines are taken from Federal Register, Vol. 71, No. 15, January 24, 2006, pp. 3848-3849. Further information can be found at <http://aspe.hhs.gov/poverty/06poverty.shtml>.

IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines.

With regard to the IOLTA certificate, we have been informed by the directors of Legal Services Corporation, an IOLTA-funded program, that they will handle the screening process for potential participants in the Pro Bono Program, thus satisfying Texas Rule of Civil Procedure 145 and Texas Rule of Appellate Procedure 20 and avoiding the need for a contested hearing on indigence in the Supreme Court.²

3. Selection and referral process

As noted, if three members of the Court decide to request briefs on the merits in a case involving parties who are pro se, it will refer that case to the Committee. The case will then proceed on the usual procedural course in terms of briefing, oral argument, and ultimate disposition with the appointed attorney serving as lead counsel—with a few exceptions, as noted below.

a. Referral of individual cases

Once the Court identifies a case for inclusion in the Pro Bono Program—by way of internal vote sheets or otherwise and presumably after the petition for review briefing has been completed—the Court would direct the Clerk’s office to refer the matter to the Committee. That referral process would result in notification to the parties who have previously appeared, as well as to the Committee, of the case’s selection for inclusion in the Program. This letter will also include a one-page application for the pro se litigant to fill out. A proposed form of this letter as well as the application is attached as Exhibit A.

² According to Texas Rule of Civil Procedure 145(c) and the proposed amendment to Texas Rule of Appellate Procedure 20, where an affidavit of inability to pay is coupled with an attorney’s IOLTA certificate, the affidavit may not be contested.

b. Explanation of Program to the pro se party

The Committee would then notify the pro se litigant by letter (a proposed form of which is attached as Exhibit B), that:

- The case has been initially selected for inclusion in the Pro Bono Program
- Participation in the Program is purely voluntary, and the pro se litigant must apply by filling out and returning the one-page application within thirty (30) days from the date of the letter.
- Participation in the Pro Bono Program is conditioned upon a showing of financial eligibility, as that term is defined in the Program (see part B.2, *supra*)
- If the pro se litigant elects to be included in the Program, the State Bar of Texas will seek placement of the case with its pro bono volunteer attorneys, and this process will likely involve the transmission of background information about the case through email distribution to potential volunteers, as well as posting of minimal, publicly available facts about the case on the Internet, solely for the purpose of locating a volunteer

Once (1) the application is sent to the Committee indicating the pro se litigant's desire to participate in the program, (2) financial eligibility is confirmed, and (3) a placement is made, the pro se litigant will receive a letter from the Committee with the identity of the appointed counsel and will have fourteen (14) days to object to the particular counsel chosen by the Committee. A copy of the proposed Committee's letter to the pro se litigant notifying him or her of the match is attached as Exhibit C.

- The Committee's second letter will set forth the scope of the representation, making clear that the appointment is for the duration of a particular appeal and/or other appellate proceeding in the captioned cause in this Court, ends upon the conclusion of any motion for rehearing, and does not include any obligation to carry the case forward to the United States Supreme Court.
- In the letter, the volunteer attorney will be instructed to contact his or her client and a proposed form of communication with the client is attached as Exhibit D.

If an objection is made, financial eligibility cannot be confirmed, or a match cannot be made for any reason, the Program Liaison will send a letter to the pro se litigant indicating that

the Committee has notified the Court that placement in the Pro Bono Program was unsuccessful, allowing the case to continue from that point forward as a pro se case.

c. Ascertainment of Financial Eligibility

When the Clerk notifies the Committee of the referral, he would also make available to the Committee copies of the petition and any responses and replies—either electronically or in paper form, according to the Court’s preferences. Upon receipt of a copy of the Court’s referral letter and petition (and responses/replies), the Pro Bono Committee will first identify whether the financial eligibility requirements have been or can be met. As noted, we anticipate in most cases that we will be able to obtain a copy of the docketing statement from the court of appeals, which has a section devoted to the indigence issue that includes information as to date of filing for any affidavit of indigence, any contest, and the result of that contest. As a result, the status of the party should be easily ascertainable in most cases. If the docketing statement does not establish indigence, and neither the court of appeals nor Supreme Court’s docket (nor the petition itself) reflects indigence, we would then contact the pro se party after receiving his/her application to determine whether the pro se party meets the Program’s standards for financial eligibility, and if so, facilitate the steps necessary to screen the pro se party as to the income requirements for issuing an IOLTA certificate.

