

The Ninth Circuit's Pro Bono Program: Making a Difference One Appellant at a Time

WHEN *THE FEDERAL LAWYER* asked me to write an article about the Ninth Circuit's Pro Bono Program, I jumped at the opportunity to publicize the very worthwhile efforts of Ninth Circuit judges, staff, and lawyers to assist appellants in important appeals. In most states, the rules of professional conduct strongly encourage pro bono service. The Ninth Circuit's Pro Bono Program is one way to fulfill that goal and to make a real difference—one appellant at a time.

My first experience with the Ninth Circuit's Pro Bono Program was in 1995. I had just finished a three-month jury trial. I had billed enough hours by the end of May to take the rest of the year off, and I wanted to focus on developing my appellate practice—something I had intended to do since completing my Ninth Circuit clerkship. As a junior associate in a large law firm, I had written plenty of appellate briefs. But this time, I wanted to take on my own appeal—one that I did not have to share with a more senior attorney who would, in all likelihood, insist on handling oral argument. That's when I learned about the Ninth Circuit's Pro Bono Program. Most lawyers who have not had judicial clerkships are surprised to learn that one of three appeals in the Ninth Circuit involves a pro se litigant—someone who is not represented by counsel. Many—although certainly not all—of these litigants produce incomplete, inarticulate, and sometimes unintelligible briefs. Without legal representation, dispositive issues may be ignored and the arguments may be one-sided at best.

The problem is exacerbated by the Ninth Circuit's heavy caseload. For example, in 1992 (the year before the Pro Bono Program was created), almost 8,000 appeals were filed in the Ninth Circuit alone. Almost 3,000 of those appeals had at least one pro se party. In a given year, therefore, a Ninth Circuit judge (as part of a two- or three-judge panel) could resolve well over 100 appeals involving pro se litigants. And, of course, the court's case law has expanded greatly since 1992, especially with regard to immigration appeals; hence, the number of pro se litigants has increased as well.

The Ninth Circuit addressed this problem in 1993

by creating the Pro Bono Program. Today, the court's staff reviews all pro se appeals for jurisdictional defects at the outset. Appeals are dismissed if such defects exist or if a pro se litigant fails to prosecute the appeal. Staff attorneys process most of the remaining appeals by presenting them to a two-judge "screening" panel in San Francisco. If a pro se appeal is considered complex, it is reviewed to determine whether pro bono counsel should be appointed. This is typically the case with appeals that involve multifaceted legal issues or involving questions of first impression.

The Ninth Circuit's commitment to these appeals is substantial. In addition to devoting resources to the screening process described above, the court reimburses various expenses of pro bono counsel, enters an order that schedules briefing and oral argument at counsel's convenience (within reason, of course), and provides counsel with a complete copy of the district court's and the Ninth Circuit's record. And best of all, the court has agreed to hear oral argument in all appeals handled by pro bono counsel. This is especially important for junior attorneys who—like me in 1995—don't want to sit on the sidelines while someone else argues before the court.

The court also appreciates the work of lawyers who volunteer to work on these cases, and the panel often thanks counsel for their service at oral argument. In my first pro bono appeal, I had a similar experience. At the conclusion of a *very* difficult argument, a panel member remarked, "Counsel, the court understands that you are representing the appellant on a pro bono basis. The court appreciates your service. You certainly gave it a good try." Although it was hard to appreciate that final retort at the time, I later received a decision accepting nearly all my arguments, which made me feel much better.

In fact, I felt so good after that experience that I volunteered to be a district coordinator for the Ninth Circuit's Pro Bono Program—and I have continued to do so since 1996. Every few weeks or so, the Pro Bono Program sends me the record in an appeal in which pro bono counsel are needed. I write up a short summary of the appeal and send it to lawyers who have signed up to receive these summaries. If a case strikes their fancy, they call my assistant to volunteer. And the case is given to whomever volunteers first, to file, brief, to argue, and, I hope, to win.

In addition to acting as a district coordinator, I have now accepted more than 15 appeals from the Ninth

Circuit's Pro Bono Program. I also teach a course on appellate practice at the University of Washington School of Law, in which students write briefs and then argue an actual appeal as part of the Pro Bono Program. These cases have ranged from prisoners' rights litigation, to habeas corpus appeals, to immigration cases, to civil matters. Every case is interesting and each is rewarding in its own way.

