



UNITED STATES DISTRICT COURT

Southern District of Indiana

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July 15, 2016

NOTICE

TO: THE PUBLIC AND MEMBERS OF THE PRACTICING BAR FOR THE
SOUTHERN DISTRICT OF INDIANA

The Court has considered the recommendation of the Local Rules Advisory Committee for the Southern District of Indiana to amend the Local Rules with the adoption of new Local Rule 87. The Clerk issued a Public Notice on May 13, 2016, regarding proposed new Local Rule 87, and the Court has considered the proposed new Local Rule and all of the comments received.

Pursuant to 28 U.S.C. § 2071 and Rule 83 of the Federal Rules of Civil Procedure, the United States District Court for the Southern District of Indiana hereby gives public notice that the following amendment to the Local Rules of this Court is adopted, effective **September 1, 2016**. Unless otherwise indicated, as seen in this Notice **redline** text is added and **struck** text is deleted. The proposed amendment is as follows:

Local Rule 87 – Representation of Indigent Litigants

Preamble: All attorneys admitted to the bar of this court have agreed to follow the Indiana Rules of Professional Conduct, which state that it is “the basic responsibility” and an “ethical and social obligation” of all lawyers to provide pro bono legal services. Because of this obligation, the Indiana Rules of Professional Conduct provide that a lawyer “shall not seek to avoid appointment by a tribunal to represent a person except for good cause.”

(a) Recruitment of Counsel. If the court determines that a litigant is unable to afford representation, the court may recruit counsel to represent an indigent litigant using the Voluntary Panel or the Obligatory Panel.

(1) Voluntary Panel. The Voluntary Panel consists of attorneys who have applied for membership and who are willing to volunteer to represent litigants who are unable to afford representation. Any attorney who is a member of this court’s bar may join the Voluntary Panel.

(2) Obligatory Panel. The Obligatory Panel consists of attorneys who are members of this court's bar and have appeared in a threshold number of civil cases in this district during the previous calendar year.

(A) Creation of the Obligatory Panel. The Obligatory Panel will be created annually. The threshold number of appearances used to determine which attorneys are eligible for the Obligatory Panel will depend on the need for representation in a given year. The threshold number will be set forth in a General Order. All attorneys who are in good standing and meet this threshold are eligible for selection to the Obligatory Panel unless exempted under Local Rule 87(a)(2)(B). Attorneys will be notified by the clerk's office if they are selected for the Obligatory Panel.

(B) Exemptions. An attorney is exempt from selection to the Obligatory Panel if the attorney:

(i) has a principal place of business more than sixty miles outside of this District; or

(ii) is employed full-time as an attorney by an agency of the United States, a state, a county, or any sub-division thereof; or

(iii) is employed full-time as an attorney by the Indiana Federal Community Defenders, Inc.; or

(iv) is employed full-time as an attorney by a not-for-profit legal aid organization.

(3) Frequency of Recruitment. No attorney will be obligated to represent an indigent litigant more than once during a calendar year, except as provided in Local Rule 87(d), nor will an attorney be recruited to represent an indigent litigant sooner than twelve months after the conclusion of the attorney's most recent service as recruited counsel. Any recruited counsel who spends more than 100 hours in the course of representation under this rule may move for an exemption from the Obligatory Panel for an additional period of time. Any such motion must be filed within 30 days of the conclusion of the representation.

(b) Duties of Recruited Counsel. An Order of Recruitment serves as an appearance for recruited counsel effective 7 days after issuance, unless relief from the appointment is granted. The 7 days is tolled while any motion to withdraw is pending. Promptly following the filing of an Order of Recruitment, recruited counsel must communicate with the newly-represented litigant concerning the action.

(c) Duration of Representation. An attorney recruited under this rule must represent the litigant from the date the Order of Recruitment becomes effective until:

(1) the attorney withdraws as allowed under this rule; or

- (2) the attorney is discharged or removed from the case; or
- (3) the expiration of the time set forth in the court's Order of Recruitment in instances of limited appointments; or
- (4) the court enters final judgment (if reasonable collection and enforcement efforts are not appropriate); or
- (5) the attorney undertakes reasonable collection and enforcement efforts after final judgment.

(d) Withdrawal of Representation. After the filing of the Order of Recruitment in a case, recruited counsel may file a motion to withdraw pursuant to Local Rule 83-7 only on the following grounds, or on such other grounds as the assigned judge finds adequate for good cause shown:

- (1) a conflict of interest precludes counsel from accepting the responsibilities of representing the litigant in the action; or
- (2) in counsel's opinion, he or she is not competent to represent the litigant in the particular type of action assigned; or
- (3) because of the temporary burden of other professional commitments involved in the practice of law, counsel lacks the time necessary to represent the litigant; or
- (4) some personal incompatibility or a substantial disagreement on litigation strategy exists between counsel and the litigant; or
- (5) in counsel's opinion the litigant is proceeding for purpose of harassment, or the litigant's claims or defenses are not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal of existing law; or
- (6) relief from recruitment is warranted due to recent substantial prior assistance to the court as recruited counsel.

Any motion by recruited counsel for relief from an Order of Recruitment on any of the grounds set forth in this section must be made to the assigned judge promptly after recruited counsel becomes aware of the existence of such grounds, or within such additional period as may be permitted by the assigned judge for good cause shown.