d. Selecting pro bono counsel

Once the pro se litigant agrees to be included in the Program by affirmatively indicating his or her intention to do so, the Committee will disseminate limited information about the case, such as the parties, the issues presented, and any urgency of the proceedings, to our members to solicit a volunteer for the case. As part of this process, we plan to take advantage of available technology to get the information to our volunteers so that they can sign up for individual cases

based on their availability and interest. In this regard, we are in the process of setting up a specialized webpage and tailored email lists to disseminate information regarding particular cases to our volunteers through the Texas Lawyers Help webpage, <http://www.texaslawyershelp.org>, as well as the Appellate Section's webpage. We will also send out a Listserv email to the attorneys who have signed up for pro bono referrals containing information about the nature and posture of the case, including impending deadlines, and the parties (for purposes of checking potential conflicts of representation). A copy of proposed information to be used in the web posting and email alert is attached as Exhibit E. The benefit of this process is that we are likely to expedite the matching process by insuring that the information gets to a wide number of attorneys quickly and avoiding the inefficient process of calling attorneys one-by-one.

The Committee will then evaluate the attorney responses and contact the lead attorney to confirm his or her willingness to serve before making the selection. We will also select a mentor counsel to assist the lead pro bono attorney, but we do not recommend that this information be included in the formal appointment papers out of concern that the client may look to the mentor and bypass the lead lawyer.

When we confirm a match, we will advise the Court via email or through any other mechanism of communication the Court prefers. The selection notice will contain the style of the case, including both trial and appellate cause numbers (if available), the name and contact information of the pro bono lawyer, the name and contact information for the pro bono litigant, and any additional volunteer appellate lawyer(s). At this point, the Court would designate the case as being included in the Pro Bono Program if the match were successful and direct the clerk

to order a briefing schedule. The volunteer will also file a notice with the Court that states that he or she is counsel of record. *See* TEX. R. APP. P. 6.1(c).

If, however, the pro se party fails to satisfy the financial eligibility requirements, objects to the volunteer attorney, or we are for other reasons unable to make a match, we will advise the Court that we were unable to place the pro se party with counsel so that the case can continue as pro se and the Court can order a briefing schedule.

e. Requests for inclusion to the Pro Bono Committee

The procedure outlined above will likely capture the majority of cases that would be most desirable for inclusion in the Pro Bono Program. However, we are concerned that another category of meritorious cases might be missed simply because they were able to find a counsel to file their petition for review. Specifically, we are aware of a number of cases in which pro bono counsel have represented a party at the intermediate appellate court, but cannot devote the additional time necessary to seek discretionary review—especially if that review includes briefing on the merits, which is a very time-consuming effort. In these cases, appellate counsel is willing to prepare the 15-page petition for review, believing that an issue raised by the court of appeals’ disposition merits this Court’s consideration, but would be more than willing to hand off the representation to another counsel if merits briefing is requested. We would like for the Court to consider allowing another avenue to Program participation for this narrow category of cases through application to the Committee. The same core eligibility requirements would apply: the litigant must meet the financial eligibility requirement, and the Court must first request briefing on the merits, in order to be considered by the Committee. But if these requirements are met, we recommend that the Court consider allowing this group of pro se litigants to participate in the Pro Bono Program as well. As one of the requirements is a request

for briefing on the merits, we do not believe this category will substantially increase the number of cases in the Program, and the posture presents the same attraction to our volunteers who would be willing to take over the representation.

This alternative path to the Program could be structured as follows:

- The Committee notifies counsel and potential pro se litigants of this alternative in *A Guide to Practice Before the Supreme Court of Texas* (“Guide”) (Exhibit F).
- The pro se litigant or counsel fills out a form Request for Inclusion in the Pro Bono Program, *see* Exhibit G, as a formal means of notifying the Committee that the pro se litigant fulfills the financial eligibility requirements for the Program and that merits briefing has been requested by the Court (although we would not necessarily need a formal, written request if counsel contacts us directly with that information and we are able to independently verify the information).
- The Committee determines that the financial eligibility requirements either have been or can be satisfied (and facilitates the filing of any necessary documents). A proposed form of Affidavit is attached as Exhibit H.
- The Committee either receives the petition and responses/replies from pro se litigant’s counsel or contacts the Court to obtain copies.
- The Committee locates pro bono counsel through the same procedure outlined in part B.3.d; and the Committee notifies the Court of the inclusion of the case in the Program, including the same information outlined in part B.3.d, above.

