

Supreme Court Administrative Determinations on the Report and Recommendations of the *Ad Hoc* Committee on *Pro Bono* Assignments

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Introduction

The Supreme Court in 1997 created the *Ad Hoc* Committee on *Pro Bono* Assignments in response to a request (from the New Jersey State Bar Association and from others) for a reexamination and possible improvement of the system and process by which attorneys have been providing pro bono services to the public, including those services provided pursuant to the Court's 1992 *Madden v. Delran* decision (representation for indigent defendants facing consequences of magnitude). The Committee, chaired by Assignment Judge Eugene D. Serpentelli, submitted its report to the Court in November 1998. The Court has carefully considered each of the Committee's recommendations. The Court's determinations as to each of the recommendations are now set forth in this document.

As noted in the Committee's report, the Court, in its charge to the Committee, specifically asked it to (1) develop a means of measuring *pro bono* service by attorneys; (2) review the adequacy and scope of the current *pro bono* assignment exemption categories, including the Assignment Judges' discretion to grant excuses; (3) review the relationship between *pro bono* assignments for complex and difficult matters (i.e., terminations of parental rights and domestic violence cases) to other *pro bono* assignments, including the desirability of assignment credits; (4) review the way fee- generating assignments and pro bono assignments are made and consider how best to coordinate assignments, as appropriate; (5) analyze whether there is a disproportionate burden on attorneys assigned in municipal courts or in other types of *pro bono* services; (6) consider whether to recommend that certain legal services be provided by the state; and (7) address any other aspect of *pro bono* assignments that the Committee believes warrants study and will benefit the Judiciary and the Bar while continuing to further New Jersey's tradition of *pro bono* services to the poor.

Because the subject matter here under consideration directly affects the bar and the practice of law, the Court sought to involve the bar at all stages of the process. More than half of the Committee members were practitioners (both private and public sector), and a number of those were representatives of the organized bar. The report was published for comment (with a three-month comment period). A number of comments were submitted by private attorneys, county bar associations, the New Jersey State Bar Association and others; the Court considered all of those comments. Additionally, the Court met with representatives of the New Jersey State Bar Association to review the report and recommendations.

Determinations on the Committee's Recommendations

Committee Recommendation 1 (Report at 16-17) -- "The Committee recommends that all counties be required to use the computer system developed by the Administrative Office of the Courts to assign both pro bono and fee generating matters. Further, the computer system should, at a minimum, be able to track basic information regarding the assignment process, including the name of the attorney assigned to handle a particular matter, the court where the matter was heard[,] and the case type."

Court Determination -- The Court agrees that all vicinages be required to use the AOC's computer system for this purpose. The Court also agrees that the computer system should be able track basic information about each assignment (e.g., attorney, vicinage, case type); to the extent that the computer system does not have that capability at present, the Court directs that it be modified and enhanced as necessary.

Committee Recommendation 2A (Report at 18) -- "The process whereby the Supreme Court annually reviews and

modifies, as needed, the various exemptions from pro bono assignments should be continued. It is further recommended that Assignment Judges should continue to have discretion to excuse temporarily attorneys from pro bono assignments where good cause is shown.”

Court Determination -- The Court agrees with both portions of this recommendation (and, in fact, has continued to follow the annual review and modification procedure for the list of possible exemptions from pro bono service).

Committee Recommendation 2B (Report at 20) -- “It is recommended that the Supreme Court revise the 1998 Exemption Categories for use during 1999 in accordance with the proposed listing contained in Appendix I [to the Report].”

Court Determination -- The Court acted on this separately and since the date of the report

has issued two revised listings of exemption categories, one for use in 1999 and, subsequently, one for use in 2000.

Committee Recommendation 3 (Report at 22) -- “It is recommended that Assignment Judges, based on input from their respective County Bar Associations, be authorized to grant additional offsetting credit for time spent by attorneys assigned to handle complex or difficult matters.”

Court Determination -- The Court approves this recommendation.

Committee Recommendation 4 (Report at 23) -- “Fee generating cases should be assigned, where practical, only to those attorneys who have already handled a pro bono assignment, regardless of the type of assignment system in place (i.e., voluntary or mandatory). Further, fee generating assignments should be made, where appropriate, according to a strict, alphabetical rotation.”