A few especially significant cases give a sense of why this work is so important. In one case, I was appointed by the Ninth Circuit to represent a Muslim inmate who alleged that various jail officials had violated his First Amendment rights by desecrating copies of the holy Koran and by preventing him from properly observing Ramadan and otherwise observing the tenets of his religion. The District Court held that all these claims lacked merit and granted summary judgment in favor of the defendants.

In order to represent the appellant in this case, we had to study both federal law and Muslim religious principles. We were able to show that the defendants were largely ignorant of the requirements of the Muslim faith and had therefore failed to accommodate those requirements properly. The Ninth Circuit agreed with our arguments, reversed the district court's summary judgment ruling, and remanded the case for additional proceedings, including the appointment of counsel on remand (because my appointment was limited to the Ninth Circuit's proceedings).

Although we were not required to do so, we decided to continue to represent the litigant on remand and to attempt to negotiate a settlement agreement. We were successful in doing so and, as a result of our efforts, Oregon prison officials agreed to proper accommodations for Muslim inmates, such as allowing for prayer when required by the Muslim faith, providing personal prayer rugs, accommodating dietary needs, and granting permission for the Muslim chaplain to provide Kufi caps to be worn during congregational prayer. These accommodations were not limited to our client; they are made for all Muslim inmates at the same institution—something that we can be, and are, proud to have accomplished.

Our client was very happy as well. He responded by writing me a letter in which he described how his rights had been violated, how he had felt when the District Court dismissed his claims on summary judgment, and how the Ninth's Circuit Pro Bono Program had made a difference:

During all of Ramadan, jail officials violated our rights [by restricting us] from worshiping God to praying by our bunks. I documented everything they did to us, including denying us a simple sack lunch that was to be our feast at the conclusion of Ramadan. ... But when I filed the case, [the District Court] dismissed my case. I felt as if I had been socked in the stomach. I felt no one cared what happen to us in jail. I felt a

feeling of hopelessness. I appealed to the Ninth Circuit Court. They appointed a lawyer by the name of Leonard Feldman [as well as Professor Eric Schnapper of the University of Washington School of Law and three of his students]. They read my case and understood my rights had been violated. ... They worked with me and filed the briefs. We won, I can't believe it! There are people out there that really do care. Thank God for the Ninth Circuit.

Although lawyers who accept cases through the Pro Bono Program have no obligation to do anything beyond the appeal itself, this example shows that it can be very rewarding to see a case through to its completion.

In another pro bono appeal, the Ninth Circuit appointed me to represent a client in a very compelling habeas corpus appeal. For years, this individual had been challenging a state court conviction for armed burglary in which the trial court judge had told the jury that reasonable doubt can be defined as a seven on a scale of one to ten. After the individual objected to that remark, the judge corrected himself by explaining that reasonable doubt was not any single number but rather was "somewhere between a six and nine." The result, of course, was a numerical definition of reasonable doubt that barely exceeded a preponderance of the evidence.

The defendant was pro se during trial, and he continued to represent himself in state court (on direct appeal and habeas review) as well as in federal court (on habeas review). His conviction was affirmed by the state courts and by a federal district court in California. Rather than follow suit, the Ninth Circuit recognized the need to appoint pro bono counsel and eventually reversed the ruling, holding that the erroneous definitions of reasonable doubt were "structural errors" that require automatic reversal under the Sixth Amendment. Our client (who at the time of the Ninth Circuit's ruling was out on parole after serving seven years of an 11-year sentence) was therefore entitled to a new trial.