After that point, the case would progress according to the Court’s schedule, although it would be designated as a Program case by the Court.

4. Post-placement procedures

a. Obtaining the record

One logistical problem that may affect the timing of a brief on the merits is the pro bono counsel’s ability to access the record. Typically, the Court requests the record from the court of appeals at the time it requests briefing on the merits. The record will be critical to pro bono counsel, who presumably has not been involved in prior proceedings, and we want to insure that counsel have access to the trial court record as soon as possible; any time lapse between the time

the court of appeals sends the record to the Court and the receipt of that record by the Court may affect counsel's ability to prepare the brief on the merits. If pro bono counsel is in a city other than Austin, it may prove even more difficult to obtain the record because the Court typically does not permit the record to be checked out for copying. Although there are couriers in Austin who can make copies, that process is expensive. Access to the record could be handled in Program cases in various ways: (i) the Clerk's office could make special accommodations to pro bono counsel in a Program case to facilitate access to the record; (ii) the Committee will work with the local courier companies to see if they can donate all or part of their costs of making a copy of the record; (iii) where possible, the law firms of pro bono counsel will likely carry the copying and courier costs as part of the pro bono contribution, but a number of our volunteers are solo practitioners or associated with small law firms, and we would not want the cost of obtaining the record to be a barrier to representation.

b. Extensions of time

Although the Court is very reasonable about extensions of time generally for filing briefs and other documents, we hope that the Court would consider these circumstances in connection with requests for extensions from Pro Bono Program participants, especially at the commencement of their representation and if the record is not readily available at the time of the appointment.

C. Mentoring

As noted, we have implemented a mechanism for involving our more seasoned, experienced appellate practitioners in the pro bono process. We are quite fortunate to have a number of "the best" appellate practitioners in this State involved in our Section, and they have expressed interest in mentoring younger lawyers through the pro bono process. One obvious

benefit to the younger lawyers is that they would receive direct training from top appellate lawyers, many of whom they would not have been able to access absent such a program. The mentor appellate lawyers would be able to contribute their time and experience in brainstorming about the issues, reviewing and editing briefs, and assisting with oral argument preparation (*e.g.*, moot courts) without having to undertake full responsibility for the case. This proposal has been enthusiastically received by the Section members.

D. The Committee's Continuing Role After Placement

Administratively, the Committee would maintain contact with our volunteer attorneys through "progress report" emails, much like the ones used by Volunteer Legal Services of Central Texas to communicate with their volunteers. As noted, the Committee will designate one of its members to be the Program Liaison to serve as the point of contact for the Court, the pro bono clients, and the volunteer lawyers. As noted above, once a case has been accepted into the Pro Bono Program, the Program Liaison will notify the client regarding the Committee's role in assisting the pro bono lawyer and provide contact information for the Program Liaison so that the client can make contact if an issue arises. This letter would also explain the limits on the scope of the representation and the fact that we cannot guarantee replacement counsel if the client rejects the counsel provided or if a substitution becomes necessary.

The Program Liaison will also follow up regularly with the volunteer attorneys to insure that we receive periodic reports of the appeal's progress and to remind the volunteer lawyer that we are here to help. In this regard, the Committee will offer a support network for volunteer lawyers to access resources, such as mentors in appropriate cases, treatises, sample appellate briefs, and other materials. We believe that the knowledge that the Committee will provide

support and materials to its volunteers will enhance their confidence in taking on pro bono appeals, as well as the final work product that the Court receives.

E. Substitution of Pro Bono Counsel

Although we have been fortunate that our attorneys have typically handled pro bono appeals through the entire appellate process, we also recognize that there may be situations where an attorney who originally undertakes representation may have to withdraw, due to acceptance of a public position, illness or other personal situations, client conflict, and the like. Our proposal is that, in these instances, the attorney advise both the Court and the Committee, and, if the Court deems it appropriate to permit the withdrawal of the appointed attorney, the Committee will attempt to place the client with a new volunteer attorney, although we cannot guarantee a replacement volunteer. The Committee will take into account the circumstances necessitating the withdrawal in soliciting and recommending a reassignment. If substitute counsel is found and reassignment is recommended, the Committee will notify the Court through the same procedure described above in part B.3.d, above. This process will be explained in the Guide.