Court Determination -- Rather than the Committee’s recommendation, the Court instead prefers an approach that does not link Madden assignments and fee-generating assignments. Under the approach approved by the Court, attorneys will be encouraged to apply for fee-generating appointments in specific subject matter areas or case types. Those appointments should not be given as a quid pro quo to those attorneys who have received pro bono assignments; they should not be seen as rewarding attorneys for taking on pro bono assignments. However, in selecting from among those attorneys who have applied for fee-generating appointments in a particular case type, the Assignment Judge may give preference to those on the particular list who also have handled pro bono matters during a defined previous time period. This approved approach, which was recommended to the Court by the Judicial Council, is set forth in greater detail in an attachment to these Administrative Determinations.

Committee Recommendation 5 (Report at 26-27) -- “Due to the limited data available to the Committee with regard to the number and types of pro bono assignments, it is the recommendation of the Committee that the analysis in response to this charge[, namely, to analyze whether there is a disproportionate burden on attorneys assigned in Municipal Courts or in other types of pro bono matters,] be reexamined if the recommendation contained in charge 1 is adopted, which requires all vicinages to use a computer system that will generate reliable statistics concerning pro bono assignments.”

Court Determination -- As set forth above, the Court has in fact approved the Committee’s Recommendation 1 and has directed that the AOC’s computer system, if it is not already capable of meeting these needs, be modified and enhanced to do so. The Court agrees that once the improved statistical database has been developed, there needs to be an analysis of any disproportionate burdens resulting from pro bono assignments. The Court asks the Administrative Director of the Courts to determine when that analysis should be conducted.

Committee Recommendation 6A (Report at 28-29) -- “It is recommended that the Judiciary make the Executive and Legislative Branches aware of the need to appropriate sufficient funding for Government sponsored Legal Services and other programs to provide legal services in connection with Superior Court matters currently being assigned to pro bono private attorneys.”

Court Determination -- The Court does not believe that it would be appropriate for the Judiciary to make such

communications to the Executive and the Legislature. Without commenting on the underlying merits of the recommendation, the Court notes that such communications would be within the proper role of the organized bar. The Court also notes that the Legislature has already dealt with some aspects of this recommendation, in particular with regard to providing funding for representation in termination of parental rights cases.

Committee Recommendation 6B (Report at 30-31) -- “The Committee recommends that if only limited State or other resources become available to fund matters currently handled by pro bono attorneys, those monies should first be used to fund programs that handle the more difficult and complex matters, such as termination of parental rights and domestic violence contempt cases. Further, the feasibility of obtaining funding to establish county-based attorneys to provide representation in these types of complex matters should be explored.”

Court Determination -- As with the preceding recommendation, the Court does not believe that it would be entirely appropriate for the Judiciary to make such suggestions to the Executive and the Legislature. Without commenting on the underlying merits of the recommendation, the Court notes that such communications would be within the proper role of the organized bar. The Court also notes that the Legislature has already dealt with some aspects of this recommendation, in particular with regard to providing funding for representation in termination of parental rights cases.

Committee Recommendation 7A (Report at 33) -- “It is recommended that, where feasible, voluntary programs be established to assign attorneys to handle Superior Court pro bono matters as an alternative to the current mandatory system. Additionally, the voluntary programs should be designed to allow attorneys to handle cases in their area(s) of expertise.”

Court Determination -- The Court approves the concept of attorneys volunteering for pro bono assignments in identified clusters of case types.

Committee Recommendation 7B (Report at 35) -- “It is recommended that the Assignment Judge be authorized to utilize ‘buy-out’ programs, in each county, for any attorney who is either not able to or does not wish to handle a pro bono matter.”

Court Determination -- The Court accepts this recommendations in part and modifies it in part. The Court will not sponsor such programs, but will permit them to be used by individual attorneys/law firms or by local bar associations so long as the attorney who fulfills the assignment obligation is qualified to handle the type of case involved.

Committee Recommendation 7C (Report at 37) -- “Since the Madden decision, the types of cases assigned to pro bono attorneys have increased. The Committee recommends that the Judiciary solicit input from the Bar, to the extent feasible, regarding the inclusion of new matters eligible for pro bono assignment.”

Court Determination -- The Court agrees with this recommendation and will solicit such input from the bar when appropriate.