(e) Consequences of Relief from Recruitment. Recruited counsel permitted to withdraw pursuant to subsections (d)(1), (d)(2), or (d)(3) of this rule will remain

eligible for another recruitment during the remaining calendar year. Attorneys relieved from recruitment pursuant to subsection (d)(4), (d)(5), or (d)(6) of this rule will have completed their service for the remaining calendar year and will not be recruited for twelve months after the date in which they were relieved from recruitment. Should recruited counsel be permitted to withdraw for any other reason, the assigned judge will decide if the relieved counsel will be eligible for another recruitment during the remaining calendar year. In the absence of an affirmative decision on the matter by the assigned judge, the relieved counsel will remain eligible for recruitment.

(f) Attorney's Fees.

(1) Fee Agreements. Unless the appointment is for a limited purpose, recruited counsel may negotiate a fee arrangement with the litigant at the outset of the representation. If a fee arrangement is entered into that provides for fees other than those provided by statute, counsel must notify the court by filing a Notice of Fee Agreement. If such a Notice is filed, counsel may not seek reimbursement or prepayment of expenses under subsection (g) of this rule. Fee agreements are not permitted in instances of limited appointments.

(2) Allowance of Fees. Upon the filing of a motion for attorney's fee by recruited counsel, the judge may award attorney's fees to recruited counsel for services rendered in the action as authorized by applicable statute (including 42 U.S.C. § 1997e(d)), regulation, rule, or other provision of law, including case law.

(g) Expenses Incurred by Recruited Counsel. The litigant shall bear the cost of any expenses of the litigation to the extent reasonably feasible in light of the litigant's financial condition. Recruited counsel is not required to advance the payment of such expenses. However, it is permissible for recruited counsel, or the firm with which counsel is affiliated, to advance part or all of the payment of any such expenses without requiring that the litigant remain ultimately liable for such expenses, except out of the proceeds of any recovery.

(1) Eligibility for Prepayment or Reimbursement of Expenses. Recruited counsel may move for the prepayment or reimbursement of expenses incurred in the preparation and presentation of the litigation. Any request for funds in excess of One Thousand Dollars (\$1,000.00) - in total for the case - must be approved by the assigned judge before the expense is incurred.

(2) No Vested Right to Reimbursement or Prepayment. Neither the litigant nor recruited counsel has a vested right to prepayment or reimbursement, and the availability of funds may limit such payments.

(3) Procedures for Requesting Prepayment or Reimbursement and Authority to Incur Expense. The Procedures for requesting prepayment or reimbursement of expenses and the authority to incur expenses are set out in a General Order of the court.

Local Rules Advisory Committee Comments Re: 2016 New Rule 87

Proposed Rule 87 was adopted out of necessity.

The Southern District of Indiana has an especially high volume of pro se and prisoner litigants. Over half of the district's civil case load is initiated pro se, and over half of the pro se cases are brought by prisoners. This requires the court to frequently recruit counsel to represent pro se litigants pursuant to 28 U.S.C. § 1915(e)(1).

In recent years, the Seventh Circuit has increasingly emphasized that § 1915(e)(1) requires district courts to recruit counsel for pro se litigants in a significant proportion of pro se cases, especially in complex cases brought by prisoners. *See, e.g., Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015); *Henderson v. Ghosh*, 755 F.3d 559 (7th Cir. 2014). Moreover, the Seventh Circuit has stated that "courts should strive to implement programs to help locate pro bono assistance for indigent litigants," *Perez v. Fenoglio*, 792 F.3d 768, 785 (7th Cir. 2015), and noted that the "mandatory nature" of the Northern District of Illinois's program makes it superior to strictly voluntary programs, *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 659 (7th Cir. 2014).

Local Rule 87 is the court's effort, after consultation with a broad range of attorneys who regularly practice in this court, to ensure that the court can recruit counsel in every case in which the law requires it. The court estimates recruited counsel will be necessary in approximately 70 civil cases per year – many involving prisoner litigants. Despite the publication of this proposed Rule, it is the court's goal to provide representation to indigent litigants, when needed, by way of volunteer counsel, as happens now. The court will rely on the Obligatory Panel only when efforts to find volunteer counsel fall short.

To summarize the process, subject to certain exemptions, attorneys who have appeared in the threshold number of cases in the preceding calendar year will be drawn upon to populate the "Obligatory Panel." Attorneys will be assigned a quarter during which they will be eligible for recruitment, and will be notified of the "duty" quarter well in advance.

For each case in which it is determined recruited counsel is required, initial efforts will be made to obtain volunteer counsel. If a motion to appoint counsel is granted, the case will be posted on the "Pro Bono Opportunities" section of the court's website (<http://www.insd.uscourts.gov/pro-bono-opportunities>). Twice a month an email will be sent to Voluntary Panel members asking them to consider taking a listed case. Any attorney admitted to practice in this district may register to participate in the Voluntary Panel. After two weeks, an email will be sent to the Obligatory Panel members that are "on call," asking for volunteers. After another two weeks, if no one has volunteered, the assigned judge will select an individual from that quarter's list of attorneys.

The court is committed to utilizing limited appointments when appropriate to pull attorneys into the most critical parts of cases (*e.g.*, exhaustion of administrative remedies), then releasing counsel from the case (unless counsel prefers to stay engaged).