



# We Need You!

## Join the Federal Pro Bono Program and Fight the Good Fight

BY ANDRÉA L. VIEIRA, ESQ.

**What do you know about the Federal Pro Bono Program? Did you know that a significant portion of our federal court docket is taken up by civil rights cases brought by inmates under 42 U.S.C. § 1983? Did you know that the cases in the program have been screened for merit? Did you know that the program will pay your costs up to \$7,500? Did you know about the possibility of attorney fees per statute that can include fees on settlements and not just a verdict? Did you know that attorneys also get CLE credit for taking a program case?**

When an attorney agrees to take a case under the Federal Pro Bono Program, the attorney is defending the U.S. Constitution and doing a service to the community, the litigants, and the court. Inmate § 1983 cases are time-consuming for the courts, since unrepresented inmates have difficulties understanding the rules and procedures of civil litigation. So, keep reading. This is an opportunity you don't want to pass up.

### About the Federal Pro Bono Program

The Federal Pro Bono Program started in 2014. Since that time, the federal court has referred 147 cases in the District of Nevada to the program.<sup>1</sup> As of 2021, of those 147 cases, 114 cases were placed with an attorney. After a case goes through the statutory screening process and the inmate meets the criteria for appointment of counsel, the court will place the case in the program. Once an attorney agrees to take a case, the Legal Aid Center of Southern Nevada acts as the pro bono liaison in the district and coordinates with the attorney for the Order of Appointment of Counsel to be issued. Attorneys in the program are covered under the Legal Aid Center's malpractice insurance and get one hour of CLE credit for

every three hours of attorney time, up to four CLE credits. There are also training CLEs and mentors available.

### **What do you mean, “these cases are screened for merit?”**

I’m glad you asked. Pursuant to 28 U.S.C. § 1915A(a), the federal court must conduct a preliminary screening in any case in which an inmate seeks redress under 42 U.S.C. § 1983 (the federal civil rights statute formerly known as the Ku Klux Klan act of 1871). The court identifies any cognizable claims and dismisses claims that are frivolous, malicious, fail to state a claim, or seek monetary relief from a defendant who is immune from such relief. The court applies the same standard when screening under § 1915 as under FRCP 12(b)(6). All or part of a complaint filed by an inmate can be dismissed *sua sponte* if the inmate’s claims lack an arguable basis either in law or in fact.

### **How does the federal court pay my costs?**

An attorney who has been appointed to a case can seek reimbursement of reasonable expenses or compensation for services in any manner authorized under the program. The presumptive maximum reimbursement for costs is currently \$7,500. The details are contained in the Second Amended General Order 2019-07 found on the federal court’s website. The attorney is not required to advance the cost and can choose whether to seek reimbursement or an advancement of an expected expense. Costs that qualify include, but are not limited to, depositions, travel, service of process, interpreters, and experts. If the attorney gets a monetary award through settlement or judgment, the program’s fund gets reimbursed. Lawyers who take a case under the program are not charged fees for using PACER in the case on which they are serving as pro bono counsel.

### **What do you mean, “I can ask for attorney fees?”**

Per 42 U.S.C. § 1988(b), in any action to enforce a provision of § 1983, the court may award reasonable attorney’s fees to the prevailing party, other than

the U.S. The Ninth Circuit held that a plaintiff can be a “prevailing party” when the plaintiff “enters into a legally enforceable settlement agreement against the defendant ...”<sup>2</sup> Further, the Ninth Circuit has recognized that “litigants who achieve relief other than a judgment on the merits or a consent decree are prevailing parties ...”<sup>3</sup>

A plaintiff can recover attorney fees if a two-part set is met:

- 1) there is a material alteration in the legal relationship between the parties; and
- 2) the material alteration is stamped with some “judicial imprimatur” such as incorporating the agreement into an order.<sup>4</sup>