Conclusion

The Court takes this opportunity to express its appreciation to Judge Serpentelli and the members of the Committee for their time and their effort in preparing the Committee’s comprehensive report and recommendations. The Court also expresses its appreciation to the New Jersey State Bar Association and the other state-level and county bar associations that participated in this process and contributed to the result, which should be a more effective and efficient system of assignment of pro bono and fee- generating matters. The Court has asked the Administrative Director of the Courts to take whatever steps are necessary to implement these administrative determinations.

Dated: May 11, 2000

APPOINTMENT OF ATTORNEYS TO FEE GENERATING CASES

The system for appointment of attorneys in fee generating cases should be uniform throughout the State and have as its goal the provision of effective, fair, and competent representation to all parties and interests covered by the appointment. The system should also be capable of being administered efficiently and be clearly understood by all involved. Attorneys must be treated fairly and should, therefore, be given the opportunity to elect whether or not they wish to be considered for these appointments. The appointments themselves should then be made fairly so that equality in the distribution of the appointments prevails. Finally, attorneys should recognize that in certain areas there well may be the need for training and that by indicating a willingness to accept an appointment they also indicate a willingness to participate in an appropriate training program.

Judges at the trial level of the Superior Court have occasion to appoint attorneys to serve in one capacity or another in cases which will generate a fee or other compensation for the attorney. Attorneys should be appointed to those cases from lists which are maintained by the Assignment Judge for major categories of service. The lists should be drawn broadly from the membership of the bar and appointments from each list should normally be made in order by the judge handling the case in question. The judge may give a preference to attorneys on the list who have previously received pro bono assignments. When the case is of unusual complexity and requires special competence on the part of the attorney, the appointing judge should have the discretion to select from the list an attorney who is known to be especially capable.

There should be a separate list for each major category of service. A lawyer should be permitted to be on more than one list, if he or she so chooses. Probably the most common categories of fee generating cases are proceedings for the appointment of guardians for incapacitated persons, where R.4:86-4 requires the appointment of an attorney for the alleged incapacitated person, and condemnation proceedings, in which N.J.S.A. 20:3-12 requires that at least one of the commissioners (the presiding commissioner) be an attorney. At a minimum, the Assignment Judge should maintain a list for each of those two categories of service. It might also be desirable to have separate lists for attorneys who would be available to act to represent patients in special medical guardianship proceedings under R.4:86-12 (where the attorney must be able to act within minutes or hours of appointment); for cases in which the court needs to appoint a guardian for an incompetent and where friends, relatives, or the Public Guardian are not available; for cases in which an attorney might be appointed as the personal representative of an estate because a fiduciary has been removed for cause or because a fiduciary has not been effectively designated by the decedent; or for cases in which a corporate receiver of one kind or another is needed.

Names of attorneys for volunteering for inclusion on the various lists should be obtained by the Assignment Judge with the assistance of county bar associations and other attorney associations (including minority bar associations). For example, if the Assignment Judge is attempting to create a list of attorneys who would like to represent alleged incapacitated persons in guardianship cases, he or she would inform the county bar association and other attorney associations that lawyers interested in such appointments should indicate their interest by sending a letter to the Assignment Judge by a specified date. The Assignment Judge should inform the associations of the usual rate of compensation for such matters. The associations could then pass the relevant information along to their members in one of their general mailings or in their newsletters. Where special limitations are applicable (such as the requirement of N.J.S.A. 20:3-12 that condemnation commissioners must be residents of the county in which the property is located and the presiding commissioner must have been a member of the bar for at least ten years), those limitations should be specified by the Assignment Judge in the request made to the associations.

Appointments to fee generating cases should not be limited to lawyers who have previously performed pro bono work by court assignment. However, the judge making the appointment may give a preference to attorneys on the particular list who have previously received pro bono assignments during a specific time frame. The fact that an attorney expresses an interest in handling a particular kind of case is a preliminary indication that the attorney will be likely to handle the case effectively. Of course, if experience with a particular attorney shows that the attorney is not qualified to handle the category of case for which he or she has volunteered, the judge would have discretion not keep that attorney on that particular list.

Once they have been created, the list for each category should be updated periodically, though perhaps no more frequently than once a year and probably not less frequently than once every two years.

The assignment and compensation of attorneys as arbitrators under Rule 4:21A-2(b) and Rule 4:21A-5(c) seems to be working well under the procedures set forth in those Rules. No changes are being made in that area.

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