Like the Muslim pro bono client, the client in this matter also wrote a letter expressing his gratitude. The letter stated,

I thank you immensely for your huge contribution to my struggle. ... For me, as a former *pro per*, I must admit, this case has caused me many heartaches along the way. ... A *pro per* is fighting an uphill battle from the start. ... In these instances, a louder trumpet is needed, to sound off the rights of the poor and innocent. Mr. Feldman, you, along with your tenacious team, have done just that. You have sounded off my rights in a way in which I could not. This is why pro

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bono work is so important to me. I respect you immensely for accepting my case, because I am aware of all of the legal ramifications which allow you the right to not be forced to do so. In my opinion, it takes a great deal of integrity to set aside valuable time, merely to help the little guy, the less fortunate. I pray that, if I am especially fortunate enough to make a difference in someone's life, given the opportunity, I will not waver in my actions. Because if I can ever cause someone to feel the way I felt, upon receiving the Ninth Circuit Court's [opinion granting a new trial], there will be no doubt in my mind, that I have truly done a good deed.

This letter explains in large part why I continue to devote a substantial portion of my time (more than 200 hours per year) to pro bono appeals.

But this isn't the only reason I accept these cases. Nor is it the only benefit provided by volunteering. As a result of my work with the Ninth Circuit's Pro Bono Program, I have been fortunate to get to know members of the court and its staff. I believe the court respects the

work that I do—both in pro bono and other appeals. All told, I have prevailed in more than 90 percent of the appeals that I have litigated in the Ninth Circuit. Clients appreciate that statistic, as do potential clients, and it is yet another reason that I continue to accept pro bono appeals and actively encourage others to do so as well.

This, of course, leads to the inevitable request: Take a pro bono appeal, please! The procedure for getting involved is easy and does not require a firm commitment. If you are interested, please send an e-mail to my assistant (Catherine.Bryan@hellerehrman.com). When a pro bono appeal becomes available, you will receive a short e-mail memorandum describing the appeal and asking for volunteers. You can delete the e-mail or read it and volunteer—there is no commitment whatsoever. But if you do volunteer, I suspect that you will eventually agree that the personal and professional benefits can be overwhelming. **TFL**

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Feinberg recently wrote a book, *What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11*—a transfixing and deeply personal account of his service as special master of the September 11 Fund. In the book, he describes how his service as special master forever changed his life. He downsized his firm and now focuses on cases that are more meaningful and that offer greater benefit for society than simply disputes with and between corporations. For example, in 2004, a Kentucky court asked Feinberg to mediate a class action lawsuit brought against the Roman Catholic diocese of Covington; the suit was filed on behalf of molestation victims, who alleged that the diocese had mishandled their accusations. Yet again, the assignment was fraught with emotionally charged issues and victims who had suffered a great deal of anguish.

In April 2007, after the shootings on the campus of Virginia Tech, in which 32 individuals were killed and many others were wounded, donations poured into the university. Virginia Tech set up the Hokie Spirit Memorial Fund to accept the more than \$8.5 million in contributions, which the university had initially planned to use for scholarships in memory of the victims. However, the families of some of the victims were upset that they were not consulted about how the funds would be used, and some suspected that the university was exploiting the tragedy by using it in its fund-raising efforts. In response, the university suspended its initial plans and asked Feinberg to come up with a fair way to distribute the money. Feinberg was named as administrator of the Hokie Spirit Memorial Fund and again volunteered his time for the assignment.

Feinberg's first task was to meet with the families, who, much like the families affected by Sept. 11, were suspicious and angry at the outset; many of them still had questions about the university's response on the day of the tragedy. Feinberg assuaged much of the anger simply by his willingness to meet with the families. He then developed protocols to distribute the funds to the families of the deceased victims, which were available at each family's option to endow a scholarship as a memorial to their loved one. The president of Virginia Tech expressed the campus' gratitude to Feinberg for his willingness to give "many, many hours of his own time and [for] shar[ing] his special insight and judgment in developing the protocols. He literally appeared from nowhere during a time of need for all of us and we thank him."

Feinberg is still invested in the future of the legal profession. He serves as a law professor at Georgetown University, Columbia University, the University of Virginia, and New York University and has served as a visiting lecturer in the last year at Vanderbilt Law School, UCLA Law School, Duke University Law School, and the New York Law School. He is a fascinating lecturer, and his classes are quite popular among law students. But even beyond law students, Feinberg is a hero to many in the legal profession. His development of a new area of the law and his dedication to public service and pro bono work throughout his career are inspiring examples of the difference that a lawyer can make. **TFL**

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