As part of this analysis, if a court “incorporates the terms of a voluntary settlement into an order, ‘it may thereafter enforce the terms of the parties’ agreement ... [and] its authority to do so clearly establishes a judicially sanctioned change in the legal relationship of the parties,’ [...] because the plaintiff thereafter may return to court to have the settlement enforced.”<sup>5</sup> “Attorney fees are recoverable by pro bono attorneys to the same extent that they are recoverable by attorneys who charge for their services.”<sup>6</sup>

### **How does the court determine if a litigant needs counsel?**

Courts have discretion under 28 U.S.C. § 1915(e)(1), to “request” that an attorney represent indigent civil litigants upon a showing of “exceptional circumstances.”<sup>7</sup> The court determines whether “exceptional circumstances” exist by evaluating:

- 1) the likelihood of plaintiff’s success on the merits; and
- 2) the plaintiff’s ability to articulate the claim pro se “in light of the complexity of the legal issues involved.”<sup>8</sup>

The Federal Pro Bono Program can be an excellent opportunity for you or one of your associates (I’m talking to you, managing partners) to get valuable federal court experience arguing before federal judges, participating in a settlement conferences, and maybe even going to trial, while helping litigants who desperately need counsel to fight for their constitutional rights. These cases are

bigger than the people who bring them because they are about the limits on government power and the preservation of our rights under the Constitution.

When considering the statistics that I shared with you, as a lawyer it saddens me to think that, since the program’s inception in 2014, 33 people whose cases were deemed by a federal judge to have some merit were unable to have an attorney represent them in a case involving their constitutional rights. There are no rights more fundamental to liberty than those secured by the Constitution. Inmates are often forgotten by the system most simply because they are unseen by those of us in a free society while they are locked away in an institution. The inmate is one whose voice is not often heard and whose affliction is hidden behind the walls of a prison. This makes an inmate more susceptible to unconstitutional conduct because the alleged perpetrators control the narrative and the environment.

When an inmate is able to gather the strength and ability to seek redress for a constitutional violation, the inmate should not have a meritorious claim subverted simply because the inmate doesn’t know the law or civil procedure. How can an inmate effectively litigate a civil rights case in federal court when the inmate does not know how to notice or take a deposition, propound discovery, or prove causation and damages? To understand the severity of the need, one need only look at the types of cases in the program, which include denial of life-saving medical care, retaliation for exercising the rights to free speech and assembly, and the use of sometimes deadly excessive force.

When you take a case under the program, you are getting a case that has been screened by a federal judge for merit, your costs of suit up to \$7,500 are covered, you have the opportunity to seek attorney fees, you can gain valuable federal court experience, and you will be using your expert knowledge to make a difference in the community and the lives of the litigants. Not to mention, if I was a federal judge whose overloaded docket was burdened with these cases, I would be quite grateful to

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an attorney providing this help to the court and the litigants.

So, what are you waiting for? Reach out to Michael Wendlberger at Legal Aid Center of Southern Nevada ([MWendlberger@lacs.nv.gov](mailto:MWendlberger@lacs.nv.gov)) or Emily Gesmundo, the Federal Court Pro Bono Liaison ([Emily\\_Gesmundo@nvd.uscourts.gov](mailto:Emily_Gesmundo@nvd.uscourts.gov)), and get your case today! You'll be glad you did.

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## ENDNOTES:

1. Legal Aid Center of Southern Nevada statistics
2. *Barrios v. CA. Interscholastic Fed.*, 277 F.3d 1128 (9th Cir. 2002).
3. *Cabonell v. I.N.S.*, 429 F.3d 894, 899 (9th Cir. 2005).
4. *Id.*
5. *Id.* at 901.
6. See *Voice v. Stormans Inc.*, 757 F.3d 1015, 1017 (9th Cir. 2014) citing *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939 (1989) ("[W]here there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee.>").
7. *Agyeman v. Corrections Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004).
8. *Id.* at 1103 (quotation omitted).



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