F. Winding Up the Representation

After completion of the representation, we recommend that the following steps be taken around the time the mandate issues.

1. Recognition of the Pro Bono Commitment

Official recognition of the time and contribution of pro bono attorneys is something that the Court may want to consider. As noted, our experience has been that our appellate lawyers put a great deal of time and care into their pro bono representation, and official appreciation of that sacrifice goes a long way to make an attorney feel that it was “all worth it.” It could be as

simple as having the Chief or senior Justice make mention of the pro bono representation at the conclusion of oral argument (as the Fifth Circuit does in its appointed docket) or perhaps some language acknowledging the Court's appreciation of the pro bono representation in a letter accompanying issuance of the opinion or otherwise concluding the case.

Another idea is to indicate on the docket sheet or in the style of the case that it is "Pro Bono." The Ninth Circuit apparently designates a case in the program as "PRO BONO" in the caption of the case under the cause number.

Finally, at the conclusion of the appellate proceeding, the Committee will follow up with a certificate of appreciation to the attorney for his or her efforts in the case.

2. Evaluation Process

We believe that the Pro Bono Program would benefit from feedback from the attorney participants and have proposed a form for evaluating various aspects of the Program from the standpoint of the attorney. *See Exhibit I.*

We have also considered the idea of asking the clients for evaluation input. One concern is that their views of the Program will be heavily influenced by outcome and may not reveal benefits or problems with the process. If there are real communication problems between attorney and client, the Pro Bono Committee is available to address them, and we believe that the informal process will allow more candid discussion by all involved. If, however, the Court believes that formal client feedback as to the Program and the volunteer attorneys would be beneficial, we are willing to monitor that process and report back to the Court the results of both sets of evaluations in any format the Court prefers.

3. Reporting

The Committee will report to the Court on an annual basis as to the utilization of the Pro Bono Program, including cases pending assignment, the developmental stages of all cases pending in the Program, the identities of the volunteer lawyers, the ultimate termination/disposition of Program cases, and feedback from the evaluation process. We are willing and able to compile and communicate this and any other information that would be useful in any format that the Court desires.

G. Appellate Education

A number of the appellate pro bono programs that we have studied have included an educational component, complete with proposed forms, to make it easier on pro se parties to preserve and pursue their right to appeal. Several courts provide written materials to help guide pro se parties through the appellate process, similar to the self-help kit for domestic violence created by Texas Access to Justice and the Court, and/or the varying pro se packets for divorce, child custody, etc. that many district courts make available on their websites.

As noted above, the Committee has prepared *A Guide to Practice Before the Supreme Court of Texas*, that could be available in the Clerk's office in paper form and on the Committee's website. A draft of the Guide is attached as Exhibit F. The Guide contains an overview of the process and practice before the Court, provides answers to commonly asked questions, and refers the party to appellate forms and specimens, such as a motion for extension of time to file a petition or brief, petition for review and response, waiver letter, and briefs on the merits, as well as other documents necessary to proceed with the case. The Guide, together with these forms and specimens, would be posted on the Committee's webpage on the State Bar of

Texas Appellate Section website, <http://www.tex-app.org/com-probono.html>, and the Court's website, <http://www.supreme.courts.state.tx.us>, could contain a link to these materials.

The Guide is designed to present the appellate process before the Court in layperson's terms. The Guide and form documents could also be used by attorneys who are not as familiar with practice before this Court. It is our hope that providing this information and making the proper forms available will give litigants greater confidence in the process, reduce the burden on the Clerk's office in answering routine questions, and otherwise assist pro se litigants in navigating the appellate process.

A part of the Guide will educate the public about the Pro Bono Program. Pro se parties should be aware that their cases could be considered for inclusion in the program in deciding whether to file a petition for review. It is also possible that trial and/or appellate counsel, believing that the case contains an issue meriting this Court's consideration, would be willing to assist a pro se party in preparing a petition for review if they knew that pro bono counsel might be available to handle the briefs on the merits and argument if the Court were to request it. Finally, as outlined in part B.3.e above, we recommend that the Committee have the ability to recommend cases for inclusion in the Program where a pro se litigant has been represented by pro bono counsel during the petition phase if the pro se litigant satisfies the financial eligibility requirements and the Court requests briefs on the merits.